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THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE
EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME XXVII.

SPECIFIC PERFORMANCE.

STATUTES.

STOCK EXCHANGE.

STREET AND AERIAL TRAFFIC.

TELEGRAPHS AND TELEPHONES.

THEATRES AND OTHER PLACES

OF ENTERTAINMENT.

TIME.

TORT.

TRADE AND TRADE UNIONS.

TRADE MARKS, TRADE NAMES,
AND DESIGNS.

TRAMWAYS AND LIGHT RAIL-
WAYS.

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THE

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A COMPACT STATEMENT OF THE PRINCIPLES
OF THE LAW OF ENGLAND

BY
THE HON. MR. JUSTICE

WILLIAM GOSSETT

OF THE HON. MR. JUSTICE

BRADBURY, AGNEW, & CO. LD., PRINTERS,
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<i>Highways - - - -</i> „ HIGHWAYS, STREETS, AND BRIDGES.	
<i>Municipal Powers - - -</i> „ LOCAL GOVERNMENT.	
<i>Parliamentary Committees - - -</i> „ PARLIAMENT.	
<i>Railways - - - -</i> „ RAILWAYS AND CANALS.	
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<i>Street Traffic - - - -</i> „ STREET AND AERIAL TRAFFIC.	

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See COUNTY COURTS; MAYOR'S COURT, LONDON; PRACTICE
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TRANSFER OF BILL OF LADING.

See SALE OF GOODS; SHIPPING AND NAVIGATION.

TRANSFER OF CHOSSES IN ACTION.

See CHOSSES IN ACTION.

TRANSFER OF GOODS.

See BILLS OF SALE; SALE OF GOODS.

TRANSFER OF LAND.

See REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

TRANSFER OF NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

TRANSFER OF SHARES.

See COMPANIES; STOCK EXCHANGE.

TRANSFER OF SHIPS.

See SHIPPING AND NAVIGATION.

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See FISHERIES; SHIPPING AND NAVIGATION.

TREASON AND TREASON FELONY.

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TREASURE TROVE.

See CONSTITUTIONAL LAW; CORONERS; CRIMINAL LAW AND PROCEDURE.

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See LOCAL GOVERNMENT.

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<i>Justice of the Peace</i>	-	-	-	„	MAGISTRATES.
<i>Magistrate</i>	-	-	-	„	MAGISTRATES.
<i>Malicious Prosecution</i>	-	-	-	„	MALICIOUS PROSECUTION AND PROCEDURE.
<i>Negligence</i>	-	-	-	„	NEGLIGENCE.
<i>Nuisance</i>	-	-	-	„	NUISANCE.
<i>Open Spaces</i>	-	-	-	„	OPEN SPACES AND RECREATION GROUNDS.
<i>Party Walls</i>	-	-	-	„	BOUNDARIES, FENCES, AND PARTY WALLS.
<i>Police</i>	-	-	-	„	POLICE.
<i>Public Authorities Protec- tion Act</i>	-	-	-	„	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
<i>Recreation Grounds</i>	-	-	-	„	OPEN SPACES AND RECREATION GROUNDS.
<i>Seduction</i>	-	-	-	„	MASTER AND SERVANT.
<i>Sheriff</i>	-	-	-	„	SHERIFFS AND BAILIFFS.
<i>Street Traffic</i>	-	-	-	„	STREET AND AERIAL TRAFFIC.
<i>Tort</i>	-	-	-	„	TORT.
<i>Trover</i>	-	-	-	„	TROVER AND DETINUE.

TRIAL.

See CRIMINAL LAW AND PROCEDURE ; JUDGMENTS AND
ORDERS ; JURIES ; MAGISTRATES ; PRACTICE AND
PROCEDURE.

TRICK, LARCENY BY.

See CRIMINAL LAW AND PROCEDURE.

TRIERS.

See CRIMINAL LAW AND PROCEDURE ; JURIES.

TRINIDAD.

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<i>Contract - - - - CONTRACT.</i>	
<i>Conversion in Equity - - - - EQUITY; SETTLEMENTS; WILLS.</i>	
<i>Criminal Law - - - - CRIMINAL LAW AND PROCEDURE.</i>	
<i>Damages - - - - DAMAGES.</i>	
<i>Lien - - - - LIEN.</i>	
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<i>Sale of Goods - - - - SALE OF GOODS.</i>	
<i>Tort - - - - TORT.</i>	
<i>Trespass - - - - TRESPASS.</i>	

TRUCK ACTS.

See FACTORIES AND SHOPS; MASTER AND SERVANT; WORK AND LABOUR.

TRUE OWNER.

See BILLS OF SALE.

TRUSTEE.

See TRUSTS AND TRUSTEES.

TRUSTEE IN BANKRUPTCY.

See BANKRUPTCY AND INSOLVENCY.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad... ..	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	.. ..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	.. ..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	.. ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	.. ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	.. ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	.. ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	.. ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	.. ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	.. ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	.. ..	Beawes's Lex Mercatoria
Bellewe	.. ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.
Bell, C. C.	.. ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	.. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	.. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	.. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	.. ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	.. ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	.. ..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	.. ..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	.. ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	.. ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	.. ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	.. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com...	.. ..	Blackstone's Commentaries
Bl. D. & Osb.	.. ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	.. ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	.. ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	.. ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	.. ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	.. ..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	.. ..	Sir J. Brooke's Abridgment
Bro. C. C.	.. ..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	.. ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	.. ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	.. ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor.	.. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	.. ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	.. ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb. . . .	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)
Ch. App. . . .	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob. . . .	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909—(current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C.	..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas.	..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas.	..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	..	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	..	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	..	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	..	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	..	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	..	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	..	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	..	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
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Part I.—Meaning of Specific Performance.

SECT. 1.—*Nature of Specific Performance.*

1. Specific performance is equitable relief given by the court in cases of breach of contract, in the form of a judgment that the defendant do actually perform the contract according to its terms and stipulations (*a*).

Equitable relief by court.

2. Disobedience to such judgment beyond the mere nonpayment of money, constitutes a contempt of court and is punishable by all the consequences of such contempt, as, for example, by imprisonment (*b*) if the defendant is able to perform the contract, and declines or omits to do so.

Consequence of disobedience to order of court.

3. As a general rule, the proper remedy of a person seeking to enforce the observation of a positive contract is an action for specific performance, as distinct from the enforcement of a negative contract by injunction (*c*). As a further distinction, it should be noted that an action for specific performance is appropriate only to the enforcement of the obligations of an executory as distinguished from an executed contract (*d*). For this purpose an executory

Obligations to which remedy is appropriate.

(*a*) For an account of the origin and development of the jurisdiction of the Court of Chancery with regard to specific performance, see title EQUITY, Vol. XIII., pp. 11, 12.

(*b*) See, generally, title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 306 *et seq.* As to other methods of carrying an order into effect, see, further, pp. 85 *et seq.*, *post*.

(*c*) See title INJUNCTION, Vol. XVII., p. 235.

(*d*) *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.* (1873), L. R. 16 Eq. 433, *per* Lord SELBORNE, L.C., at p. 439; see *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 547; *Anon.* (1728), Mos. 37 (bond to convey land); see title CONTRACT, Vol. VII., pp. 345 *et seq.*

SECT. 1.
Nature of
Specific
Performance.
—

contract is an agreement which is not intended between the parties to be the final instrument regulating their mutual relations under their contract; an executed contract, on the contrary, is a contract in which all has been already done to settle finally the relative positions of the parties (*e*).

SECT. 2.—*Kindred but Distinct Remedies.*

Specific performance distinguished from other remedies :—

Injunction.

4. Specific performance is an extraordinary remedy given by the court, and must be distinguished from certain other legal or equitable remedies which appear to resemble it, but are in fact different in nature. In particular the following distinctions may usefully be drawn :—

(1) The obligations arising under an executed contract (*f*), that is, under the final instrument which regulates the rights of the parties, are enforced, not by judgment for specific performance, but by an injunction (*g*).

Enforcement of express trusts.

(2) Actions for the enforcement of express trusts differ from actions for specific performance, in that trusts are not matters of contract, but involve obligations of purely equitable force, to which formerly only a Court of Chancery could have given effect (*h*).

Enforcement of constructive trusts.

(3) A constructive trust arising from fraud or breach of a fiduciary relationship may be enforced by the court by virtue of its independent jurisdiction (*i*), as being an equitable obligation.

Delivery of chattels.

(4) The delivery of a specific chattel, if the right to such delivery flowed from contract, could be enforced by the Court of Chancery; and even a right to delivery not flowing from contract might be enforced by the court (*j*). In the latter case, the remedy closely resembled the remedy of specific performance. A court of common law also had even before the Judicature Act, 1873 (*k*), power to order the delivery of a specific chattel without giving the defendant the option of retaining it on paying its

(*e*) *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.* (1873), L. R. 16 Eq. 433. As an illustration, reference may be made to an agreement to execute a deed. The agreement is an executory contract; the deed is in most cases an executed contract, an action upon which would lie outside the scope of the peculiar jurisdiction in specific performance. It should be noted, however, that there are many deeds which in ordinary course contain covenants which appear to be executory contracts and would usually be enforced by an action for specific performance, such as the covenant for further assurance in a conveyance of land (see title SALE OF LAND, Vol. XXV., pp. 426, 463), and a covenant to settle after-acquired property in a marriage settlement (see p. 71, *post*; title SETTLEMENTS, Vol. XXV., pp. 548 *et seq.*). As to enforcing the obligations of a final instrument, see the text, *infra*.

(*f*) See the text, *supra*.

(*g*) See *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.*, *supra*; *Burrows v. Greenwood* (1840), 4 Y. & C. (EX.) 251 (voluntary contract); and see, generally, title INJUNCTION, Vol. XVII., pp. 235, 243 *et seq.*

(*h*) *Kelly v. Walsh* (1878), 1 L. R. Ir. 275 (declaration of trust); see titles EQUITY, Vol. XIII., p. 89; TRUSTS AND TRUSTEES.

(*i*) See titles EQUITY, Vol. XIII., pp. 15, 156; TRUSTS AND TRUSTEES.

(*j*) See title EQUITY, Vol. XIII., p. 12; and see pp. 14, 15, *post*.

(*k*) 36 & 37 Vict. c. 66.

value (*l*). Such an action differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant (*m*).

(5) Where for good consideration a mortgage or charge has been created in a form not enforceable at law, the court can enforce the charge as an equitable right; this, however, is not a case of specific performance (*n*). In a proper case the court may also enforce the execution of a legal mortgage or charge; this is a case of specific performance (*n*).

(6) An action of mandamus to compel performance of a duty is analogous to an action for specific performance. Such an action, however, does not lie for the purpose of enforcing a duty arising merely from a personal contract, but only a duty of a public or quasi-public character (*o*).

SECT. 2.
Kindred but
Distinct
Remedies.

Enforcement
of charge.

Mandamus.

SECT. 3.—*Equitable Nature of Relief by Specific Performance.*

5. The jurisdiction to grant specific performance, formerly exercisable only by a court of equity, is now vested in all branches of the High Court of Justice (*p*), but the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases is assigned to the Chancery Division (*q*); the jurisdiction still retains its character as an equitable remedy, and the old principles of equitable relief apply (*r*).

Application
of equitable
principles.

The remedy is special and extraordinary in its character, and the court has a discretion to grant it, or to leave the parties to their rights at law (*s*). The discretion of a court exercising equitable jurisdiction is, however, not an arbitrary or capricious discretion; it is a discretion to be exercised on fixed principles in accordance with the previous authorities (*t*). It is not simply a question of what the individual judge thinks is fair or reasonable; the exercise of his discretion must be judicial (*u*). If the contract is valid in form and has been made between competent parties

Exercise of
court's dis-
cretion.

(*l*) See titles EQUITY, Vol. XIII., p. 13, note (*o*); EXECUTION, Vol. XIV., p. 74; SALE OF GOODS, Vol. XXV., p. 272; TROVER AND DETINUE, p. 917, *post*.

(*m*) See title TROVER AND DETINUE, p. 888, *post*.

(*n*) See title MORTGAGE, Vol. XXI., pp. 73 *et seq*.

(*o*) See title CROWN PRACTICE, Vol. X., pp. 104 *et seq*. As to an action to enforce a right arising from a statutory engagement, see *Fisher v. Tully* (1878), 3 App. Cas. 627 (lease of Crown lands).

(*p*) See title EQUITY, Vol. XIII., p. 61; pp. 77, 78, *post*.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

(*r*) As to the effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), see *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801, 808, C. A., and the cases there cited; *Re Northumberland Avenue Hotel Co., Sully's Case* (1885), 54 L. T. 76 (promoter's agreement for lease of land); and see titles COURTS, Vol. IX., p. 52; EQUITY, Vol. XIII., pp. 61 *et seq*. On the nature of equitable relief generally, see title EQUITY, Vol. XIII., pp. 46 *et seq*.

(*s*) *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, 612, 615, C. A.

(*t*) See *Re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, C. A., *per* JESSEL, M.R., at p. 710; *Bennett v. Smith* (1852), 16 Jur. 421 (sale of land).

(*u*) See *Goring v. Nash* (1744), 3 Atk. 186; *White v. Damon* (1802),

SECT. 3.
 Equitable
 Nature of
 Relief by
 Specific
 Perform-
 ance.

and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course (*x*), even though the judge may think it involves hardship (*a*). The mere existence, however, of a valid contract is not in itself enough to bring about the interference of the court; the conduct of the plaintiff, such as delay, acquiescence, breach on his part, or some other circumstance outside the contract, may render it inequitable to enforce it (*b*), or the contract itself may, for example, on the ground of misdescription, be such that the court will refuse to enforce it (*c*). On grounds of this nature the court exercises its discretion.

Part II.—Limits of the Jurisdiction.

SECT. 1.—*Limitations Applying to Equitable Jurisdiction Generally.*

Attitude of
 court of
 equity to
 common law.

6. From the nature and origin of equitable jurisdiction, and from its relation to the system of law enforced by the courts of common law, certain rules resulted which, before the Judicature Acts (*d*), limited and determined the method on which equity acted (*e*). The most fundamental principles were (1) that equity followed the law (*f*), and (2) that it applied its remedies as supplementary to legal remedies and on the ground of their inadequacy (*g*). On the former principle, it was held before the time of Lord Somers that a court of equity would not entertain a suit for specific performance unless the plaintiff was in a position to recover damages at law (*h*). This principle was, however, overruled (*i*), and in many cases a plaintiff was granted specific performance where his legal rights were doubtful or unenforceable; for, though a court of

Supple-
 mentary
 jurisdiction.

7 Ves. 30, 35; *Buckle v. Mitchell* (1812), 18 Ves. 100, 111; *Revell v. Hussey* (1813), 2 Ball & B. 280, 288.

(*x*) *Hall v. Warren* (1804), 9 Ves. 605, 608.

(*a*) *Haywood v. Cope* (1858), 25 Beav. 140. As to refusing specific performance on the ground of hardship, see, however, pp. 37 *et seq.*, *post*.

(*b*) *Clowes v. Higginson* (1813), 1 Ves. & B. 524, 527; *Lamare v. Dixon* (1873), L. R. 6 H. L. 414; *Leech v. Schweder* (1874), 9 Ch. App. 463, 467, n.; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, 27, C. A.; see pp. 52 *et seq.*, *post*.

(*c*) See, e.g., *Re Davis and Cavey* (1888), 40 Ch. D. 601; *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, C. A.; pp. 42 *et seq.*, *post*.

(*d*) As to the Judicature Acts, see title COURTS, Vol. IX., p. 51, note (*g*).

(*e*) See, generally, title EQUITY, Vol. XIII., pp. 1 *et seq.*, and, in particular, *ibid.*, pp. 65 *et seq.*; see also *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, *supra*, at pp. 612, 615.

(*f*) See title EQUITY, Vol. XIII., p. 68.

(*g*) See *ibid.*, p. 11; and for illustrations see pp. 13 *et seq.*, *post*.

(*h*) *Dodsley v. Kinnersley* (1761), Amb. 403, *per CLARKE, M.R.*, at p. 406; compare *Chandos (Duchess Dowager) v. Brownlow* (1791), 2 Ridg. Parl. Cas. 345, 416 (covenant for renewal of lease).

(*i*) Compare *Bettesworth v. St. Paul's (Dean and Chapter)* (1728), 1 Bro. Parl. Cas. 240; and see title EQUITY, Vol. XIII., p. 12.

equity would not enforce a covenant void at law (*k*), it would relieve the plaintiff on certain terms against matters which at common law would work a forfeiture (*l*). But the court would not interfere except on the ground that, while relief should in conscience be given, no adequate relief was obtainable at law (*m*); hence it would not interfere in cases where adequate damages were recoverable at law, or no damage had in law been suffered, as, for instance, in the case of an agreement entirely unperformed to grant a loan (*n*). Since the Judicature Acts (*o*) the above rules still limit the exercise of the jurisdiction to grant specific performance (*p*).

SECT. 1.
Limitations
Applying to
Equitable
Jurisdiction
Generally.

7. The attitude of the court to the Statutes of Limitation (*q*) and to the Statute of Frauds (*r*) illustrates the principles on which the court acted, since it followed the legal rules as to limitation of actions (*s*), while it refused in certain circumstances to allow the Statute of Frauds (*r*) to be made an instrument of fraud (*t*).

Attitude
of court
towards
statute law.

8. A further limit on the jurisdiction of equity was that it acted *in personam* (*a*).

Jurisdiction
in personam.

SECT. 2.—Voluntary Contracts.

9. The court does not enforce specific performance of contracts which are voluntary, whether under seal or not: a party claiming specific performance must show some consideration proceeding from himself (*b*); even a past consideration does not

Not speci-
fically per-
formed.

(*k*) See *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 563; *Bozon v. Farlow* (1816), 1 Mer. 459 (purchase of an attorney's business); *May v. Thomson* (1882), 20 Ch. D. 705, C. A. (purchase of medical practice).

(*l*) Thus, a plaintiff would fail at law for an unessential misdescription, but equity could enforce with compensation; see *Mortlock v. Buller* (1804), 10 Ves. 292, 305; and similarly where the plaintiff has substantially, but not exactly, performed a condition; see *Davis v. Hone* (1805), 2 Sch. & Lef. 341, 347. Courts of equity also interfered on behalf of an assignee to give effect to his rights, and would enforce a contract which had become unenforceable at law by the death of the covenantor; see *Milnes v. Gery* (1807), 14 Ves. 400, 403.

(*m*) Compare *Wright v. Bell* (1818), 5 Price, 325 (purchase of a debt), where there was, apparently, no remedy at law; and see p. 13, *post*.

(*n*) *Rogers v. Challis* (1859), 27 Beav. 175; *South African Territories v. Wallington*, [1898] A. C. 309; compare *Beech v. Ford* (1848), 7 Hare, 208 (annuity); *Ashton v. Corrigan* (1871), L. R. 13 Eq. 76 (mortgage). As to agreements to indemnify, see *London and South Western Rail. Co. v. Humphrey* (1858), 6 W. R. 784; *Anglo-Australian Life Assurance Co. v. British Provident Life and Fire Society* (1862), 3 Giff. 521 (indemnity); and see, further, title MORTGAGE, Vol. XXI., p. 75.

(*o*) As to the Judicature Acts, see title COURTS, Vol. IX., p. 51, note (*g*).

(*p*) See, further, title EQUITY, Vol. XIII., pp. 12, 13, 65.

(*q*) See *ibid.*, pp. 69, 175; title LIMITATION OF ACTIONS, Vol. XIX., p. 169.

(*r*) 29 Car. 2, c. 3.

(*s*) See title EQUITY, Vol. XIII., p. 69.

(*t*) See *ibid.*, p. 75; and see pp. 30 *et seq.*, *post*.

(*a*) See title EQUITY, Vol. XIII., p. 65; p. 13, *post*.

(*b*) *Penn v. Baltimore (Lord)* (1750), 1 Ves. Sen. 444, 450; *Wycherley v. Wycherley* (1763), 2 Eden, 175 (slight consideration sufficient for confirming a family settlement); see *Brownsmith v. Gilborne* (1727), 2 Stra. 738 (voluntary settlement); *Morris v. Burroughs* (1737), 1 Atk.

SECT. 2.
Voluntary
Contracts.

suffice (c). This rule applies equally whether the volunteer seeks to enforce a contract or a settlement, except where the legal title has been completed (d).

SECT. 3.—*Acts the Performance of which would Require Continued Supervision.*

Contracts
involving
supervision.

10. The court does not enforce the performance of contracts which involve continuous acts and require the watching and supervision of the court (e).

Building
contract.

In particular, the court does not, as a rule, order the specific performance of a contract to build or repair (f). This rule,

399, 401 (voluntary agreement); *Groves v. Groves* (1829), 3 Y. & J. 163; *Brough v. Oddy* (1829), Taml. 215 (agreement to lend money); *Houghton v. Lees* (1854), 1 Jur. (N. S.) 862; *Ord v. Johnston* (1855), 1 Jur. (N. S.) 1063; *Walrond v. Walrond* (1858), John. 18; *Kennedy v. May* (1863), 11 W. R. 358; *Hervey v. Audland* (1845), 14 Sim. 531; *Cheale v. Kenward* (1858), 3 De G. & J. 27 (agreement to transfer shares; assumption of liability by transferee sufficient consideration); *Crampton v. Varna Rail. Co.* (1872), 7 Ch. App. 562 (verbal agreement); *Larios v. Bonani y Gurety* (1873), L. R. 5 P. C. 346 (agreement to advance money); *Bagnell v. Edwards* (1876), 10 L. R. Eq. 215 (partnership); *Stephens v. Green, Green v. Knight*, [1895] 2 Ch. 148, C. A. (post-nuptial contract: mutual covenants of husband and wife sufficient consideration); and compare *Burrows v. Greenwood* (1840), 4 Y. & C. (EX.) 251 (voluntary contract); *Bankes v. Small* (1887), 36 Ch. D. 716, C. A. (contract to disentail). As to voluntary covenants to surrender copyholds, see *Jefferys v. Jefferys* (1841), Cr. & Ph. 138; *Dening v. Ware* (1856), 22 Beav. 184, 189; *Steele v. Waller* (1860), 28 Beav. 466.

(c) *Robertson v. St. John* (1786), 2 Bro. C. C. 140 (a promise to renew a lease in consequence of money already laid out, *nudum pactum*: specific performance refused).

(d) *Jefferys v. Jefferys*, *supra*, per Lord COTTENHAM, L.C., at p. 141. In the case of voluntary societies for purposes of pleasure, scientific pursuits, charity or philanthropy, the court does not interfere to enforce contracts between members of such societies, so long as no right of property is involved (*Rigby v. Connol* (1880), 14 Ch. D. 482, per JESSEL, M.R., at p. 487).

(e) *Blackett v. Bates* (1865), 1 Ch. App. 117 (contract to supply engine power and keep railway line in repair); *Powell Duffryn Steam Coal Co. v. Taff Vale Rail. Co.* (1874), 9 Ch. App. 331 (contract to grant running powers); *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, C. A. (contract that porter will perform his duties); *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd. and National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (contract for delivery of coal by instalments); see *Ruynerv. Stone* (1762), 2 Eden, 128; *Phipps v. Jackson* (1887), 56 L. J. (CH.) 550; *Keith, Prowse & Co. v. National Telephone Co.*, [1894] 2 Ch. 147; and compare *Cooke v. Chilcott* (1876), 3 Ch. D. 694 (covenant running with land).

(f) This rule is mainly based on the inability of the court to supervise performance (compare *Newbery v. James* (1817), 2 Mer. 446 (expired patent); and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 248, 249), but also on the want of definiteness usually involved in such contracts, and further on the principle that damages are generally an adequate remedy; see *Errington v. Aynesly* (1788), 2 Bro. C. C. 341; *Lucas v. Commerford* (1790), 3 Bro. C. C. 166, dissenting from *dicta* in *Buxton v. Lister* (1746), 3 Atk. 382, 385, and *London (City) v. Nash* (1747), 3 Atk. 512; *Paxton v. Newton* (1854), 2 Sm. & G. 437; *Kay v. Johnson* (1864), 2 Hem. & M. 118; *Wheatley v. Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538 (covenant to work a coal mine); see *Flint v. Brandon* (1803), 8 Ves. 159 (covenant to make good a gravel pit);

however, is subject to important exceptions (*g*), and a decree for specific performance of a contract to build will be made if the following conditions are fulfilled:—(1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant has by the contract obtained possession of land on which the work is contracted to be done (*h*).

SECT. 3.
Acts the
Perform-
ance of
which
would
Require
Continued
Supervision.

SECT. 4.—Contracts for Personal Work or Service.

11. A judgment for specific performance is not pronounced, either at the suit of the employer or the employee, in the case of a contract for personal work or service (*i*). The court does not seek to

General
principle as
to contracts
of service.

South Wales Rail. Co. v. Wythes (1854), 1 K. & J. 186; affirmed, 5 De G. M. & G. 880, C. A.; *Booth v. Pollard* (1840), 4 Y. & C. (EX.) 61; *Pollard v. Clayton* (1855), 1 K. & J. 462; *Brace v. Wehnert* (1858), 25 Beav. 348; *Norris v. Jackson* (1860), 1 John. & H. 319; and compare *Soames v. Edge* (1860), John. 669 (specific performance of contract to accept lease, damages for failure to build); see also *Female Orphans Asylum v. Waterlow* (1868), 16 W. R. 1102 (agreement to grant lease); *Wood v. Silecock* (1884), 50 L. T. 251 (preliminary building agreement); *Saunders v. Brading Harbour Improvement Railway and Works Co.* (1885), 52 L. T. 426 (agreement to make a road); and see titles LANDLORD AND TENANT, Vol. XVIII., p. 379; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 548.

(*g*) *Wolverhampton Corporation v. Emmons*, [1901] 1 K. B. 515, C. A.

(*h*) *Molyneux v. Richard*, [1906] 1 Ch. 34; see *Storer v. Great Western Rail. Co.* (1842), 2 Y. & C. Ch. Cas. 48; *Saunderson v. Cockermouth and Workington Rail. Co.* (1849), 11 Beav. 497; *Darnley (Lord) v. London, Chatham, and Dover Rail. Co.* (1863), 1 De G. J. & Sm. 204, C. A.; S. C. (1865), 3 De G. J. & Sm. 24, C. A.; S. C. (1867), L. R. 2 H. L. 43; *Lytton v. Great Northern Rail. Co.* (1856), 2 K. & J. 394; *Wilson v. Furness Rail. Co.* (1869), L. R. 9 Eq. 28; *Hood v. North Eastern Rail. Co.* (1870), 5 Ch. App. 525; *Wilson v. Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279 (all cases of accommodation works); and compare *Greene v. West Cheshire Rail. Co.* (1871), L. R. 13 Eq. 44; *Todd v. Midland Great Western Railway of Ireland Co.* (1881), 9 L. R. Ir. 85; *Fortescue v. Lostwithiel and Fowey Rail. Co.*, [1894] 3 Ch. 621; *Price v. Penzance Corporation* (1845), 4 Hare, 506; *Pembroke v. Thorpe* (1740), 3 Swan, 437, n.; *Oxford v. Provand* (1868), L. R. 2 P. C. 135, which cases illustrate the same rule. In *South Wales Rail. Co. v. Wythes*, *supra*, specific performance was refused on the ground that damages would be an adequate remedy, the plaintiffs being in a position to have the railway constructed, as the land was in their possession. A dictum of Lord LOUGHBOROUGH, L.C., in *Mosely v. Virgin* (1796), 3 Ves. 184, that the court will decree specific performance of a contract to build if sufficiently definite was acted upon in *Cubitt v. Smith* (1865), 11 L. T. 298; and see *Hepburn v. Leather* (1884), 50 L. T. 660.

(*i*) *Pickering v. Ely (Bishop)* (1843), 2 Y. & C. Ch. Cas. 249; *Fitzpatrick v. Nolan* (1851), 1 I. Ch. R. 671 (personal service); *Stocker v. Brockelbank* (1851), 3 Mac. & G. 250; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *Gillis v. M'Ghee* (1861), 13 I. Ch. R. 48 (personal service); *Ogden v. Fossick* (1862), 4 De G. F. & J. 426, C. A.; *Firth v. Ridley* (1864), 33 Beav. 516; *Frith v. Frith*, [1906] A. C. 254, P. C.; *Clarke v. Price* (1819), 2 Wils. (CH.) 157 (law reporting); *Chaplin v. North-Western Rail. Co.* (1862), 5 L. T. 601; S. C., *sub nom. Horne v. London and North Western Rail. Co.*, 10 W. R. 170 (personal service); and see title MASTER AND SERVANT, Vol. XX., pp. 113, 114. Such decrees were made in earlier cases; see *Ball v. Coggs* (1710), 1 Bro. Parl. Cas. 140; *East India Co. v. Vincent* (1740), 2 Atk. 83; but later judges have refused to follow these precedents; see the cases cited *supra*.

SECT. 4.
Contracts
for Personal
Work or
Service.

Contracts
within the
rule.

compel persons against their will to maintain continuous personal and confidential relations (*k*).

This principle applies not merely to contracts of employment, but to all contracts which involve the rendering of continuous services by one person to another, as, for instance, a contract to work a railway line (*l*). Contracts of agency, such as that of a shipbroker (*m*) or an auctioneer (*n*), come under the same rule; and a contract of apprenticeship is not enforced against an infant (*o*).

SECT. 5.—*Contracts Lacking Mutuality.*

Refusal of
relief for
want of
mutuality.

12. Want of mutuality is in general a ground for refusing a judgment of specific performance: if a contract cannot be enforced against one party by reason of circumstances existing at the date of the contract, such as personal incapacity or the nature of the contract, that party will not be enabled to enforce the contract against the other party. Thus, an infant cannot sue for specific performance (*p*), since he cannot be sued therefor (*q*); a plaintiff cannot enforce a contract which could not be enforced against himself as involving performance of personal service or continuous acts, even though the consideration to be performed by the

(*k*) *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A.; *Bainbridge v. Smith* (1889), 41 Ch. D. 462, 474; *De Francesco v. Barnum* (1890), 45 Ch. D. 430; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, C. A.; but in *Rigby v. Connol* (1880), 14 Ch. D. 482, JESSEL, M.R., at p. 487, seems to confine the principle to cases where no rights of property are involved. On analogous grounds, an injunction is not granted if it in effect would compel the performance of a contract of the nature here discussed; see *Chapman v. Westerby*, [1913] W. N. 277; title INJUNCTION, Vol. XVII., p. 246; see also *ibid.*, pp. 242, 243.

(*l*) *Johnson v. Shrewsbury and Birmingham Rail. Co.*, *supra*; see *Horne v. London and North Western Rail. Co.* (1861), 10 W. R. 170; and compare *Pickering v. Ely (Bishop)* (1843), 2 Y. & C. Ch. Cas. 249 (where specific performance was refused of a contract to grant an office the holder of which would have had the right and duty of performing work of a confidential character). If the consideration or part of the consideration is work of a personal character, the court refuses to compel performance of any part of the contract on the ground of want of mutuality (see the text, *infra*); see, however, *Fortescue v. Lostwithiel and Fowey Rail. Co.*, [1894] 3 Ch. 621 (where specific performance was granted by KEKEWICH, J., of a contract between a landowner and a railway company which included as a minor part of a larger contract otherwise proper for specific performance a stipulation for certain acts in the nature of personal services).

(*m*) *Brett v. East India and London Shipping Co., Ltd.* (1864), 2 Hem. & M. 404.

(*n*) *Chinnock v. Sainsbury* (1860), 6 Jur. (N. S.) 1318; see *Bertram v. Ball* (1882), 27 Sol. Jo. 39; title AUCTION AND AUCTIONEERS, Vol. I., pp. 516, 517.

(*o*) *De Francesco v. Barnum* (1889), 43 Ch. D. 165. Conversely, an order is not made against the master (*Webb v. England* (1860), 29 Beav. 44). See titles INFANTS AND CHILDREN, Vol. XVII., pp. 72, 73; MASTER AND SERVANT, Vol. XX., pp. 73, 74.

(*p*) *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683, C. A., *per* LINDLEY, L.J., at p. 684.

(*q*) *Flight v. Bolland* (1828), 4 Russ. 298; see title INFANTS AND CHILDREN, Vol. XVII., p. 67.

defendant is not in itself of a nature to exclude specific performance (*r*); a vendor of property in or over which he had no estate or power at the time of the sale may be met by this fact as a defence to a suit by him of specific performance (*s*); and a tenant in tail cannot in general enforce a contract entered into by the tenant for life (*t*).

13. The want of mutuality must be judged of as at the date of the contract. The fact that a defendant by his own neglect or default has since the date of the contract lost the right to enforce it will not prevent its being enforced against him (*a*). Conversely, if the terms of the contract were such as originally to preclude specific performance, performance of these terms by the plaintiff will not obviate the objection (*b*).

SECT. 5.
Contracts
Lacking
Mutuality.

Want of
mutuality
material at
date of
contract.

14. There are, however, certain exceptions, or apparent exceptions, to the rule regarding lack of mutuality (*c*):—

Exceptions
to rule as
to want of
mutuality:—

(1) A conditional contract must be distinguished from one lacking in mutuality, as, for example, a contract where one party has

(1) Con-
ditional
contract.

(*r*) *Pickering v. Ely (Bishop)* (1843), 2 Y. & C. Ch. Cas. 249; *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A.; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *Ord v. Johnston* (1855), 1 Jur. (N. S.) 1063; *Hill v. Gomme* (1839), 1 Beav. 540; *Peto v. Brighton, Uckfield, and Tunbridge Wells Rail. Co.* (1863), 1 Hem. & M. 468; and see pp. 8, 9, *ante*; distinguish *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440 (application for an injunction).

(*s*) *Hoggart v. Scott* (1830), 1 Russ. & M. 293 (where the defect was waived; see p. 53, *post*); *Forrer v. Nash* (1865), 35 Beav. 167; *Brewer v. Broadwood* (1882), 22 Ch. D. 105; *Bellamy v. Debenham*, [1891] 1 Ch. 412, C. A.; see *Lee v. Soames* (1888), 36 W. R. 884; compare *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590; and see title SALE OF LAND, Vol. XXV., pp. 402 *et seq.*

(*t*) *Armiger v. Clarke* (1722), Bunb. 111; *Ricketts v. Bell* (1847), 1 De G. & Sm. 335. It is, however, now clear (notwithstanding *dicta* of DE GREY, C.J., in *Campbell v. Leach* (1775), Amb. 740, 749) that mutuality exists between a remainderman and a person who has agreed to take a lease from a tenant for life with a leasing power; see *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52; *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368; approved in *Capital and Counties Bank, Ltd. v. Rhodes*, [1903] 1 Ch. 631, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., p. 364. Again, contracts entered into by a tenant for life under the Settled Land Acts are enforceable by and against his successor in title (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31), and a tenant for life can give effect to some contracts of his predecessors in title (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 67); see title SETTLEMENTS, Vol. XXV., pp. 664, 665, 667. For other instances of unenforceable contracts, see *Avery v. Griffin* (1868), L. R. 6 Eq. 606; *Kennedy v. May* (1863), 11 W. R. 358; *Hamilton v. Grant* (1815), 3 Dow, 33, H. L. (agreement not to bar entail).

(*a*) *South Eastern Rail. Co. v. Knott* (1852), 10 Hare, 122 (defendant cannot plead that he by laches has lost the right); *Hawkes v. Eastern Counties Rail. Co.* (1852), 1 De G. M. & G. 737; (1855), 5 H. L. Cas. 331 (no defence that statutory powers of railway company had expired), overruling *dicta* to the contrary effect in *Stuart (Lord J.) v. London and North Western Rail. Co.* (1852), 1 De G. M. & G. 721, C. A.

(*b*) *Hope v. Hope* (1857), 8 De G. M. & G. 731, C. A. (where all the objectionable and illegal parts of the agreement had been performed, but the court refused to enforce the residue).

(*c*) As to the rule, see p. 10, *ante*.

SECT. 5.
Contracts
Lacking
Mutuality.

(2) Objec-
tion waived
by conduct
of party.

(3) Where
Statute of
Frauds com-
plied with.

(4) Defici-
ency in
interest con-
tracted to be
sold.

an option by the exercise of which the other party becomes bound to perform his part (*d*).

(2) The objection of lack of mutuality may be precluded by the conduct of the party against whom the contract was originally unenforceable. Thus in cases where, owing to the vendor's original incapacity to complete, the contract was unenforceable, the purchaser may preclude himself from raising that objection either by not repudiating after learning of the incapacity, or by recognising the contract by his conduct (*e*); and so, while a contract by a trustee, to purchase property from a *cestui que trust* is, generally speaking, not binding on the *cestui que trust* (*f*), the latter may, by bringing an action for specific performance, waive the want of mutuality and enforce the contract as against the trustee (*g*).

(3) Where a memorandum of a contract to satisfy the Statute of Frauds (*h*) has been signed by one party only, that party is not allowed to plead, in answer to a claim to enforce the contract, that the other party, not having signed any memorandum, could not have been sued (*i*).

(4) Where at the time of the contract a vendor had not the full interest he agreed to sell, the purchaser can, as a rule, claim a conveyance of such interest as the vendor possessed, with compensation, though the vendor would not have a corresponding right against the purchaser (*k*).

(*d*) *Weeding v. Weeding* (1861), 1 John. & H. 424 (option to purchase); compare *Chesterman v. Mann* (1851), 9 Hare, 206 (covenant to renew lease on request); *Palmer v. Scott* (1830), 1 Russ. & M. 391 (unilateral undertaking of one party); compare *Otway v. Braithwaite* (1679), Cas. temp. Finch, 405.

(*e*) In such cases the purchaser, on discovering the vendor's defective title, can repudiate the contract. This is an equitable right affecting the equitable remedy of specific performance; but should he fail to repudiate and the vendor perfect his title, he is taken to have waived the objection, and in particular he cannot claim to repudiate after a decree for specific performance without the consent of the court (*Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590; *Salisbury v. Hatcher* (1842), 2 Y. & C. Ch. Cas. 54; *Wylson v. Dunn* (1887), 34 Ch. D. 569); see also p. 11, ante.

(*f*) See titles EQUITY, Vol. XIII., p. 157; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 109, 110; TRUSTS AND TRUSTEES.

(*g*) *Ex parte Lacey* (1802), 6 Ves. 625. For cases before the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), in which it was held that, though a vendor who had previously made a voluntary settlement could not enforce the contract against the purchaser, the latter could against the vendor, see *Smith v. Garland* (1817), 2 Mer. 123; *Johnson v. Legard* (1822), Turn. & R. 281; see also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 100, note (*t*).

(*h*) 29 Car. 2, c. 3, s. 4; see title CONTRACT, Vol. VII., pp. 367 *et seq.*
(*i*) *Hatton v. Gray* (1684), 2 Cas. in Ch. 164; *Morgan v. Holford* (1852), 1 Sm. & G. 101; see also *Seton v. Slade*, *Hunter v. Seton* (1802), 7 Ves. 265; *Fowle v. Freeman* (1804), 9 Ves. 351; *Western v. Russell* (1814), 3 Ves. & B. 187, 192; *Martin v. Mitchell* (1820), 2 Jac. & W. 413; *Boys v. Ayerst* (1822), Madd. & G. 316; title CONTRACT, Vol. VII., pp. 367, 375.

(*k*) See pp. 99 *et seq.*, *post*; title SALE OF LAND, Vol. XXV., pp. 406, 407. In two cases, *Lawrenson v. Butler* (1802), 1 Sch. & Lef. 13, and *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549, Lord REDESDALE, L.C., expressed the opinion that the principle did not apply when the purchaser knew at the date of the contract of the defect in the vendor's title. This opinion has been dissented from by English judges, who have

SECT. 6.—*Agreements Ancillary to Unenforceable Principal Contract.*SECT. 6.
Agreements
Ancillary
to Unen-
forceable
Principal
Contract.

15. The court does not enforce an agreement if it is merely ancillary to a principal contract which is itself unenforceable; the adjunct must go along with the principal agreement (*l*). Thus, specific performance may be refused of an agreement to execute a bond where the bond is to secure performance of a contract to execute works, which contract could not be enforced, the bond being merely ancillary to the works, the substance of the contract (*m*). Similarly, where a person agrees to employ another as broker and also agrees to insert his name as broker in all his advertisements, the court, being unable to order performance of the former, which is the substantial, agreement, refuses to enforce the latter (*n*).

Where
principal
contract
unenforce-
able.

SECT. 7.—*Cases where Money Payment Affords an Adequate Remedy.*SUB-SECT. 1.—*In General.*

16. The ground for the interference of a court of equity by enforcing specific performance of contracts being the inadequacy of the remedy at common law, which was by payment of a sum of money as damages (*o*), it follows that the court does not so interfere in cases where a money payment affords an adequate remedy (*p*). The principle appears to be the same whether the contract leaves the amount of damages in the event of breach unliquidated, or whether it specifies a sum by way of penalty or liquidated damages; but the latter class of cases raises certain questions which are considered later (*q*).

Principle as
to damages
being
sufficient
remedy.

The common law view that a breach of contract could always be satisfied by a money payment is open to criticism, as, for instance, that the remedy depends for its efficacy on the personal solvency of the defendant (*r*), or, again, that it compels the plaintiff to accept a conjectural sum of money instead of a specific matter which may be of uncertain value (*s*); but neither reason is in itself a sufficient ground for granting specific performance (*a*).

Disadvan-
tages of relief
afforded at
common law.

given specific performance in such cases; see *Dyas v. Cruise* (1845), 2 Jo. & Lat. 460, *per* SUGDEN, L.C., at p. 487.

(*l*) Compare pp. 17, 18, *post*.

(*m*) *South Wales Rail. Co. v. Wythes* (1854), 5 De G. M. & G. 880, C.A., affirming S. C., 1 K. & J. 186; distinguish *Lumley v. Wagner* (1852), 1 De G. M. & G. 604, where the negative covenant which was enforced was distinct from the positive contract which was unenforceable; and see, further, title INJUNCTION, Vol. XVII., pp. 242, 243, 246.

(*n*) *Brett v. East India and London Shipping Co., Ltd.* (1864), 2 Hem. & M. 404.

(*o*) See p. 7, *ante*.

(*p*) *Crampton v. Varna Rail. Co.* (1872), 7 Ch. App. 562 (verbal agreement).

(*q*) See pp. 15 *et seq.*, *post*.

(*r*) See *Doloret v. Rothschild* (1824), 1 Sim. & St. 590, *per* LEACH, V.-C., at p. 598.

(*s*) See *Adderley v. Dixon* (1824), 1 Sim. & St. 607, *per* LEACH, V.-C., at p. 610; compare *Pollard v. Clayton* (1855), 1 K. & J. 462.

(*a*) See Fry on Specific Performance, 5th ed., p. 30.

SECT. 7.

SUB-SECT. 2.—*No Express Provision for Money Payment.*

Cases where
Money
Payment
Affords an
Adequate
Remedy.

Cases as
to which
common law
remedy is
sufficient.

Stock and
shares.

Chattels.

17. The following illustrations may be given of contracts in which the court refuses specific performance on the ground that damages in money would afford a sufficient remedy.

The court refuses specific performance of a sale of Government stock (*b*). On the other hand, the court enforces a contract for the sale or purchase of shares in a company (*c*), unless there is a free market in the shares, so that the vendor or purchaser may easily make a substituted contract and be compensated for the difference in price, if any, by means of damages (*d*).

The court also refuses specific performance of a contract to sell or purchase chattels which are not specific or ascertained (*e*). It may, however, specifically enforce a contract to deliver specific or ascertained chattels (*f*), and it does enforce such a contract (*g*) or

(*b*) *Cud v. Rutter* (1719), 1 P. Wms. 570; *Cappur v. Harris* (1723), Bunb. 135; *Nutbrown v. Thornton* (1804), 10 Ves. 159, 161; see title STOCK EXCHANGE, p. 254, *post*. The decisions of LEACH, V.-C., in *Doloret v. Rothschild* (1824), 1 Sim. & St. 590 (contract for sale of Neapolitan stock: specific performance granted, and decree for delivery of certificates), and in *Withy v. Cottle* (1823), 1 Sim. & St. 174 (specific performance on vendor's bill or contract for sale of life annuity payable out of dividends of stock), are contrary to the general current of authority; compare *Gardener v. Pullen* (1700), 2 Vern. 394 (sale of East India stock decreed *in specie*). In *Brealey v. Collins* (1831), You. 317, a contract to sell a life interest in the public funds was not enforced.

(*c*) *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Jackson v. Cocker* (1841), 4 Beav. 59; *Cheale v. Kenward* (1858), 3 De G. & J. 27; compare *Colt v. Nettervill* (1725), 2 P. Wms. 304; and see title COMPANIES, Vol. V., p. 184. As to cases of a company suing a purchaser for specific performance of his contract to take shares, see *New Brunswick etc. Co. v. Muggeridge* (1859), 4 Drew. 686; *Sheffield Gas Consumers' Co. v. Harrison* (1853), 17 Beav. 294; *Oriental Inland Steam Co. v. Briggs* (1861), 2 John. & H. 625; *Odessa Tramways Co. v. Mendel* (1878), 8 Ch. D. 235, C. A.; as to specific performance of a contract to take shares, see, further, pp. 73 *et seq.*, *post*.

(*d*) In such cases it appears that damages would afford an adequate remedy, so that the basis of the court's jurisdiction is gone; see *Re Schwabacher, Stern v. Schwabacher, Koritschoner's Claim* (1908), 98 L. T. 127, 128; title STOCK EXCHANGE, p. 254, *post*.

(*e*) *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191, 209; see *Heathcote v. North Staffordshire Rail. Co.* (1850), 2 Mac. & G. 100, 112; *Hoare v. Dresser* (1859), 7 H. L. Cas. 290, 317; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Donnell v. Bennett* (1883), 22 Ch. D. 835; *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd., and National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (where specific performance was refused of a contract by a colliery company to deliver coal from their colliery to a steel company for the latter's requirements over a term of years); but see *Taylor v. Neville* (undated), cited 3 Atk., 384, which appears to be wrongly decided; see also *Pollard v. Clayton* (1855), 1 K. & J. 462. Where delivery of the chattels is only part of an otherwise enforceable contract, delivery may be enforced (*Marsh v. Milligan* (1857), 3 Jur. (N. S.) 979); see, further, pp. 4, 5, *ante*.

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52; see *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440, 445; and see, further, title SALE OF GOODS, Vol. XXV., p. 272.

(*g*) A ship, as a chattel of unique value, comes within the principle; see *Lynn v. Chaters* (1837), 2 Keen, 521; *Claringbould v. Curtis* (1852), 21 L. J. (CH.) 541; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Hart v. Herwig* (1873), 8 Ch. App. 860, 866; *Bathiany v. Bouch* (1881), 4 Asp. M. L. C. 380; see also *Falcke v. Gray* (1859), 4 Drew. 651 (contract for

any other obligation (*h*) to deliver chattels, if the goods are of so unique or special a character that money compensation is not adequate; but only, it seems, at the suit of the purchaser or person entitled to the chattels under the contract or obligation (*i*).

The court does not as a rule refuse to enforce an agreement to grant or accept a lease (*k*) or to sell or purchase land (*l*) on the ground that damages would be a sufficient remedy.

SUB-SECT. 3.—*Express Provision for Payment of Penalty or Damages.*

18. Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted (*m*). Nor does the distinction

SECT. 7.
Cases where
Money
Payment
Affords an
Adequate
Remedy.

Agreements
as to land.

Contract
stipulating
for payment
of money.

sale of china jars); *Thorn v. Public Works Commissioners* (1863), 32 Beav. 490. In *Dowling v. Betjemann* (1862), 2 John. & H. 544, it was held that, as in the contract the value of the chattel has been fixed by the vendor, specific performance, in the circumstances of that case, should not be granted at the suit of the vendor, as the matter has been reduced to terms of money; but this rule cannot, it seems, apply in ordinary actions at the suit of the purchaser for specific performance of a contract for the sale of goods. It is not clear how far the court will exercise its jurisdiction where the thing sold, though not unique, is of special value and importance to the buyer or person entitled; see *North v. Great Northern Rail. Co.* (1860), 2 Giff. 64, where the court restrained the sale, under a claim to detain, of wagons of the plaintiffs essential to the carrying on of the plaintiffs' business; *Buxton v. Lister* (1746), 3 Atk. 383, *per* Lord HARDWICKE, L.C.; and see note (*e*), p. 14, *ante*. In *Nutbrown v. Thornton* (1804), 10 Ves. 159, Lord ELDON, L.C., ordered delivery of chattels on a farm, such as stock etc. necessary for the enjoyment of the farm, as being included in the contract to let the tenant have both farm and chattels. As to a contract relating to an undivided moiety of mineral rights, see *Hexter v. Pearce*, [1900] 1 Ch. 341; compare *Burrow v. Scammell* (1882), 19 Ch. D. 175.

(*h*) *Pusey v. Pusey* (1684), 1 Vern. 273 (the Pusey horn; as to which case see *Nutbrown v. Thornton*, *supra*, at p. 163, where stress is laid on the heir's desire to possess the family horn, namely, the *pretium affectionis*); *Somerset (Duke) v. Cookson* (1735), 3 P. Wms. 390 (ancient silver altar-piece); *Fells v. Read* (1796), 3 Ves. 70 (rare tobacco box); *Lloyd v. Loaring* (1802), 6 Ves. 773 (masonic ornaments); *Lingen v. Simpson* (1824), 1 Sim. & St. 600 (particular trade book); compare *Pearne v. Lisle* (1749), Amb. 75, *per* Lord HARDWICKE, L.C., at p. 77; and see *Saville v. Tancred* (1748), 1 Ves. Sen. 101; *Arundell (Lady) v. Phipps and Taunton* (1804), 10 Ves. 139; *Lowther v. Lowther (Lord)* (1806), 13 Ves. 95; *Pooley v. Budd* (1851), 14 Beav. 34; *Thombleson v. Black* (1837), 1 Jur. 198 (agreement relating to copyright enforced).

(*i*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52; and see the cases cited in note (*g*), p. 14, *ante*, note (*h*), *supra*.

(*k*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 375, 378 *et seq.* In *Clayton v. Illingworth* (1853), 10 Hare, 451, specific performance of a yearly tenancy was refused (compare *Fenner v. Hepburn* (1843), 2 Y. & C. Ch. Cas. 159), but even a yearly tenancy in a proper case is enforced; see *Lever v. Koffler*, [1901] 1 Ch. 543; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; and compare *Glasse v. Woolgar* (1897), 41 Sol. Jo. 573, C. A. (contract to let for one day to view procession). In *Zimble v. Abrahams*, [1903] 1 K. B. 577, C. A., a lease for life was enforced.

(*l*) See title SALE OF LAND, Vol. XXV., p. 408; see also *Clifford v. Turrell* (1841), 1 Y. & C. Ch. Cas. 138; S. C. on appeal (1845), 9 Jur. 633; *Walker v. Eastern Counties Rail. Co.* (1848), 6 Hare, 594; *Kenney v. Wexham* (1822), Madd. & G. 355; p. 16, *post*.

(*m*) *Howard v. Hopkyns* (1742), 2 Atk. 371; *French v. Macale* (1842),

SECT. 7.
Cases where
Money
Payment
Affords an
Adequate
Remedy.

Guiding
principle as
to granting
relief.

Choice of
remedy in
case of penal
clause.

Sale of land.

between penalty and liquidated damages (*n*) affect the answer to this question (*o*). The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security (*p*). In the latter case the court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance (*q*).

19. Where the contract contains a penalty clause, the contractee has his right in law upon the contract for the money payable under the clause, and also his right in equity to specific relief; he can, at his election, obtain either form of relief, but he cannot obtain both forms (*r*).

20. Thus, the ordinary provision on a sale of land that in case of default by the purchaser he shall forfeit his deposit and the seller shall be entitled to resell and claim any deficiency as liquidated damages does not exclude a claim for specific performance by the seller (*s*).

2 Dr. & War. 269; *Roper v. Bartholomew, Butler v. Bartholomew* (1823), 12 Price, 797.

(*n*) For an explanation of this distinction, see titles BONDS, Vol. III., p. 96; DAMAGES, Vol. X., p. 328; see also titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 242 *et seq.*, 255; MASTER AND SERVANT, Vol. XX., p. 107; SHIPPING AND NAVIGATION, Vol. XXVI., p. 135 (charterparty).

(*o*) *London City v. Pugh* (1728), 4 Bro. Parl. Cas. 395; *Webb v. Clark* (1782), 1 Fonblanque, Treatise of Equity, 154; *French v. Macale* (1842), 2 Dr. & War. 269; *Coles v. Sims* (1854), 5 De G. M. & G. 1, C. A.; *Carden v. Butler* (1832), Hayes & Jo. 112; *Bird v. Lake* (1863), 1 Hem. & M. 111; *Bray v. Fogarty* (1870), 4 I. R. Eq. 544.

(*p*) *French v. Macale*, *supra*; *Coles v. Sims*, *supra*; *Roper v. Bartholomew, Butler v. Bartholomew* (1823), 12 Price, 797, 821; and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 495; EQUITY, Vol. XIII., p. 151.

(*q*) See the cases cited in notes (*o*), (*p*), *supra*.

(*r*) *Fox v. Scard* (1863), 33 Beav. 327, 328; see *Gedye v. Montrose (Duke)* (1857), 5 W. R. 537 (assignment of lease); *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377 (injunction).

(*s*) For instance, see *Crutchley v. Jerningham* (1817), 2 Mer. 502, 506; *Long v. Bowring* (1864), 33 Beav. 585; and see title SALE OF LAND, Vol. XXV., p. 400. For other instances of specific performance, notwithstanding a penal clause, see *Howard v. Hopkyns* (1742), 2 Atk. 371; *Jeudwine v. Agate* (1829), 3 Sim. 129, 141; *Logan v. Wienholt* (1833), 1 Cl. & Fin. 611, H. L.; *Butler v. Powis* (1845), 2 Coll. 156; *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112, C. A. It is no bar to specific performance that the penalty is by bond; compare *Hobson v. Trevor* (1723), 2 P. Wms. 191; *Clarkson v. Edge* (1863), 33 Beav. 227; *Roper v. Bartholomew, Butler v. Bartholomew*, *supra*. The same principle is applied where the relief is claimed by way of injunction, as, for instance, in covenants not to carry on a certain trade or business, with a penalty clause superadded; see *Bird v. Lake* (1863), 1 Hem. & M. 111; compare *Clarkson v. Edge*, *supra*; *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518; *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, 458, C. A.; title INJUNCTION, Vol. XVII., p. 236.

21. The court may treat the penal sum as security, and not as an alternative mode of performance, notwithstanding that the obligation is expressed in an alternative form (*t*).

Specific performance may also be ordered where the benefit of performance will go to one person and that of the penalty to another (*a*).

The relative smallness of the penalty may be a ground for treating it as mere security for due performance (*b*), though there is no general rule to this effect (*c*).

22. There are, however, cases where the court holds on the construction of the contract that the intention of the parties is that the act may be done by the contracting party or that payment may be made by him of the stipulated amount, so that the contracting party has in effect the option either of doing the act which he has contracted to do or paying the specified sum, the contract being alternative, either to do or abstain from doing on payment of the sum in money (*d*). The question is one of construction depending on the precise form of the contract and the circumstances of the case (*e*), but the court leans to treating the penalty clause as intended to secure due performance of the agreement (*f*).

23. Where the sums payable vary in amount or frequency with the things to be done or abstained from, the payment may be treated as an alternative mode of performance; thus, in the case of leases, it may be held that the tenant is given the option of doing certain things on payment of an increased rent or other penalty (*g*), though not if there is a stipulation that the doing of the act is to work a forfeiture (*h*).

The court may treat covenants to perform or pay as alternative where specific performance would work unreasonable results (*i*).

SECT. 8.—*Cases where Performance of the Contract would be Valueless.*

24. Specific performance is not decreed of a contract which the defendant would be entitled to revoke or dissolve when executed,

SECT. 7.
Cases where
Money
Payment
Affords an
Adequate
Remedy.

Penal sum
treated as
security.

Cases where
payment an
alternative
to perform-
ance.

Payments
varying in
amount and
frequency.

Where
specific per-
formance
unreasonable.

Revocable
contracts.

(*t*) *Chilliner v. Chilliner* (1754), 2 Ves. Sen. 528 (contract to renew a lease or answer in damages).

(*a*) *French v. Macale* (1842), 2 Dr. & War. 269.

(*b*) *Chilliner v. Chilliner*, *supra*.

(*c*) *Roy v. Beaufort (Duke)* (1741), 2 Atk. 190; *Astley v. Weldon* (1801), 2 Bos. & P. 346; *French v. Macale*, *supra*.

(*d*) *Ranger v. Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 94; compare *Astley v. Weldon*, *supra*.

(*e*) *Ranger v. Great Western Rail. Co.*, *supra*.

(*f*) *Finch v. Salisbury (Earl)* (1675), Cas. temp. Finch, 212.

(*g*) *Woodward v. Gyles* (1691), 2 Vern. 119; *Rolfe v. Peterson* (1772), 2 Bro. Parl. Cas. 436 (discussed by Lord LOUGHBOROUGH in *Hardy v. Martin* (1783), 1 Cox, Eq. Cas. 26); *Legh v. Lillie* (1860), 6 H. & N. 165; *Hurst v. Hurst* (1849), 4 Exch. 571; *Gerrard v. O'Reilly* (1843), 3 Dr. & War. 414; *Magrane v. Archbold* (1813), 1 Dow, 107, H. L.; and see titles AGRICULTURE, Vol. I., pp. 249, 250 (farm leases); LANDLORD AND TENANT, Vol. XVIII., pp. 469, 470.

(*h*) *Barret v. Blagrove* (1800), 5 Ves. 555; *Dyke v. Taylor* (1861), 3 De G. F. & J. 467, C. A.; compare *French v. Macale*, *supra*.

(*i*) *Magrane v. Archbold*, *supra*.

SECT. 8.
Cases where
Perform-
ance of the
Contract
would be
Valueless.

such as a revocable deed, since it would be idle to do that which might instantly be undone by one of the parties. Instances of the application of this principle are afforded by the refusal to order specific performance of an agreement for a partnership at will (*k*), or of a contract for a lease which is to contain a proviso for re-entry on breach of a covenant which has already been broken in such a way by the plaintiff as to entitle the defendant to re-enter (*l*). Conversely, specific performance has been refused on the ground that performance has become valueless to the defendant (*m*).

SECT. 9.—*Cases where the Defendant is not Personally Subject to the Jurisdiction.*

Defendant
not subject to
jurisdiction.

Service of
writ outside
jurisdiction.

25. Equity acts *in personam* (*n*), and cannot therefore pronounce a judgment for specific performance against a defendant who is not personally subject to the jurisdiction of the courts of this country.

A judgment is not given against a foreign sovereign (*o*), or against a person not capable of being served within the jurisdiction (*p*), save that service of a writ may be allowed out of the jurisdiction when any contract affecting land or hereditaments within the jurisdiction is sought to be enforced in the action, or when the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to its terms ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland (*q*).

Remedy
against
Crown.

26. Though an action does not lie against the Crown (*r*), a petition of right may, it seems, be allowed against the Crown for specific

(*k*) *Hercy v. Birch* (1804), 9 Ves. 357; *Sheffield Gas Consumers' Co. v. Harrison* (1853), 17 Beav. 294; *Bluck v. Mallalue* (1859), 27 Beav. 398; see, further, p. 76, *post*; and compare *Wheeler v. Trotter* (1736), 3 Swan. 174, n., where specific performance was refused of an agreement by the registrar of a Consistory Court to delegate his office, such delegation being obviously revocable.

(*l*) *Jones v. Jones* (1803), 12 Ves. 186; but it must be clear that the right to forfeit exists. As to granting specific performance in cases where the court would relieve against forfeiture, see p. 61, *post*.

(*m*) ——— *v. White* (1706–13), 3 Swan. 108, n.

(*n*) As to this principle, see, further, title EQUITY, Vol. XIII., pp. 48, 65, 66. The same rules apply to the court's jurisdiction in reference to injunctions; see title INJUNCTION, Vol. XVII., pp. 204, 205; and compare title CONFLICT OF LAWS, Vol. VI., pp. 202 *et seq.* The same principle operates affirmatively to give the court jurisdiction with reference to land situate abroad; see titles CONFLICT OF LAWS, Vol. VI., p. 205; EQUITY, Vol. XIII., p. 66; and compare *Foubert v. Turst* (1703), 1 Bro. Parl. Cas. 129 (specific performance of contract made abroad relating to foreign land, the parties being permanently resident here); *Norris v. Chambres* (1861), 29 Beav. 246 (special circumstances necessary if parties casually in the country).

(*o*) *Smith v. Weguelin* (1869), L. R. 8 Eq. 198; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 310, 311.

(*p*) See, however, the anomalous case of *Hart v. Herwig* (1873), 8 Ch. App. 860 (contract made abroad for sale of foreign ship: substituted service allowed on master, ship being within jurisdiction).

(*q*) R. S. C. Ord. 11, r. 1; see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 117 *et seq.*

(*r*) *Nurse v. Seymour (Lord)* (1851), 13 Beav. 254; see title CONSTITUTIONAL LAW, Vol. VI., pp. 412 *et seq.*

performance of a contract, at least to the extent of a declaratory judgment that the petitioner is entitled to specific performance (s).

SECT. 9.

Cases where the Defendant is not Personally Subject to the Jurisdiction.

Part III.—Defences to Claim for Specific Performance.

SECT. 1.—*Contract not in Fact Concluded.*

27. Where it is sought to enforce specific performance of a contract (a), the court must be satisfied (1) that there is a concluded contract in fact; (2) that the contract so concluded is not incomplete by reason that the parties have failed to agree, expressly or by implication, on some essential matter; (3) that the contract is precise and certain, or, in other words, that, although all essential matters may have been dealt with, there is not such uncertainty and vagueness that exact performance cannot be ordered (b).

Contract must be concluded.

28. Whether there is in fact a concluded contract depends on the rules of law (c) relating to the elements of a valid contract—in particular, with respect to offer and acceptance. This question is distinct from another, namely, whether the rules of law relating to the form in which a contract must be embodied, or evidenced before the court, have been observed (d). Cases of concluded contracts

Factors determining a concluded contract.

(s) *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426, 457. As to petitions of right, see title CROWN PRACTICE, Vol. X., pp. 26 *et seq.*; and see Fry on Specific Performance, 5th ed., p. 65.

(a) It has been questioned what is included in the term "contract"; a judge's order made by consent is from many aspects a contract, with further elements added by reason of the order of the court; see *Wentworth v. Bullen* (1829), 9 B. & C. 840; *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570; *Conolan v. Leyland* (1884), 27 Ch. D. 632; but specific performance of such an order was refused in *Thames Iron Works Co. v. Patent Derrick Co.* (1860), 1 John. & H. 93, by PAGE WOOD, V.-C., it being the order of another court and providing its own method of enforcement. In *Caton v. Caton* (1867), L. R. 2 H. L. 127, the House of Lords differed in opinion as to whether instructions for a settlement were a contract for a settlement or instructions for a contract. A recital in a deed may be evidence of a contract (*Wilson v. Keating* (1859), 4 De G. & J. 588, C. A., affirming S. C., 27 Beav. 121 (transferee of shares held bound to pay on contract evidenced by transfer, though a mere nominee)).

(b) See pp. 21 *et seq.*, *post*.

(c) For a statement of these rules, see title CONTRACT, Vol. VII., pp. 345 *et seq.*; see also titles SALE OF GOODS, Vol. XXV., pp. 124, 125; SALE OF LAND, Vol. XXV., pp. 289, 290.

(d) Mainly under the Statute of Frauds (29 Car. 2, c. 3); see title CONTRACT, Vol. VII., pp. 360 *et seq.*; *Leominster Canal Navigation Co. v. Shrewsbury and Hereford Rail. Co.* (1857), 3 K. & J. 654 (purchase of canal); compare *Kidderminster Corporation v. Hardwick* (1873), L. R. 9 Exch. 13 (letting of tolls); *Oxford Corporation v. Crow*, [1893] 3 Ch. 535 (lease); and see titles LANDLORD AND TENANT, Vol. XVIII., pp. 372 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 134 *et seq.*; SALE OF LAND, Vol. XXV., pp. 290 *et seq.*; see also pp. 28 *et seq.*, *post*.

SECT. 1.
Contract
not in Fact
Concluded.

Representa-
tion inducing
conduct and
importing
obligation.

must of course be distinguished from cases where the parties have never got beyond the stage of negotiation (*e*), or where an offeree has purported to accept an offer which has lapsed by delay or other reason (*f*).

29. In certain cases where a representation has been made by one party to another with the object of inducing the other to act in a certain way, and the other has so acted, courts of equity, in dealing with claims for specific performance or other equitable relief, have proceeded on the principle of requiring the defendant to make good the representations (*g*). Cases of this nature, which have sometimes been described as involving the doctrine of "equitable estoppel" (*h*), ought, it seems, to be dealt with as cases of contract, the question being whether the representation amounts to a promise which can be enforced (*i*), and they should be distin-

(*e*) The old practice of the Court of Chancery in a case of doubt was to refuse specific performance and leave the parties to establish their rights at common law (*Huddleston v. Briscoe* (1805), 11 Ves. 583; *Stratford v. Bosworth* (1813), 2 Ves. & B. 341; *Skelton v. Cole* (1857), 1 De G. & J. 587, C. A.). Questions of this nature have turned on whether the acceptance was clear and unambiguous (see *Thomas v. Blackman* (1844), 1 Coll. 301; *Warner v. Willington* (1856), 3 Drew. 523; *Horsfall v. Garnett* (1858), 6 W. R. 387), or conditional (see *Crossley v. Maycock* (1874), L. R. 18 Eq. 180 (general acceptance accompanied by special conditions of sale); *Lewis v. Brass* (1877), 3 Q. B. D. 667, C. A.; *Jones v. Daniel*, [1894] 2 Ch. 332; *Hudson v. Buck* (1877), 7 Ch. D. 683; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311), or whether the acceptance sought to introduce new terms or to vary the terms of the offer (see *Kennedy v. Lee* (1817), 3 Mer. 441; *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554; *Meynell v. Surtees* (1854), 3 Sm. & G. 101; S. C. on appeal (1855), 3 W. R. 535; *Holland v. Eyre* (1825), 2 Sim. & St. 194; *Hall v. Hall* (1850), 12 Beav. 414; *Lucas v. Martin* (1888), 37 Ch. D. 597, C. A.; *Lucas v. James* (1849), 7 Hare, 410; *Duke v. Andrews* (1848), 2 Exch. 290; distinguish *Boys v. Ayerst* (1822), Madd. & G. 316 (acceptance defining a term left open in the offer); *Clive v. Beaumont* (1848), 1 De G. & Sm. 973 (no intention to import new term); *Rossiter v. Miller* (1878), 3 App. Cas. 1124 (reference to execution of formal contract not introducing new terms); and compare *Gibbins v. North Eastern Metropolitan Asylum District* (1847), 11 Beav. 1; *Skinner v. M'Douall* (1848), 2 De G. & Sm. 265; *Bonnewell v. Jenkins* (1878), 8 Ch. D. 70, C. A.); see also *Harris' Case* (1872), 7 Ch. App. 587 (indulgence by acceptor).

(*f*) See title CONTRACT, Vol. VII., pp. 347, 352 *et seq.* As to delay, see *Williams v. Williams* (1853), 17 Beav. 213; *Ramsgate Victoria Hotel Co. v. Montefiore, Same v. Goldsmid* (1866), L. R. 1 Exch. 109; as to withdrawal of offer before acceptance, see *Dickinson v. Dodds* (1876), 2 Ch. D. 463, C. A.; *Grierson v. Cheshire Lines' Committee* (1874), L. R. 19 Eq. 83; and compare *Warner v. Willington*, *supra*; as to lapse of offer by refusal or counter offer, see *Hyde v. Wrench* (1840), 3 Beav. 334; *Honeyman v. Marryatt* (1857), 6 H. L. Cas. 112, affirming S. C. (1855), 21 Beav. 14.

(*g*) As to estoppel by representation, see title ESTOPPEL, Vol. XIII., pp. 376 *et seq.*; as to the doctrine of "making good," see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 721, 722.

(*h*) On the meaning of "equitable estoppel," see title ESTOPPEL, Vol. XIII., pp. 376, 377, notes (*n*), (*o*), (*p*).

(*i*) "There is no middle term, no *tertium quid*, between a representation so made as to be effective for such a purpose and a contract; they are identical. That which leads to the representation being made and acted upon, determines its nature, gives it the character of a contract, or leaves

guished from cases of estoppel in the ordinary sense of the term (*k*). Where the representation operates simply as an estoppel, it can only receive effect, apart from questions of fraud (*l*), as a step in the evidence on which a claim in contract or other obligation is based (*m*), and must then be a statement of an existing fact (*n*). If, however, the representation is sought to be relied on as a promise, it is necessary to show that it imported a binding obligation (*o*), and not merely an honourable engagement (*p*). Only in the former case is it enforced as a promise.

SECT. 1.
Contract
not in Fact
Concluded.

SECT. 2.—Contract not Sufficiently Certain.

SUB-SECT. 1.—In General.

30. The court, before enforcing a contract, must be satisfied that it is certain (*q*).

Contract
must be
certain.

it a mere representation" (*Maunsell v. Hedges, White etc.* (1854), 4 H. L. Cas. 1039, *per* Lord CRANWORTH, at p. 1056); see also *Alderson v. Maddison* (1880), 5 Ex. D. 293, *per* STEPHEN, J., at p. 296; S. C. (1881), 7 Q. B. D. 174, 180, C. A.; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331, 334; and see titles CONTRACT, Vol. VII., p. 364; MISREPRESENTATION AND FRAUD, Vol. XX., p. 722, note (*g*).

(*k*) See *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., where it was said that estoppel was a rule of evidence, not a cause of action.

(*l*) In which case the fraud or deceit constitutes a substantive cause of action; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 660, 679, 680, 694, 724.

(*m*) See *Low v. Bouverie*, *supra*; title ESTOPPEL, Vol. XIII., pp. 376 *et seq.*

(*n*) See *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, *per* Lord MACNAGHTEN, at p. 130; *Low v. Bouverie*, *supra*.

(*o*) Cases illustrating this principle are mainly cases in reference to marriage contracts entered into on the faith of representations made by third parties interested; see the cases cited in title SETTLEMENTS, Vol. XXV., p. 536, note (*s*); and see *Montgomery v. Reilly* (1827), 1 Bli. (N. S.) 364, H. L.; *Viret v. Viret* (1880), 17 Ch. D. 365, n. In *Hutton v. Rossiter* (1855), 7 De G. M. & J. 33, C. A., the representation was made by a person not related to the parties to the marriage. It must of course be shown that the representation actually induced the marriage or other act; see *Goldicutt v. Townsend* (1860), 28 Beav. 445. *Piggott v. Stratton* (1859), 1 De G. F. & J. 33, C. A., affirming S. C., John. 341 (explained in *Spicer v. Martin* (1888), 14 App. Cas. 12, *per* Lord MACNAGHTEN, at p. 23, and in *Low v. Bouverie*, *supra*, *per* KAY, L.J., at p. 110), related to a collateral representation on the faith of which a lease was taken. As to collateral agreements of this nature, see, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447.

(*p*) As illustrations of cases where the terms of the representation are held to preclude a promissory intention, see *Maunsell v. Hedges, White etc.*, *supra*; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Maddison v. Alderson* (1883), 8 App. Cas. 467, disapproving *Loffus v. Maw* (1862), 3 Giff. 592; and, for other examples, see *Walpole (Lord) v. Orford (Lord)* (1797), 3 Ves. 402; *Morehouse v. Colvin* (1851), 15 Beav. 341; *Re Fickus, Farina v. Fickus*, *supra*. In such cases the court has held either that the language used was too vague to raise an obligation in law, or that it was not intended to be binding and left the representation within the sphere of merely honourable engagement. In other cases, where a representation has been followed by a formal settlement which has not embodied the representation, the settlement *primâ facie* supersedes the representation; see *Loxley v. Heath* (1866), 1 De G. F. & J. 489, C. A.; and see the cases cited in title SETTLEMENTS, Vol. XXV., p. 537, note (*i*).

(*q*) *Buxton v. Lister* (1746), 3 Atk. 383, *per* Lord HARDWICKE, L.C.,

SECT. 2.
Contract
not
Sufficiently
Certain.

Manner in
which
uncertainty
arises.

Time at
which com-
pleteness and
certainty
determined.

Effect of
part per-
formance on
uncertainty.

Effect of
fraud.

Uncertainty may arise in various ways, which may be classified as follows:—(1) Where the contract is so vague in its general terms that the obligations of the parties are not ascertainable (*r*); (2) where the subject-matter of the contract is not sufficiently identified (*s*); (3) where the parties are not sufficiently identified (*t*); (4) where, in the case of a sale, the price is not ascertained (*a*); and (5) where some material term of the contract is omitted (*b*).

31. The completeness of a contract is to be determined at the commencement of the action (*c*), since it is at that time that non-performance must be incapable of justification (*d*). Performance is, however, ordered even if the contract is incomplete at that date, if the incompleteness is due to the default of the defendant and is such that it can be remedied or compensated (*e*); or where a term which is not then ascertained is capable of being ascertained by means available to the court (*f*).

32. Whenever objection is raised to the enforcement of a contract on the grounds of uncertainty, the court is more anxious to enforce the contract if there has been part performance (*g*) from which the party seeking to resist the enforcement has derived a benefit, and the circumstances are such that the plaintiff cannot be compensated fully otherwise than by specific performance (*h*).

33. When there is fraud on the part of the defendant, objection on the ground of uncertainty is not allowed to prevail (*i*).

at p. 386; see *Walpole (Lord) v. Orford (Lord)* (1797), 3 Ves. 402; *Underwood v. Hitchcox* (1749), 1 Ves. Sen. 279; *Franks v. Martin* (1759), 1 Eden, 309; and compare *Brizick v. Manners* (1742), 9 Mod. Rep. 284 (parol agreement to grant mortgage). As to uncertainty in agreements for leases, see title LANDLORD AND TENANT, Vol. XVIII., p. 378.

(*r*) See pp. 23, 24, *post*.

(*s*) See p. 24, *post*.

(*t*) See pp. 24, 25, *post*.

(*a*) See pp. 25, 26, *post*.

(*b*) See p. 27, 28, *post*.

(*c*) *Adams v. Broke* (1842), 1 Y. & C. Ch. Cas. 627; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90, C. A., reversing S. C., 18 Ch. D. 280.

(*d*) *Right d. Fisher v. Cuthell* (1804), 5 East, 491.

(*e*) *Pritchard v. Ovey* (1820), 1 Jac. & W. 396; *Kensington (Lord) v. Phillips* (1817), 5 Dow, 61, H. L.; *Soames v. Edge* (1860), John. 669; *Norris v. Jackson* (1860), 1 John. & H. 319; *Middleton v. Greenwood* (1864), 2 De G. J. & Sm. 142, C. A.

(*f*) *Walker v. Eastern Counties Rail. Co.* (1848), 6 Hare, 594; *Owen v. Thomas* (1834), 3 My. & K. 353; *Monro v. Taylor* (1850), 8 Hare, 51; *Pickles v. Sutcliffe*, [1902] W. N. 200.

(*g*) As to part performance, see pp. 31 *et seq.*, *post*.

(*h*) See *Parker v. Taswell* (1858), 2 De G. & J. 559, 571; *Hart v. Hart* (1881), 18 Ch. D. 670, 685; *Saunderson v. Cockermouth and Workington Rail. Co.* (1849), 11 Beav. 497; affirmed (1850), 2 H. & Tw. 327; followed in *South Eastern Railway v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12, C. A. (railway company having obtained possession under grant, held bound to permit the making of the necessary accommodation works); and see *Waring and Gillow, Ltd. v. Thompson* (1912), 29 T. L. R. 154, 156, C. A. (proposals to found new company).

(*i*) *Chattock v. Muller* (1878), 8 Ch. D. 177 (agreement by which A. promised to grant a portion of an estate on purchase to B., in considera-

SUB-SECT. 2.—*Contract too Vague in its General Terms.*

SECT. 2.

Contract
not
Sufficiently
Certain.

How far
uncertainty
in terms a
valid defence.

34. The court does not as a rule enforce specific performance of an agreement unless its terms are certain and unambiguous, so that the obligations of the parties are clearly ascertained (*k*). Specific performance is, however, granted when there is such a degree of certainty as is reasonably required in the circumstances (*l*), or the original uncertainty has been removed by a subsequent election (*m*), or by a course of dealing between the parties (*n*), or by terms reasonably implied in law (*o*). The use of the phrase

tion of B. not competing at purchase; inquiry directed to ascertain boundaries; apparently, if unascertainable, A. would be ordered to convey whole).

(*k*) See *Douglas v. Baynes*, [1908] A. C. 477, 485, P. C.; and see, for example, *Franks v. Martin* (1759), 1 Eden, 309 (obscure marriage articles); *Hodges v. Horsfall* (1829), 1 Russ. & M. 116 (sale of land according to plan insufficiently identified); *Kemble v. Kean* (1829), 6 Sim. 333 (engagement as actor: terms vague); *Pearce v. Watts* (1875), L. R. 20 Eq. 492 (agreement for sale of land, subject to reservation of land "necessary for a railway," held too vague; but, if the conveyance is executed, the exception, being uncertain, is bad; see *ibid.*, per JESSEL, M.R., at p. 493); *Savill Brothers, Ltd. v. Bethell*, [1902] 2 Ch. 523, C. A.; *Stuart (Lord James) v. London and North Western Rail. Co.* (1852), 1 De G. M. & G. 721, C. A., reversing S. C., 15 Beav. 513 (agreement for sale of land required for railway); compare *Webb v. Direct London and Portsmouth Rail. Co.* (1852), 1 De G. M. & G. 521, C. A., reversing S. C. (1851), 9 Hare, 129; *Oxford Corporation v. Crow*, [1893] 3 Ch. 535; *Lancaster v. De Trafford* (1862), 8 Jur. (N. S.) 873 (description of lands to be sold vague); *South Wales Rail. Co. v. Wythes* (1854), 5 De G. M. & G. 880, C. A. (agreement to construct railway to plans of specified surveyor); *Taylor v. Portington* (1855), 7 De G. M. & G. 328, C. A. (provision as to decorating rooms); *Paris Chocolate Co. v. Crystal Palace Co.* (1855), 3 Sm. & G. 119 (agreement to provide accommodation for sale of chocolate); *Cooper v. Hood* (1858), 26 Beav. 293 (agreement to sell share in partnership, provisions as to money to remain in business undefined); *Williamson v. Wooton* (1855), 3 Drew. 210 (reservation of mines); *Callaghan v. Callaghan* (1841), 8 Cl. & Fin. 374, H. L. (inconsistent terms); *Macphail v. Torrance* (1909), 25 T. L. R. 810 (agreement to make ample provision by will); and see *Reynolds v. Waring* (1831), You. 346 (uncertain evidence of parol agreement); *Legh v. Haverfield* (1800), 5 Ves. 452 (agreement established, but contradictory evidence as to its terms: specific performance refused); see also *Smith v. Wheatecroft* (1878), 9 Ch. D. 223 (sale of land). In *Pilling v. Armitage* (1806), 12 Ves. 78 (lease), the plaintiff having failed to prove the agreement which he set up, was refused specific performance of a different agreement admitted by the defendant; compare *Legal v. Miller* (1750), 2 Ves. Sen. 299 (lease of house). For cases of uncertainty in agreements of tenancy, see title LANDLORD AND TENANT, Vol. XVIII., p. 378.

(*l*) *Great Northern Rail. Co. v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 5 De G. & Sm. 138; compare *Baumann v. James* (1868), 3 Ch. App. 508 (agreement to do specified "and other" works, where the other works were clearly of small amount).

(*m*) *Jenkins v. Green* (No. 1) (1858), 27 Beav. 437 (agreement to lease land "less 37 acres": defect capable of cure by selection by lessor before execution); compare *South Eastern Railway v. Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A.

(*n*) Compare *Oxford v. Provand* (1868), L. R. 2 P. C. 135; *Waring and Gillow, Ltd. v. Thompson* (1912), 29 T. L. R. 154, C. A.

(*o*) Compare *South Wales Rail. Co. v. Wythes*, *supra*, and the cases cited in note (*k*), *supra*.

SECT. 2.
Contract
not
Sufficiently
Certain.

How uncer-
tainty as to
subject-
matter may
arise.

"et cetera" does not render a contract too uncertain if it is sufficiently plain from the context what is included in the phrase (*p*).

SUB-SECT. 3.—*Uncertainty as to Subject-matter.*

35. The incompleteness of the contract may be in regard to the identification of the subject-matter, and may in such case arise either where the subject-matter was not finally determined at the date of the contract but was left to be ascertained thereafter, or where the subject-matter, although determined at the date of the contract, was not described sufficiently for identification (*q*).

How defect
may be cured.

36. In the former case the defect may be cured if the subject-matter is ascertained by the proper party prior to the action being brought (*r*).

In the latter case the defect may be cured if the identification of the subject-matter can be completed by admissible extrinsic evidence (*s*).

In some cases the court acts on the maxim *id certum est quod certum reddi potest* (*t*). The description must be such as to enable the court to ascertain what the parties intended to be the subject of their contract, and, if this cannot be done, specific performance is refused (*a*).

SUB-SECT. 4.—*Uncertainty as to Parties.*

What is
sufficient
description.

37. The incompleteness of the contract may be in regard to the identification of the parties. Such incompleteness is a bar

(*p*) *Powell v. Lovegrove* (1856), 8 De G. M. & G. 357, C. A.; *Cooper v. Hood* (1858), 26 Beav. 293; *Parker v. Taswell* (1858), 2 De G. & J. 559; compare *Baumann v. James* (1868), 3 Ch. App. 508.

(*q*) Compare, as to mines, title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 547.

(*r*) *Rumble v. Heygate* (1870), 18 W. R. 749 (contract for sale of so much land as was necessary for churchyard: held, made definite by selection made by plaintiff); *Jenkins v. Green* (No. 1) (1858), 27 Beav. 437; compare *Haywood v. Cope* (1858), 25 Beav. 140.

(*s*) For instance, parol evidence was admitted to identify "this place" (*Waldron v. Jacob and Millie* (1870), 5 I. R. Eq. 131); "the lease" (*Horsey v. Graham* (1869), L. R. 5 C. P. 9); "your wool" (*Macdonald v. Longbottom* (1859), 1 E. & E. 977); see *Shardlow v. Cotterell* (1881), 20 Ch. D. 90, C. A.; compare *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Clinan v. Cooke* (1802), 1 Scf. & Lef. 22 (reference to another writing); *Skinner v. M'Douall* (1848), 2 De G. & Sm. 265; *Plant v. Bourne*, [1897] 2 Ch. 281, C. A.; *North v. Percival*, [1898] 2 Ch. 128; and see, further, title CONTRACT, Vol. VII., p. 372, note (*e*); as to admissibility of evidence, see *ibid.*, pp. 523 *et seq.*; titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 444 *et seq.*; EVIDENCE, Vol. XIII., p. 566.

(*t*) *Owen v. Thomas* (1834), 3 My. & K. 353 (ascertainment of property not described in the contract save by reference to the deeds being in the possession of a named person); *Monro v. Taylor* (1850), 8 Hare, 51 (specified area of land described as partly freehold and partly leasehold); *Wylson v. Dunn* (1887), 34 Ch. D. 569 (land as agreed upon); compare *Naylor v. Goodall* (1877), 26 W. R. 162.

(*a*) *Stewart v. Alliston* (1815), 1 Mer. 26; *Daniels v. Davison* (1809), 16 Ves. 249, 256; *Kennedy v. Lee* (1817), 3 Mer. 441; *Price v. Griffith* (1851), 1 De G. M. & G. 80, C. A.; *Inge v. Birmingham, Wolverhampton and Stour Valley Rail. Co.* (1853), 3 De G. M. & G. 658.

to performance wherever the law requires a written memorandum or contract (b), unless the description or reference is such as to enable the parties to be identified (c). The contract of an agent is treated for this purpose as the contract of his principal, and though the name of the latter does not appear in the writing his identity may be proved by parol evidence (d). A description of a party simply as the executor, the mortgagee, or trustee is sufficient, since parol evidence enables it to be ascertained who fills the capacity described (e); and similarly it is sufficient if the vendor is described as the owner or proprietor of the property (f).

SECT. 2.
Contract
not
Sufficiently
Certain.

It is not, however, enough to refer simply to the vendor, since that leaves the identity purely to parol evidence if there is nothing in the memorandum to show who the vendor is (g); but, even in such a case, the terms of the contract may contain a sufficient description, as where the party is described as vendor and the conditions of sale show that the vendor is in possession (h).

Description
of party as
vendor.

SUB-SECT. 5.—*Uncertainty as to Price.*

38. The price is a material term in every contract of sale, and, unless the price is ascertained by the contract, or machinery is provided for its ascertainment, the contract is incomplete and cannot be enforced (i); thus, where a vendor agrees to sell to a purchaser for a named sum less than any other purchaser will give, the price is neither ascertained nor ascertainable, and there is no contract capable of enforcement (k).

Price a
material
term.

39. The contract, while not fixing a price, may define how the price is to be ascertained or may provide for a fair price. In the former case there is no enforceable contract until the price has been

Contract not
fixing price.

(b) See pp. 28 *et seq.*, *post*.

(c) Compare *Potter v. Duffield* (1874), L. R. 18 Eq. 4; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360, C. A.; and see title CONTRACT, Vol. VII., p. 371.

(d) *Filby v. Hounsell*, [1896] 2 Ch. 737; *Commings v. Scott* (1875), L. R. 20 Eq. 11 (signature by an auctioneer "on behalf of the vendor" is not sufficient); *Potter v. Duffield*, *supra*; see titles AGENCY, Vol. I., p. 505; CONTRACT, Vol. VII., p. 371.

(e) *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Hood v. Barrington* (Lord) (1868), L. R. 6 Eq. 218; *Carr v. Lynch*, [1900] 1 Ch. 613; see also *Bourdillon v. Collins* (1871), 19 W. R. 556; *Towle v. Topham* (1877), 37 L. T. 308; *Catling v. King* (1877), 5 Ch. D. 660, C. A.; title CONTRACT, Vol. VII., p. 372.

(f) *Sale v. Lambert* (1874), L. R. 18 Eq. 1; *Beer v. London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412.

(g) *Rossiter v. Miller*, *supra*; *Potter v. Duffield*, *supra*; *Jarrett v. Hunter* (1886), 34 Ch. D. 182; *Coombs v. Wilkes*, [1891] 3 Ch. 77; *Pattle v. Anstruther* (1893), 41 W. R. 625, C. A.; see *Thomas v. Brown* (1876), 1 Q. B. D. 714; titles CONTRACT, Vol. VII., pp. 371, 372; SALE OF LAND, Vol. XXV., p. 291.

(h) *Commings v. Scott*, *supra*; see *Carr v. Lynch*, *supra*; and see, further, the cases cited in title CONTRACT, Vol. VII., pp. 371, 372.

(i) See *Douglas v. Baynes*, [1908] A. C. 477, P. C.; *Re Kharashkoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. 451, C. A.; see also *Langstaff v. Nicholson* (1858), 25 Beav. 160; titles SALE OF GOODS, Vol. XXV., p. 147; SALE OF LAND, Vol. XXV., p. 292.

(k) *Bromley v. Jefferies* (1701), 2 Vern. 415.

SECT. 2.
Contract
not
Sufficiently
Certain.

Price depen-
dent on
valuation.

Value sub-
sidiary to
principal
purpose of
contract.

fixed in accordance with the mode of ascertainment provided (*l*), as, for example, by the valuation of named persons(*m*), since the court does not order performance of a contract at a price still to be fixed (*n*).

If valuers have to be appointed by the parties, and one party refuses to appoint, the contract remains incomplete (*o*); the court cannot appoint valuers in the party's stead (*p*). Similarly, the contract cannot be enforced if the valuers appointed refuse to act or fail to give a valid valuation (*q*), although, if the failure to act or to give a valuation is due to the interference of one party, an action may lie for damages (*r*) or an injunction may be granted against such interference (*s*). In the same way, there is no enforceable contract if a named valuer has been incapable of acting (*t*), though the court has in certain cases interfered to supply the defect (*a*).

40. Where the thing to be valued is subsidiary to the main purpose of the contract, the court treats the mode of valuation as non-essential, and the contract as one for sale at a fair price (*b*), as, for example, in the case of a provision for the valuation of furniture (*c*), or of plant and machinery (*d*); similarly, where partnership articles provide for a valuation when the partnership expires, the particular mode may be treated as non-essential, and the court provides for the fixing of a reasonable value (*e*).

(*l*) *Bridgend Gas and Water Co. v. Dunraven* (1885), 31 Ch. D. 219; compare *Morgan v. Milman* (1853), 3 De G. M. & G. 24, C. A.

(*m*) *Milnes v. Gery* (1807), 14 Ves. 400; compare *London Guarantie Co. v. Fearnley* (1880), 5 App. Cas. 911, 920; title SALE OF GOODS, Vol. XXV., p. 148. A sale on such terms cannot be made by trustees (*Peters v. Lewes and East Grinstead Rail. Co.* (1880), 16 Ch. D. 703, 713; see title SALE OF LAND, Vol. XXV., p. 321, note (*i*)), nor by a tenant for life purporting to sell under his statutory powers (*Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50; see title SETTLEMENTS, Vol. XXV., p. 652).

(*n*) *Darbey v. Whitaker* (1857), 4 Drew. 134; *Tillett v. Charing Cross Bridge Co.* (1859), 26 Beav. 419.

(*o*) *Milnes v. Gery*, *supra*; compare *Wilks v. Davis* (1817), 3 Mer. 507; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529.

(*p*) *Milnes v. Gery*, *supra*; *Blundell v. Brettargh* (1810), 17 Ves. 232; *Gourlay v. Somerset (Duke)* (1815), 19 Ves. 429; *Agar v. Macklew* (1825), 2 Sim. & St. 418; *Darbey v. Whitaker*, *supra*.

(*q*) *Hopcraft v. Hickman* (1824), 2 Sim. & St. 130; *Chichester v. M'Intire* (1830), 4 Bli. (N. S.) 78, H. L.

(*r*) Compare *Smith v. Peters* (1875), L. R. 20 Eq. 511.

(*s*) *Ibid.*

(*t*) *Firth v. Midland Rail. Co.* (1875), L. R. 20 Eq. 100; see title CONTRACT, Vol. VII., p. 433; and compare *Wycombe Rail. Co. v. Donnington Hospital* (1866), 1 Ch. App. 268 (absence of surveyor's certificate under Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 9); title SALE OF GOODS, Vol. XXV., p. 148.

(*a*) Compare *Meynell v. Surtees* (1854), 3 Sm. & G. 101; affirmed (1855), 3 W. R. 535, where the plaintiff was in possession and had made expenditure on the faith of the contract.

(*b*) *Gourlay v. Somerset (Duke)*, *supra*; see also *Hall v. Warren* (1804), 9 Ves. 605.

(*c*) *Richardson v. Smith* (1870), 5 Ch. App. 648.

(*d*) *Jackson v. Jackson* (1853), 1 Sm. & G. 184; *Paris Chocolate Co. v. Crystal Palace Co.* (1855), 3 Sm. & G. 119.

(*e*) *Dinham v. Bradford* (1869), 5 Ch. App. 519; see title PARTNERSHIP, Vol. XXII., p. 102.

SUB-SECT. 6.—*Material Terms Omitted.*

41. Apart from questions relating to the subject-matter, the parties, and the price, the absence of other material terms renders a contract unenforceable (*f*), unless they can be supplied by the court either by construction or inference or implication of law (*g*). The question as to what terms are material in any contract depends on the nature of the contract.

The court may, on the ground of absence of material terms, refuse to enforce contracts in the following circumstances: when a contract providing for an increase of rent does not state from what time it is to commence (*h*); when a contract does not define the length of the term agreed to be granted (*i*); when a contract for a lease for lives does not ascertain what are the lives (*k*); when an agreement for a partnership is silent as to the capital (*l*); when the parties differ as to what expenses are to be borne by the vendor (*m*); or when an auctioneer's receipt relied on as a contract does not refer to the conditions of the sale (*n*). Where a material term of a contract is left to future agreement, the contract is unenforceable until that term has been agreed (*o*); and, where a material term is left to the decision of a third person, specific performance of the contract is not granted while such decision is lacking (*p*).

42. In the absence of express agreement, however, the law in many cases makes good the defect by supplying terms by implication or inference: thus, a contract to sell a house is *prima facie* construed as a contract to sell the fee simple (*q*), while a similar contract

SECT. 2.
Contract
not
Sufficiently
Certain.

Absence of
material
terms.

Examples of
materiality.

Terms implied
or inferred
by law.

(*f*) *South Wales Rail. Co. v. Wythes* (1854), 5 De G. M. & G. 880, 888, C. A.; *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238, 285; *Rummens v. Robins* (1865), 3 De G. J. & Sm. 88, C. A.; see *Blore v. Sutton* (1817), 3 Mer. 237; *Nesham v. Selby* (1872), L. R. 13 Eq. 191; affirmed, 7 Ch. App. 406; *Marshall v. Berridge* (1881), 19 Ch. D. 233, C. A., overruling *Jaques v. Millar* (1877), 6 Ch. D. 153 (cases in which the date of commencement of a lease was omitted); see also titles CONTRACT, Vol. VII., p. 373; LANDLORD AND TENANT, Vol. XVIII., pp. 375, 381.

(*g*) See, for instance, *Hampshire v. Wickens* (1878), 7 Ch. D. 555 (lease with "usual covenants"); *Lucas v. Hall*, [1899] W. N. 92 ("usual public-house contract").

(*h*) *Ormond (Lord) v. Anderson* (1813), 2 Ball & B. 363; see title LANDLORD AND TENANT, Vol. XVIII., p. 373.

(*i*) *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22; *Gordon v. Trevelyan* (1814), 1 Price, 64; *Bayley v. Fitzmaurice* (1857), 8 E. & B. 664; see *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.

(*k*) *Wheeler v. D'Esterre* (1814), 2 Dow, 359, H. L.

(*l*) *Downs v. Collins* (1848), 6 Hare, 418; compare *Caddick v. Skidmore* (1857), 2 De G. & J. 52; *Isaacs v. Evans*, [1899] W. N. 261; and see title PARTNERSHIP, Vol. XXII., p. 22.

(*m*) *Stratford v. Bosworth* (1813), 2 Ves. & B. 341.

(*n*) *Blagden v. Bradbear* (1806), 12 Ves. 466; see title AUCTION AND AUCTIONEERS, Vol. I., pp. 504, 505.

(*o*) *Hall v. Conder* (1857), 2 C. B. (N. S.) 22; *May v. Thomson* (1882), 20 Ch. D. 705, C. A.; *Ozd v. Coombes* (1884), 28 Sol. Jo. 378.

(*p*) *Tillett v. Charing Cross Bridge Co.* (1859), 26 Beav. 419; *Darnley (Earl) v. London, Chatham and Dover Rail. Co.* (1865), 3 De G. J. & Sm. 24, C. A.; *S. C.* (1867), L. R. 2 H. L. 43.

(*q*) *Hughes v. Parker* (1841), 8 M. & W. 244; compare *Price v. Assheton* (1834), 1 Y. & C. (EX.) 82; and see title SALE OF LAND, Vol. XXV.,

SECT. 2.
Contract
not
Sufficiently
Certain.

may, by reason of its other terms, be construed as a contract to sell the vendor's interest (*r*). In a contract for the sale of land, a condition is implied for a good title and for delivery up of the deeds or satisfactory proof of their contents and loss (*s*). Such conditions may, however, be waived (*t*), or may be rebutted by the express terms of the contract (*a*), or by notice (*b*).

Inference
assisted by
part per-
formance.

43. In cases where a contract is *primâ facie* incomplete, the court may be more ready to infer a term so as to make the contract complete and enforceable if there has been part performance (*c*) on the faith of the contract (*d*); but where a contract is, on the face of it, complete, parol evidence is not, as a rule, admitted to prove the exclusion of some material term (*e*).

SECT. 3.—*Statute of Frauds not Complied with.*

SUB-SECT. 1.—*Nature of the Defence.*

The statutory
requirements.

44. By s. 4 of the Statute of Frauds (*f*) it is provided that no action shall be brought to charge any person on a contract or sale of any lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought or some memorandum or note thereof shall be in writing and signed by the party to be charged or some other person thereunto lawfully authorised by him. The same provision also applies to certain other contracts (*g*); and a similar provision applies to

p. 301. As to implying terms in a contract to grant a lease, see title LANDLORD AND TENANT, Vol. XVIII., p. 381; and see, generally, title CONTRACT, Vol. VII., pp. 512, 513.

(*r*) *Bower v. Cooper* (1843), 2 Hare, 408; compare *Flight v. Barton* (1832), 3 My. & K. 282 (contract to take underlease implies notice of term of lease).

(*s*) *Re Halifax Commercial Banking Co. and Wood* (1898), 79 L. T. 536, C. A.; see title SALE OF LAND, Vol. XXV., p. 341.

(*t*) *Hawksley v. Outram*, [1892] 3 Ch. 359, C. A.; *Bennett v. Fowler* (1840), 2 Beav. 302; but see *Lloyd v. Nowell*, [1895] 2 Ch. 744, where waiver of express stipulation as to preparing a formal contract was ineffectual.

(*a*) *Freme v. Wright* (1819), 4 Madd. 364.

(*b*) *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320; *Cato v. Thompson* (1882), 9 Q. B. D. 616, C. A.; *Cowley v. Watts* (1853), 17 Jur. 172. Notice does not affect express terms (*Barnett v. Wheeler* (1841), 7 M. & W. 364; *Lett v. Randall* (1883), 49 L. T. 71).

(*c*) As to part performance, see pp. 31 *et seq.*, *post*.

(*d*) *Kusel v. Watson* (1879), 11 Ch. D. 129, C. A.; *Browne v. Warner* (1807), 14 Ves. 156; *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521; *Wood v. Beard* (1876), 2 Ex. D. 30; *Zimble v. Abrahams*, [1903] 1 K. B. 577, C. A.

(*e*) *Croome v. Lediard* (1834), 2 My. & K. 251; *Thorpe v. Hosford* (1872), 20 W. R. 922. As to parol additions or variations to a written contract, see *Sullivan v. Jacob* (1828), 1 Mol. 472 (surrender and removal of lease); *Clay v. Rufford* (1849), 8 Hare, 281 (partnership); *Martin v. Pyecroft* (1852), 2 De G. M. & G. 785, C. A.; *Vouillon v. States* (1856), 2 Jur. (N. S.) 845.

(*f*) 29 Car. 2, c. 3; see title CONTRACT, Vol. VII., pp. 523 *et seq.*

(*g*) For a full discussion of the statutory provision, see titles CONTRACT, Vol. VII., pp. 361 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., pp. 372 *et seq.*; SALE OF LAND, Vol. XXV., pp. 290 *et seq.*

any contract for the sale of goods of the value of £10 or upwards (*h*).

The former statutory provision (*i*) is a bar to an action for specific performance in the case of any contract coming within its terms, unless the requirements of the statute have been complied with (*k*), or unless those conditions exist which equity has recognised as taking the case out of the statute (*l*).

SECT. 3.
Statute of
Frauds not
Complied
with.

The statute
as a defence.

45. The statute (*i*) relates to the mode of proving the contract, and not to the existence of the contract (*m*); and it is enough if a note or memorandum satisfying its terms is in existence before action brought (*n*). Any note or memorandum is enough so long as it contains the terms of a concluded contract (*o*), even though it shows that the preparation of a formal contract is contemplated (*p*), and even though it consists of a number of documents, provided there is sufficient evidence of their interconnection (*q*). The note or memorandum need only be signed by the party to be charged, that is, the defendant (*r*) or his agent (*s*); it is immaterial for what purpose it was actually brought into existence (*t*), nor does the place or form of the signature matter if in fact it authenticates the document as a whole (*u*).

The suffi-
ciency of the
statutory
memorandum
as proof of
contract.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; see title SALE OF GOODS, Vol. XXV., p. 127.

(*i*) Statute of Frauds (29 Car. 2, c. 3), s. 4; see p. 28, *ante*.

(*k*) *Popham v. Eyre* (1773), Lofft, 786, 801 (sale of mortgaged land).

(*l*) As to which, see pp. 30 *et seq.*, *post*.

(*m*) *Leroux v. Brown* (1852), 12 C. B. 801; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, 207, C. A. It applies in the case of contracts relating to land abroad (*ibid.*; see title CONFLICT OF LAWS, Vol. VI., p. 237).

(*n*) *Lucas v. Dixon* (1889), 22 Q. B. D. 357, C. A.; *Bill v. Bament* (1841), 9 M. & W. 36.

(*o*) *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A. (recital in will). No particular form is necessary (*Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360, 383, C. A.).

(*p*) The question is whether the parties have arrived at a complete agreement which simply requires formal expression, or whether they have only arrived at agreement as to some terms leaving others to be settled in the formal agreement, or are only in the stage of treaty pending a final and formal agreement. For examples of the former class, see *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Bonnewell v. Jenkins* (1878), 8 Ch. D. 70, C. A.; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295, C. A.; *Filby v. Hounsell*, [1896] 2 Ch. 737; as to the latter, see *Winn v. Bull* (1877), 7 Ch. D. 29; *Crossley v. Maycock* (1874), L. R. 18 Eq. 180; *Goodall v. Harding* (1884), 52 L. T. 126; *Hucklesby v. Hook* (1900), 82 L. T. 117.

(*q*) *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238. As to what constitutes sufficient evidence of connexion, see the cases cited in title CONTRACT, Vol. VII., pp. 369, 370, notes (*u*), (*x*), (*a*), (*b*), (*c*).

(*r*) *Fowle v. Freeman* (1804), 9 Ves. 351; *Ormond (Lord) v. Anderson* (1813), 2 Ball & B. 363, 370; *Egerton v. Mathews* (1805), 6 East, 307; *Laythorpe v. Bryant* (1836), 3 Scott, 238; *Liverpool Borough Bank v. Eccles* (1859), 4 H. & N. 139; and see *Reuss v. Picksley* (1866), L. R. 1 Exch. 342, Ex. Ch. (written proposal accepted orally); title CONTRACT, Vol. VII., p. 367.

(*s*) As to agents for this purpose, see title CONTRACT, Vol. VII., pp. 377 *et seq.*

(*t*) For instances, see *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A. (resolution in company's minute book); *Bailey v. Sweeting* (1861), 9 C. B. (N. S.) 843 (letter repudiating contract); *Wilkinson v. Evans* (1866), L. R. 1 C. P. 407; *Dewar v. Mintoft*, [1912] 2 K. B. 373, 387.

(*u*) *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Ogilvie v. Foljambe* (1817),

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Frauds not
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with.

Circum-
stances
taking case
out of statute.

SUB-SECT. 2.—*Exceptions.*(i.) *In General.*

46. Courts of equity have treated certain circumstances as taking a case out of the operation of the Statute of Frauds (*a*), and have accordingly in such circumstances granted relief by specific performance, notwithstanding the absence of a sufficient note or memorandum. The fact that the sale is by order of the court may be sufficient to take the case out of the statute (*b*). The other circumstances sufficient for this purpose fall under the general heads of (1) fraud (*c*); (2) part performance (*d*); and (3) admission in the pleadings (*e*).

(ii.) *Fraud.*

The statute
not to be
used as an
instrument
of fraud.

47. It has been held that the Statute of Frauds (*f*) may not be used as an instrument of fraud (*g*), and that it cannot be relied on to prevent proof of a fraud (*h*). On this principle evidence has been admitted of a parol collateral contract on the faith of which the written contract was entered into, and on proof of such parol contract a plaintiff seeking to enforce the written agreement has been refused specific performance thereof, or has been granted specific performance only subject to the terms of the collateral agreement (*i*). Similarly, where a breach of the collateral parol agreement would have amounted to fraud, a plaintiff seeking to enforce it, has obtained specific performance of its terms (*j*). Fraud, however, within the above rule is not established merely by proving that the party promised to sign a record of the agreement and broke

Enforcement
of collateral
terms.

3 Mer. 53 (acceptance in third person); *Lucas v. James* (1849), 7 Hare, 410 (signature in pencil or print); compare *Bennett v. Brumfitt* (1867), L. R. 3 C. P. 28 (name printed in bill-head); *R. v. Riley*, [1896] 1 Q. B. 309, 313, C. C. R. (instructions for telegram); *Torret v. Cripps* (1879), 27 W. R. 706; and see *Evans v. Hoare*, [1892] 1 Q. B. 593.

(*a*) 29 Car. 2, c. 3, s. 4; see p. 28, *ante*.

(*b*) This rule has been held to apply to a sale in the Court of Chancery by private contract, and to a sale by auction before a master (*A.-G. v. Day* (1749), 1 Ves. Sen. 218; *Blagden v. Bradbear* (1806), 12 Ves. 466; *Re Goren, Ex parte Cutts* (1838), 3 Deac. 242, 267; *Lord v. Lord* (1827), 1 Sim. 503); but not to ordinary sales by public auction (*Blagden v. Bradbear, supra*); and see title SALE OF LAND, Vol. XXV., p. 293.

(*c*) See the text, *infra*.

(*d*) See pp. 31 *et seq.*, *post*.

(*e*) See p. 36, *post*.

(*f*) 29 Car. 2, c. 3, s. 4; see p. 28, *ante*.

(*g*) *Mestaer v. Gillespie* (1805), 11 Ves. 621, *per* Lord ELDON, L.C., at p. 627. The statute is a weapon of defence, not offence (*Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, 323).

(*h*) *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, C. A., *per* LINDLEY, L.J., at p. 206; and see the authorities reviewed in *Re Marlborough (Duke)*, *Davis v. Whitehead*, [1894] 2 Ch. 133.

(*i*) *Clarke v. Grant* (1807), 14 Ves. 519.

(*j*) *Pember v. Mathers* (1779), 1 Bro. C. C. 52; *Pearson v. Pearson* (1884), 27 Ch. D. 145, 148, C. A. As to such collateral agreements, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447; *Snelling v. Thomas* (1874), L. R. 17 Eq. 303 (where the plaintiff's evidence was rejected); compare *Jervis v. Berridge* (1873), 8 Ch. App. 351; and see, further, title EQUITY, Vol. XIII., p. 75.

that promise (*k*), though a plea that the defendant fraudulently prevented the writing coming into existence may avail (*l*).

(iii.) *Part Performance.*

48. Part performance of a parol contract by one party may debar the other party from setting up the Statute of Frauds (*m*) in answer to a claim for specific performance, on the ground that such part performance raises an equity against the party who has allowed it to take place on the faith of there being a contract, and prevents that party from denying that the contract exists (*n*). The part performance accordingly must be by the party seeking to enforce the parol agreement (*o*).

49. Acts of part performance can only be relied upon for this purpose if they are such as to be referable to no other title than such a contract as is alleged (*p*). Acts which are ambiguous in this respect as being consistent with some other title than such contract will not suffice (*q*). Thus, possession by a tenant who obtained possession under a previously existing lease does not constitute part performance in respect of an alleged agreement to grant a renewal of that lease (*r*), and the same principle applies to acts of reconstruction or repair by a tenant in possession (*a*). If, however, the acts of part performance are referable to some contract, and are consistent with the contract alleged, evidence is admissible as to the precise

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Frauds not
Complied
with.

The principle
of part per-
formance.

Acts of part
performance
must be
referable to
agreement
alleged.

(*k*) *Whitchurch v. Bevis* (1789), 2 Bro. C. C. 559, 565; *Wood v. Midgley* (1854), 5 De G. M. & G. 41, C. A., reversing S. C. (1854), 2 Sm. & G. 115. The older cases (*Leake v. Morris* (1682), 1 Dick. 14; *Hollis v. Whiteing* (1683), 1 Vern. 151; *Hollis v. Edwards* (1683), 1 Vern. 159) to the contrary effect are not good law; compare also *Warden v. Jones* (1857), 2 De G. & J. 76, not following *Dundas v. Dutens* (1790), 1 Ves. 196 (agreement in consideration of marriage).

(*l*) *Maxwell v. Montacute (Lady)* (1719), 1 Eq. Cas. Abr. 19; *Whitchurch v. Bevis*, *supra*; see *Mullet v. Halfpenny* (1700), cited in Peachey, Marriage etc. Settlements, p. 82; S. C., *sub nom. Halfpenny v. Ballet*, 1 Vern. 373 (paper signed by defendant, obtained from plaintiff by defendant's fraud).

(*m*) 29 Car. 2, c. 3, s. 4; see p. 28, *ante*.

(*n*) See *Maddison v. Alderson* (1883), 8 App. Cas. 467, *per* Lord SELBORNE, L.C., at p. 476; *Guernsey (Lord) v. Rodbridges* (1708), Gilb. (CH.) 3; *Stewart v. Kennedy* (1890), 15 App. Cas. 75; *Hoare v. Kingsbury Urban Council*, [1912] 2 Ch. 452, 463.

(*o*) See the cases cited in titles CONTRACT, Vol. VII., p. 380; LANDLORD AND TENANT, Vol. XVIII., pp. 375, 376; SALE OF LAND, Vol. XXV., p. 294.

(*p*) *Maddison v. Alderson*, *supra*, at p. 479; compare *Anon.* (circa 1667), Freem. (CH.) 128. According to early authorities the acts must also be reasonably material; see *Simmons v. Cornelius* (1663), 1 Rep. Ch. 128 [241]; *Voll v. Smith* (1669), 3 Rep. Ch. 16 [28]; *Seagood v. Meale* (1721), Prec. Ch. 560 (inconsiderable earnest money).

(*q*) *Seagood v. Meale*, *supra*; *Gunter v. Halsey* (1739), Amb. 586; *Price v. Salusbury* (1863), 32 Beav. 446; *Dickinson v. Barrow*, [1904] 2 Ch. 339; compare *Anon.*, *supra*, which probably would not now be followed.

(*r*) *Wills v. Stradling* (1797), 3 Ves. 378; *Ex parte Hooper* (1815), 19 Ves. 477, 479; *Morphett v. Jones* (1818), 1 Swan. 172, 181; *Phillips v. Alderton* (1875), 24 W. R. 8; *Brennan v. Bolton* (1842), 2 Dr. & War. 349; see title LANDLORD AND TENANT, Vol. XVIII., p. 377.

(*a*) *Frame v. Dawson* (1807), 14 Ves. 385.

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Statute of
Frauds not
Complied
with.

Essential
charac-
teristics of
acts of part
performance.
Knowledge
of acts.

Acts must be
those of the
contracting
parties.

terms of the particular contract which is alleged (*b*). In effect, the necessity of writing is dispensed with, and the court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point (*c*).

50. The acts of part performance must, in addition, be of such a nature and done in such circumstances as render it a fraud by the other party to refuse performance of the contract (*d*). Hence, the other party must have been aware that they were being done on the faith of the existence of a contract (*e*); and, where the party against whom it is sought to enforce the contract is not the party with whom the contract is made, it must be shown that he, with knowledge of the contract, permitted the acts of part performance to be done, as, for example, where it is sought to enforce against a remainderman a parol contract made with the tenant for life (*f*).

Acts cannot be relied on as part performance if they are not the acts of the parties to the contract, as, for instance, acts done by valuers with a view to a valuation (*g*); and it appears that no

(*b*) *Isaacs v. Evans*, [1899] W. N. 261; *Forster v. Hale* (1798), 3 Ves. 696, 712; *Dale v. Hamilton* (1846), 5 Hare, 369, 381.

(*c*) A similar rule applies under the words of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; compare *Tomkinson v. Staight* (1856), 17 C. B. 697; and see title SALE OF GOODS, Vol. XXV., p. 127.

(*d*) *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Buckmaster v. Harrop* (1802), 7 Ves. 341, *per* GRANT, M.R., at p. 346; *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167, 177. A similar rule applies to contracts of corporations which are unenforceable at law for want of the corporate seal; see *Wilson v. West Hartlepool Harbour and Rail. Co.* (1864), 34 Beav. 187; affirmed (1865), 2 De G. J. & Sm. 475, C. A.; and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 61; CORPORATIONS, Vol. VIII., p. 381. *Wilson v. West Hartlepool Harbour and Rail Co.*, *supra*, however, was decided on the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 97 (see title COMPANIES, Vol. V., pp. 710, 725), and has been distinguished, on the ground that such provisions are directory only and do not invalidate contracts made in other ways, from cases where the power to contract is derived from a statute which itself requires that power to be exercised in a particular way; see *Hoare v. Kingsbury Urban Council*, [1912] 2 Ch. 452, *per* NEVILLE, J., at p. 465 (where, although the Statute of Frauds (29 Car. 2, c. 3), s. 4, would not, owing to acts of part performance, have been a valid defence, it was held that the contract in question was not binding owing to non-compliance with the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174; see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 112; LOCAL GOVERNMENT, Vol. XIX., p. 268).

(*e*) Compare Fry on Specific Performance, 5th ed., p. 295. Cases where both parties act in the belief that there is a binding contract must be distinguished from acquiescence; see *Hoare v. Kingsbury Urban Council*, *supra*, at p. 465; title EQUITY, Vol. XIII., p. 167. As to the distinction between estoppel and acquiescence, see titles ESTOPPEL, Vol. XIII., p. 396; MISREPRESENTATION AND FRAUD, Vol. XX., p. 752. As to acquiescence in the case of unratified contracts of corporations, see title CORPORATIONS, Vol. VIII., p. 381. In *Hoare v. Kingsbury Urban District Council*, *supra*, *Crook v. Seaford Corporation* (1870), L. R. 10 Eq. 678, was distinguished on the ground of acquiescence.

(*f*) *Blore v. Sutton* (1817), 3 Mer. 237; *Whitbread v. Brockhurst* (1784), 1 Bro. C. C. 404; compare *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52, 72; *Morgan v. Milman* (1853), 3 De G. M. & G. 24, 33, C. A.

(*g*) *Cooth v. Jackson* (1801), 6 Ves. 12.

equity would arise in favour of a party who has at his command an alternative (*h*) and equivalent method which renders unnecessary the interference of the court (*i*).

51. The doctrine of part performance does not extend to contracts which the Court of Chancery would not have enforced even if they had been in writing (*k*); thus, it does not apply to a contract for work and labour (*l*), or for personal service extending over a period exceeding a year (*m*), or of guarantee (*n*). It has been said that the doctrine is limited to cases concerning land (*o*); but this opinion has been treated as too narrow (*p*), and the exact limit of the doctrine is somewhat doubtful (*q*). It is clear that for the doctrine to apply there must be a completed contract, which, apart from the question of writing, is obligatory on the parties and which is not incomplete (*r*) or matter of mere honourable engagement (*a*).

52. Of the particular acts which have been held to constitute part performance, that most commonly considered has been the possession of land. Such possession must be the acknowledged possession by a stranger of another's land (*b*), and only explicable on the ground of a contract either of sale or lease (*c*), or other

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Contracts
to which
the doctrine
applies.

Particular
acts of part
performance.

Possession.

(*h*) As to alternative options, see p. 17, *ante*, pp. 63, 64, *post*.

(*i*) *Morgan v. Milman* (1853), 3 De G. M. & G. 24, C. A., *per* Lord CRANWORTH, L.C., at p. 35. As, for instance, where the purchaser can carry the contract into effect under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

(*k*) *McManus v. Cooke* (1887), 35 Ch. D. 681.

(*l*) *Kirk v. Bromley Union Guardians* (1848), 2 Ph. 640. *Pembroke v. Thorpe* (1740), 3 Swan. 437, n., may be explained by Lord HARDWICKE's opinion that the court had original jurisdiction in building contracts; see pp. 8, 9, *ante*; title WORK AND LABOUR.

(*m*) *Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A.; *Maddison v. Alderson* (1883), 8 App. Cas. 467; see pp. 9, 10, *ante*.

(*n*) *Wain v. Warlters* (1804), 5 East, 10; 1 Smith, L.C., 11th ed., p. 323.

(*o*) *Britain v. Rossiter*, *supra*; see *Prested Miners Co., Ltd. v. Garner*, [1910] 2 K. B. 776, 779 (which may, however, depend on the doctrine that specific performance is not generally ordered of a contract for the sale of chattels).

(*p*) *McManus v. Cooke*, *supra*; *Maddison v. Alderson*, *supra*, *per* Lord SELBORNE, L.C., at p. 474; compare *Lindsay v. Lynch* (1804), 2 Sch. & Lef. 1; *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L.; *Herbert (Lady M.) v. Powis (Earl)* (1766), 1 Bro. Parl. Cas. 355 (annuity; verbal promise); *Lassence v. Tierney* (1849), 1 Mac. & G. 551; and see *Crowley v. O'Sullivan*, [1900] 2 I. R. 478 (part performance in agreement for partnership).

(*q*) See Fry on Specific Performance, 5th ed., pp. 297, 298, where it is suggested that the true rule may be that the doctrine of part performance applies to all contracts as to which a court of equity would entertain a suit (not merely a suit for specific performance, as suggested in *McManus v. Cooke*, *supra*, *per* KAY, J., at p. 697) if such contracts had been in writing; and see title CONTRACT, Vol. VII., p. 380.

(*r*) *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131, *per* Lord BROUGHAM, at p. 158; *Re Foster, Ex parte Foster* (1883), 22 Ch. D. 797, C. A.; but see *Laird v. Birkenhead Rail. Co.* (1859), John. 500.

(*a*) *Walpole (Lord) v. Orford (Lord)* (1797), 3 Ves. 402 (honourable engagement of two parties to make wills of certain tenor).

(*b*) Adverse possession does not suffice; see *East India Co. v. Nuthumbadoo Veerasawmy Moodelly* (1851), 7 Moo. P. C. C. 482.

(*c*) *Morphett v. Jones* (1818), 1 Swan. 172, 181; *Butcher v. Stapely* (1686), 1 Vern. 363; *Pyke v. Williams* (1704), 2 Vern. 455; *Aylesford's*

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Complied
with.

Expenditure
of money.

analogous contract (*d*), such as a contract of marriage (*e*) or a family arrangement (*f*).

Further, in many cases the expenditure of money by one party on the improvement and alteration of property, if done with the cognisance of the other party to the contract, has been held to amount to part performance (*g*). A vendor cannot, however, as against the purchaser, insist on the fact that the purchaser has paid part of the purchase-price, since, should the purchaser refuse to complete, the fact of the part payment would in itself be no fraud on the vendor (*h*).

(*Earl*) *Case* (1727), 2 Stra. 783; *Savage v. Carroll* (1810), 1 Ball & B. 265; *Kine v. Balfe* (1813), 2 Ball & B. 343; *Dale v. Hamilton* (1846), 5 Hare, 369, 381; *Pain v. Coombs* (1857), 3 Sm. & G. 449; affirmed (1857), 1 De G. & J. 34, C. A.; and see titles LANDLORD AND TENANT, Vol. XVIII., p. 376; SALE OF LAND, Vol. XXV., p. 296. As to cases where the fact of possession is ambiguous, see *Wills v. Stradling* (1797), 3 Ves. 378, 381; *Canning v. Catling* (1864), 4 New Rep. 259 (parol contract for lease); *Millard v. Harvey* (1864), 34 Beav. 237; *Lamare v. Dixon* (1873), L. R. 6 H. L. 414; compare *Dowell v. Dew* (1842), 1 Y. & C. Ch. Cas. 345 (possession by tenant after expiry of lease treated as pointing to contract for renewal); *Allan v. Bower* (1790), 3 Bro. C. C. 149; *Powell v. Lovegrove* (1856), 8 De G. M. & G. 357, C. A.; *Re National Savings Bank Association, Brady's Case* (1867), 15 W. R. 753; but see *Reynolds v. Waring* (1831), You. 346 (part performance does not justify order if terms of contract not sufficiently proved). Possession is part performance both by and against the owner (*Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sm. 475, 485, C. A.).

(*d*) *Lincoln v. Wright* (1859), 4 De G. & J. 16, C. A. (contract for purchase on special terms); *Coles v. Pilkington* (1874), L. R. 19 Eq. 174.

(*e*) *Surcome v. Pinniger, Ex parte Pinniger* (1853), 3 De G. M. & G. 571, C. A.; *Floyd v. Buckland* (1703), Freem. (Ch.) 268; *Ungley v. Ungley* (1876), 4 Ch. D. 73; affirmed (1877), 5 Ch. D. 887, C. A.; *Sharman v. Sharman* (1892), 67 L. T. 834, C. A.; and see title SETTLEMENTS, Vol. XXV., p. 534.

(*f*) *Stockley v. Stockley* (1812), 1 Ves. & B. 23; *Neale v. Neale* (1837), 1 Keen, 672; *Williams v. Williams* (1865), 2 Drew. & Sm. 378; affirmed (1867), 2 Ch. App. 294; *Cood v. Cood* (1863), 33 Beav. 314; and see title FAMILY ARRANGEMENTS, Vol. XIV., p. 544. As to the effect of prolonged possession in strengthening a case of part performance, see *Blachford v. Kirkpatrick* (1842), 6 Beav. 232.

(*g*) *Wills v. Stradling, supra*; *Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156. As illustrations of the principle, see *Savage v. Foster* (1723), 9 Mod. Rep. 35, 37; *Reddin v. Jarman* (1867), 16 L. T. 449; *Allan v. Bower, supra*; *Dillwyn v. Llewellyn* (1862), 4 De G. F. & J. 517; *Sutherland v. Briggs* (1841), 1 Hare, 26; *Stockley v. Stockley* (1812), 1 Ves. & B. 23; *Toole v. Medlicott* (1810), 1 Ball & B. 393; *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167; *Surcome v. Pinniger, Ex parte Pinniger, supra*; *Farrall v. Davenport* (1861), 3 Giff. 363; *Norris v. Jackson* (1862), 3 Giff. 396; compare *Williams v. Evans* (1875), L. R. 19 Eq. 547 (expenditure by sub-lessee part performance of contract between owner and sub-lessor); *Dickinson v. Barrow*, [1904] 2 Ch. 339; distinguish *Howe v. Hall* (1870), 4 I. R. Eq. 242; *Gardner v. Fooks* (1867), 15 W. R. 388. In *Frame v. Dawson* (1807), 14 Ves. 386, it was held on the facts that the expenditure could be treated as merely matter for compensation; compare *O'Reilly v. Thompson* (1791), 2 Cox, Eq. Cas. 271. So, also, where a lessee pays for certain alterations and additions to premises made by the lessor in accordance with the terms of the contract, specific performance is decreed (*Waller v. Vigurs* (1853), 2 W. R. 51).

(*h*) *Buckmaster v. Harrop* (1802), 7 Ves. 341, 345.

So also the payment in whole or in part of the purchase-money is not an act of part performance which entitles the purchaser to enforce a parol contract (*i*), though payment of an increased rent has been held sufficient part performance of an oral agreement to grant a lease for a term (*k*). Payment of auction duty is not part performance of a contract of sale (*l*).

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53. Marriage by itself is not part performance of a contract in consideration of marriage, since to hold so would be diametrically contrary to the provisions of the Statute of Frauds (*m*) in respect of such contracts (*n*), but there may be acts, independently of the marriage itself, which constitute part performance in respect of such a contract (*o*); and it has been held that cohabitation may be a sufficient part performance (*p*).

Marriage.

54. Any act relied upon as part performance must have been done under and in pursuance of the contract; acts done prior to, or preparatory to, the contract will not suffice (*q*).

Acts ante-
cedent to
contract.

(*i*) *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A.; *Hughes v. Morris* (1852), 2 De G. M. & G. 349, 356, C. A.; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22. Authorities to the contrary, such as *Pengall (Lord) v. Ross* (1709), 2 Eq. Cas. Abr. 46; *Lacon v. Mertins* (1743), 3 Atk. 1, 4; *Main v. Melbourn* (1799), 4 Ves. 720, have not been followed; see also *Borrett v. Gomeserra* (1721), Bunb. 94 (sale of copyholds). In *Child v. Comber* (1723), 3 Swan. 423, n., payment of fees to counsel drawing and engrossing deeds and providing the purchase-money was accepted as a sufficient part performance; in this case, however, there was simply a refusal to carry out, but no denial of, a parol agreement.

(*k*) *Miller and Aldworth, Ltd. v. Sharp*, [1899] 1 Ch. 622, following *Nunn v. Fabian* (1865), 1 Ch. App. 35; see *Humphreys v. Green* (1882), 10 Q. B. D. 148; *Howe v. Hall* (1870), 4 I. R. Eq. 242; *Archbold v. Howth (Lord)* (1866), 1 I. R. C. L. 608; *Conner v. Fitzgerald* (1883), 11 L. R. Ir. 106; distinguish *Thursby v. Eccles* (1900), 49 W. R. 281 (part payment of rent).

(*l*) *Lassence v. Tierney* (1849), 1 Mac. & G. 551, 571.

(*m*) 29 Car. 2, c. 3, s. 4; see title CONTRACT, Vol. VII., p. 364.

(*n*) *Caton v. Caton* (1866), 1 Ch. App. 137; affirmed on other grounds (1867), L. R. 2 H. L. 127; *Taylor v. Beech* (1749), 1 Ves. Sen. 297; *Dundas v. Dutens* (1790), 1 Ves. 196, 199; *Lassence v. Tierney*, *supra*; and see title SETTLEMENTS, Vol. XXV., p. 535.

(*o*) *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L. (execution of settlement part performance of parol contract between husband and bride's father); distinguish *Warden v. Jones* (1857), 23 Beav. 487; affirmed, 2 De G. & J. 76; *Surcome v. Pinniger*, *Ex parte Pinniger* (1853), 3 De G. M. & G. 571, C. A.

(*p*) *Webster v. Webster* (1853), 4 De G. M. & G. 437, C. A.; but see *Maddison v. Alderson*, *supra*.

(*q*) *Cole v. White* (1767), cited 1 Bro. C. C. 409 (giving instructions for lease); *Redding v. Wilkes* (1791), 3 Bro. C. C. 400 (giving deed to solicitor for preparation of conveyance); *Clerk v. Wright* (1738), 1 Atk. 12; *Cooke v. Tombs* (1794), 2 Anst. 420; *Hawkins v. Holmes* (1721), 1 P. Wms. 770; *Pembroke v. Thorpe* (1740), 3 Swan. 437, n.; *O'Reilly v. Thompson* (1791), 2 Cox, Eq. Cas. 271; *Whaley v. Bagnel* (1765), 1 Bro. Parl. Cas. 345; *Phillips v. Edwards* (1864), 33 Beav. 440; distinguish *Hodson v. Heuland*, [1896] 2 Ch. 428 (entry into possession prior to the contract, but subsequent continuance in possession treated as part performance of a contract to grant a lease); see also *Whitmore v. Farley* (1881), 45 L. T. 99, C. A. (deposit of title deeds); *Parker v. Smith* (1845), 1 Coll. 608 (acts in regard

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Complied
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Denial of
contract and
plea of statute
necessary.

(iv.) *Admission in Pleading.*

55. A case coming within the Statute of Frauds (*r*) is taken out of the statute if the party whom it is sought to charge does not by his pleading deny the existence of the contract in fact and further expressly plead that the statute has not been complied with. A failure to deny that the contract was in fact made is, under the rules of pleading, equivalent to an admission of its existence (*s*).

SECT. 4.—*Illegality of Contract.*

Illegality as
a bar to
relief.

56. The court does not interfere directly to enforce an illegal contract by specific performance (*t*), any more than it assists indirectly to enforce it either by awarding damages or compensation, or ordering an account of profits among the parties interested (*a*).

Enforcement
of collateral
transactions.

57. Certain collateral transactions may, however, be enforced, though they concern an original transaction tainted with illegality; for instance, a *cestui que trust* can enforce performance of a trust against the trustee, even though the transaction in respect of which the money or property was transferred to the trustee was unlawful, and could not have been enforced by the *cestui que trust* against the person who so transferred to the trustee (*b*).

Sufficiency
of evidence.

58. There are conflicting opinions on the question whether the court in refusing to grant relief must be satisfied of actual illegality (*c*), or whether it is not enough that there should be reasonable ground for contending that the transaction is unlawful (*d*).

Transaction
ultra vires.

59. On similar principles, where the defendant is a company or corporation with limited powers, a defence that the transaction sought to be enforced is *ultra vires* is, if established, a bar to specific performance (*e*).

to the dissolution of a partnership held to be part performance of a contract to grant a lease), doubted in *Maddison v. Alderson* (1883), 8 App. Cas. 467, *per* Lord SELBORNE, L.C., at p. 482.

(*r*) 29 Car. 2, c. 3, s. 4; see p. 28, *ante*.

(*s*) R. S. C., Ord. 19, rr. 15, 17, 20; see title PLEADING, Vol. XXII., pp. 447, 448, note (*d*). For the old authorities, see *Gunter v. Halsey* (1739), Amb. 586; *Limondson v. Sweed* (1711), Gilb. (CH.) 35; *Child v. Comber* (1723), 3 Swan. 423, n.; compare *Ellis v. Rogers* (1884), 50 L. T. 660. As to the effect of the death of the party making such admission, see *A.-G. v. Day* (1749), 1 Ves. Sen. 218, 221.

(*t*) As to the general nature and effect of illegality in contracts, see title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*a*) *Sykes v. Beadon* (1879), 11 Ch. D. 170, *per* JESSEL, M.R., at p. 197.

(*b*) *Powell v. Knowler* (1741), 2 Atk. 224; *Thomson v. Thomson* (1802), 7 Ves. 470; compare *McCallan v. Mortimer* (1842), 9 M. & W. 636, Ex. Ch.; *Tenant v. Elliott* (1797), 1 Bos. & P. 3; *Farmer v. Russell* (1798), 1 Bos. & P. 296.

(*c*) *Aubin v. Holt* (1855), 2 K. & J. 66, *per* WOOD, V.-C., at p. 70.

(*d*) *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A., *per* KNIGHT BRUCE, L.J., at p. 923; compare *De Hoghton v. Money* (1866), 2 Ch. App. 164, *per* TURNER, L.J., at p. 169.

(*e*) As to the question of *ultra vires*, see titles COMPANIES, Vol. V., pp. 286 *et seq.*; CORPORATIONS, Vol. VIII., pp. 359 *et seq.* On the peculiar

SECT. 5.—*Oppressiveness of Contract.*

SECT. 5.

**Oppressive-
ness of
Contract.**

60. The discretion of the court to grant specific performance is not exercised if the contract is not "equal and fair" (*f*). In such a case, even though no fraud such as to justify rescission is alleged, the court does not interfere to enforce the contract (*g*).

Contract not equal and fair.

61. As a rule, the question of the unfairness of the contract must be determined as at its date (*h*). For instance, a family arrangement or other compromise is fair if entered into by both parties, who have equal knowledge and means of knowledge, and who contract in view of some future and uncertain event or the future ascertainment of facts past but unknown (*i*). That the contingency turns out adversely to one party does not render the contract unfair (*a*). Where, however, the actual facts are such as to render what is sold worthless, and are known to one party but not to the other, the contract, though expressly dealing with an uncertainty, will not be enforced (*b*); and, if the contingency is outside the contemplation of the parties, and different in kind and degree from such uncertainty as the parties contemplated, the court refuses specific performance (*c*).

Time at which unfairness must be determined.

Though unfairness is to be judged as a rule as at the date of the contract, unfairness arising at a subsequent date may be material in this respect, as, for instance, unfairness or impropriety in the valuation of a third party, where under the contract the price is to be fixed by such valuation (*d*).

Unfairness arising at subsequent date.

position of trades unions, see title TRADE AND TRADE UNIONS, pp. 613 *et seq.*, *post*.

(*f*) *Walpole* (Lord) *v.* *Orford* (Lord) (1797), 3 Ves. 402, 420; compare *Buxton v. Lister* (1746), 3 Atk. 383, 386.

(*g*) *Willan v. Willan* (1810), 16 Ves. 72, 83; *Savage v. Taylor* (1737), Cas. temp. Talb. 234; *Twining v. Morrice* (1788), 2 Bro. C. C. 326; *Davis v. Symonds* (1787), 1 Cox, Eq. Cas. 402; *Redshaw v. Bedford Level* (Governor & Co.) (1759), 1 Eden, 346; see title SALE OF LAND, Vol. XXV., p. 303. Parol evidence is admissible to show unfairness depending not on the terms of the contract, but on extrinsic circumstances; see *Davis v. Symonds*, *supra*. As to rescission, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*

(*h*) *Revell v. Hussey* (1813), 2 Ball & B. 280, 288.

(*i*) *Williams v. Williams* (1867), 2 Ch. App. 294, *per* TURNER, L.J., at p. 304; *Frank v. Frank* (1667), 1 Cas. in Ch. 84; *Stapilton v. Stapilton* (1739), 1 Atk. 2; *Pickering v. Pickering* (1839), 2 Beav. 31, 56; *Heap v. Tonge* (1851), 9 Hare, 90; *Bucknell v. Bucknell* (1858), 7 I. Ch. R. 130; see title FAMILY ARRANGEMENTS, Vol. XIV., p. 547.

(*a*) *Lawton v. Campion* (1854), 18 Beav. 87; *Parker v. Palmer* (1662), 1 Cas. in Ch. 42; *Anon.* (1717-38), before JEKYLL, M.R., cited in *Cooth v. Jackson* (1801), 6 Ves. 11, 24 (future allotment sold for £20, subsequently allotted and worth £200); *Re Lightoller, Ex parte Peake* (1816), 1 Madd. 346 (partner agreeing to give to retiring partner large sum for business though known to be insolvent).

(*b*) *Smith v. Harrison* (1857), 3 Jur. (N. S.) 287.

(*c*) *Baxendale v. Seale* (1855), 19 Beav. 601; *Davis v. Shepherd* (1866), 1 Ch. App. 410 (uncertain amount of coal demised, but actual extent far in excess of estimate of parties).

(*d*) *Emery v. Wase* (1803), 8 Ves. 505; compare *Collier v. Mason* (1858), 25 Beav. 200; *Chichester v. McIntire* (1830), 4 Bli. (N. S.) 78, H. L.; *Eads v. Williams* (1854), 4 De G. M. & G. 674.

SECT. 5.

Oppressive-
ness of
Contract.Suppression
of fact.Relationship
of the parties.Unfairness to
third parties.

62. Unfairness may consist in such suppression of fact as does not, in the opinion of the court, amount to fraud or misrepresentation (*e*), such as the conduct of a lessee in obtaining the renewal of a lease while suppressing the fact that the person on whose life the old lease depended was *in extremis* (*f*).

63. Again, there may be circumstances in the position or mental state of the party against whom specific performance is sought, such as to render it inequitable that he should be forced by the court to perform his contract, such as, for instance, intoxication (*g*), intimidation and duress (*h*), mental weakness not amounting to insanity (*i*), distress (*k*), illiteracy, want of advice (*l*), or similar circumstances appearing inconsistent with intelligent consent (*m*). In all such cases it need not be shown that the plaintiff was guilty of intentional unfairness (*n*).

64. Another species of unfairness which may stay the hand of the court is that the contract, if enforced, would be injurious to

(*e*) As to fraud and misrepresentation, see pp. 42 *et seq.*, *post*.

(*f*) *Ellard v. Llandaff* (Lord) (1810), 1 Ball & B. 241; *Hesse v. Briant* (1856), 6 De G. M. & G. 623 (common solicitor failing to make full disclosure to both parties). As to the professional obligations of solicitors, see title SOLICITORS, Vol. XXVI.

(*g*) *Cooke v. Clayworth* (1811), 18 Ves. 12; *Nagle v. Baylor* (1842), 3 Dr. & War. 60; *Cox v. Smith* (1868), 19 L. T. 517 (sale of land; mistake); distinguish *Shaw v. Thackray* (1853), 1 Sm. & G. 537, where the party intoxicated was not the real plaintiff. In *Lightfoot v. Heron* (1839), 3 Y. & C. (ex.) 586, there had been no drinking so as to affect the parties' intelligence, and the contract was enforced. As to intoxication in regard to the validity of contracts, see *Matthews v. Baxter* (1873), L. R. 8 Exch. 132; and title CONTRACT, Vol. VII., p. 342. As to its effect in regard to gifts, see title GIFTS, Vol. XV., p. 403. As to suspicious circumstances, generally, as constituting a ground for refusing specific performance, see *Rochfort v. Creswick* (1721), 1 Bro. Parl. Cas. 171 (sale of land; part execution); *West v. Habgood* (1837), 1 Jur. 25 (sale of land); *Valentine v. Dickinson* (1861), 7 Jur. (N. S.) 857 (sale of houses).

(*h*) *Dewar v. Elliott* (1824), 2 L. J. (O. S.) (CH.) 178; see title CONTRACT, Vol. VII., p. 356.

(*i*) *Clarkson v. Hanway* (1723), 2 P. Wms. 203; *Gartside v. Isherwood* (1783), 1 Bro. C. C. 558; *Bridgeman v. Green* (1757), Wilm. 58, 61.

(*k*) *Kemeys v. Hansard* (1815), Coop. G. 125; *Johnson v. Nott* (1684), 1 Vern. 271.

(*l*) *Stanley v. Robinson* (1830), 1 Russ. & M. 527; *Helsham v. Langley* (1841), 1 Y. & C. Ch. Cas. 175; but see *Lightfoot v. Heron*, *supra*; *Haberdashers' Co. v. Isaac* (1857), 3 Jur. (N. S.) 611, cases which show that mere want of legal advice is not in itself enough.

(*m*) *Bell v. Howard* (1742), 9 Mod. Rep. 302; *Martin v. Mitchell* (1820), 2 Jac. & W. 413; *Stanley v. Robinson*, *supra*. If, however, the court is satisfied that the contract is fair and properly concluded, it grants performance (*Brinkley v. Hann* (1843), Drury temp. Sug. 175). As to transactions impeachable from the position of parties, generally, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.* As to equitable relief in cases of fiduciary relationship, see, further, title EQUITY, Vol. XIII., p. 154.

(*n*) *Mortlock v. Buller* (1804), 10 Ves. 292; *Twining v. Morrice* (1788), 2 Bro. C. C. 326 (purchase not enforced against vendor by reason of inadvertent conduct of solicitor which "damped" the sale).

third parties (*o*), or would involve a breach of trust (*p*), or breach of a prior contract with a third party (*q*), or would compel the defendant to do an act which he is not lawfully competent to do (*r*), or would involve a gross breach of duty as between principal and agent (*s*).

SECT. 5.
Oppressive-
ness of
Contract.

65. Another form of oppressiveness which may prevent specific performance may simply consist in the fact that performance would involve great hardship (*t*), even though without any

Hardship
resulting from
performance.

(*o*) *Thomas v. Dering* (1837), 1 Keen, 729 (tendency to injure remaindermen); *McKewan v. Sanderson* (1875), L. R. 20 Eq. 65 (undue advantage over other creditors); *De Cordova v. De Cordova* (1879), 4 App. Cas. 692, P. C. Similarly, before the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), subsequent conveyances for value by a voluntary settlor were not enforced at the suit of the settlor (*Johnson v. Legard* (1822), Turn. & R. 281; *Smith v. Garland* (1817), 2 Mer. 123; *Clarke v. Willott* (1872), L. R. 7 Exch. 313; *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, C. A., overruling *Re Briggs and Spicer*, [1891] 2 Ch. 127). As to cases where the purchaser consented subject to a good title being shown, see *Peter v. Nicolls* (1871), L. R. 11 Eq. 391; and see, generally, title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 92 *et seq.*

(*p*) *Mortlock v. Buller* (1804), 10 Ves. 292 (extreme disadvantageousness of contract); *Ord v. Noel* (1820), 5 Madd. 438; *Thompson v. Blackstone* (1843), 6 Beav. 470 (contract entitling purchaser to retain out of purchase-money debt due from trustee in his personal capacity); *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549 (act in excess of power); *Byrne v. Acton* (1722), 1 Bro. Parl. Cas. 186; *Bellringer v. Blagrove* (1847), 1 De G. & Sm. 63 (covenant *ultra vires*); see *Bridger v. Rice* (1819), 1 Jac. & W. 74; *Wood v. Richardson* (1840), 4 Beav. 174; *Maw v. Topham* (1854), 19 Beav. 576; *Hill v. Buckley* (1811), 17 Ves. 394; *Neale v. Mackenzie* (1837), 1 Keen, 474; *Rede v. Oakes* (1864), 4 De G. J. & Sm. 505, C. A.; *Dunn v. Flood* (1885), 28 Ch. D. 586, C. A., affirming S. C. (1883), 25 Ch. D. 629; *White v. Cuddon* (1842), 8 Cl. & Fin. 766, H. L., reversing S. C., *sub nom. Cudden v. Cartwright* (1840), 4 Y. & C. (EX.) 25; *Sneesby v. Thorne* (1855), 1 Jur. (N.S.) 536; affirmed (1856), 7 De G. M. & G. 399, C. A.; *Magrane v. Archbold* (1813), 1 Dow, 107, H. L.; *Trappes v. Cobb* (1867), 16 W. R. 117; *Naylor v. Goodall* (1877), 26 W. R. 162; *Goodwin v. Fielding* (1853), 4 De G. M. & G. 90, C. A. (unbusinesslike character of transaction). As to depreciatory conditions of sale by trustees, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14; title TRUSTS AND TRUSTEES.

(*q*) *Willmott v. Barber* (1880), 15 Ch. D. 96 (contract to assign a lease containing covenant not to assign); compare *Weatherall v. Geering* (1806), 12 Ves. 504, 511; *Mulholland v. Belfast Corporation* (1859), 9 I. Ch. R. 204; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352, 367; affirmed, [1901] 2 Ch. 37, 50, C. A.

(*r*) *New Windsor Corporation v. Stovell* (1884), 27 Ch. D. 665; *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549, 553; *Byrne v. Acton* (1722), 1 Bro. Parl. Cas. 186; *Tolson v. Sheard* (1877), 5 Ch. D. 19, C. A.; *Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 236, C. A.; *Mansfield v. Childerhouse* (1876), 4 Ch. D. 82; *Delves v. Gray*, [1902] 2 Ch. 606.

(*s*) *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1853), 4 De G. M. & G. 115, C. A.; affirmed (1857), 6 H. L. Cas. 113 (railway directors); compare *Mortlock v. Buller* (1804), 10 Ves. 292, 313. Injury to the public is not a sufficient ground for refusing specific performance (*Raphael v. Thames Valley Rail. Co.* (1867), 2 Ch. App. 147, reversing S. C. (1866), L. R. 2 Eq. 37).

(*t*) ——— *v. White* (1706-13), 3 Swan. 108, n. (wayleave); *Gould v. Kemp* (1834), 2 My. & K. 304, 308; *Re Hightett and Bird's Contract*, [1903] 1 Ch. 287, 293, 294, C. A.

SECT. 5.
Oppressive-
ness of
Contract.

Time at
which hard-
ship must
arise.

Hardship
flowing from
conduct of
defendant.

impropriety on the part of the plaintiff (*a*). Such hardship may be either obvious on the face of the contract, or more or less latent and due to collateral matters: the latter case leads more readily to the court's giving effect to the hardship and refusing performance.

66. As a general rule hardship, to operate as a ground of defence, must be such as existed at the time of the contract, and not such as has arisen subsequently from a change of circumstances; thus the court may refuse to enforce an award on a submission to arbitration if the submission involves hardship (*b*), but not on the ground of mere hardship and unreasonableness in the award itself (*c*): so a covenant to renew a sub-lease without fine may be enforced though the terms of the renewal of the head lease are changed and made more onerous (*d*). In some cases, however, hardship subsequently arising may be treated as a ground for refusing specific performance (*e*). This result generally follows if the change of conditions, involving hardship to the defendant, has resulted from the act of the plaintiff (*f*), especially if the plaintiff's conduct operated as something in the nature of a trap (*g*).

67. Hardship which flows from the conduct of the defendant (*h*), or a hardship which simply results to the defendant because the purpose he had in view has failed (*i*), or because his speculation has proved unfortunate to him (*k*), cannot be set up by way of defence. Where the defendant is a company the court cannot consider that performance may involve hardship to individual members as distinguished from the company (*l*).

(*a*) *Falcke v. Gray* (1859), 4 Drew. 651, 660.

(*b*) *Nickels v. Hancock* (1855), 7 De G. M. & G. 300, C. A.; see title ARBITRATION, Vol. I., p. 476.

(*c*) *Wood v. Griffith* (1818), 1 Swan. 43; *Weekes v. Gallard* (1869), 18 W. R. 331.

(*d*) *Evans v. Walshe* (1805), 2 Sch. & Lef. 519; *Revell v. Hussey* (1813), 2 Ball & B. 280; *Lawder v. Blackford* (1815), Beat. 522.

(*e*) *London (City) v. Nash* (1747), 3 Atk. 512 (covenant to rebuild houses in good condition and repair not enforced); *Costigan v. Hastler* (1804), 2 Sch. & Lef. 160 (mortgagor's contract to grant a lease not enforced by reason of mortgagee's refusing consent).

(*f*) *Bedford (Duke) v. British Museum Trustees* (1822), 2 My. & K. 552 (alteration in character of neighbourhood due to plaintiff's acts as ground for not enforcing restrictive covenants); see *Shrewsbury and Birmingham Rail. Co. v. Stour Valley Rail. Co.* (1852), 2 De G. M. & G. 866, 882, C. A.; *Davis v. Hone* (1805), 2 Sch. & Lef. 341; *Sayers v. Collyer* (1884), 28 Ch. D. 103, C. A.

(*g*) *Dowson v. Solomon* (1859), 1 Drew. & Sm. 1.

(*h*) *Storer v. Great Western Rail. Co.* (1842), 2 Y. & C. Ch. Cas. 48, 52; *Hawkes v. Eastern Counties Rail. Co.* (1852), 1 De G. M. & G. 737; affirmed (1855), 5 H. L. Cas. 331.

(*i*) *Adams v. Weare* (1784), 1 Bro. C. C. 567; *Morley v. Clavering* (1860), 29 Beav. 84; *Webb v. Direct London and Portsmouth Rail. Co.* (1851), 9 Hare, 129, per TURNER, V.-C., at p. 140; *Stuart (Lord James) v. London and North Western Rail. Co.* (1852), 15 Beav. 513, per ROMILLY, M.R., at p. 523.

(*k*) *Haywood v. Cope* (1858), 25 Beav. 140.

(*l*) *Hawkes v. Eastern Counties Rail. Co.*, *supra*; *Edwards v. Grand Junction Rail. Co.* (1836), 1 My. & Cr. 650.

68. The fact that performance would expose the defendant to forfeiture constitutes such hardship as induces the court to refuse performance, at least if the forfeiture would clearly result (*m*). A mere possibility is not enough, and forfeiture not resulting directly from performance of the contract, but proximately caused by other acts of the defendant, constitutes no defence (*n*).

SECT. 5.
Oppressive-
ness of
Contract.

Forfeiture
caused by
performance.

69. In some cases a plaintiff is not granted specific performance except on certain terms imposed to avoid hardships which otherwise would result to the defendant; thus, a vendor liable to covenants in respect of the land can compel the purchaser to elect either to rescind the contract or to execute an indemnity against such covenants as a term of specific performance (*o*).

Relief granted
on terms to
prevent hard-
ship.

70. The following are examples of circumstances in which the court is unwilling, on the ground of hardship, to enforce contracts: where there is no right of way to the land sold (*p*); where the property is, without the knowledge of either vendor or purchaser, being used by the tenant as a disorderly house (*q*); where the vendors have personally agreed to discharge the estate from incumbrances, and some of them are trustees (*r*); where trustees have sold in circumstances which would constitute a breach of trust (*s*); where a mortgagee who has foreclosed and intended to sell as absolute owner has by inadvertence purported to sell as a mortgagee with a power of sale (*t*).

Circum-
stances in
which no
relief granted.

71. The hardship which is involved in inadequacy of consideration requires to be discussed specially. After some earlier decisions to the contrary (*a*), it is now established that mere inadequacy of

Inadequacy
of considera-
tion.

(*m*) *Faine v. Browne* (1750), cited 2 Ves. Sen. 307 (sale involving forfeiture of one half purchase-money to vendor's brother); *Peacock v. Penson* (1848), 11 Beav. 355 (covenant to make a road not enforced on ground of risk of forfeiting the land, but compensation given).

(*n*) *Helling v. Lumley* (1858), 3 De G. & J. 493, C. A.

(*o*) *Moxhay v. Inderwick* (1847), 1 De G. & Sm. 708; *Lukey v. Higgs* (1855), 1 Jur. (N. S.) 200; see title SALE OF LAND, Vol. XXV., p. 428.

(*p*) *Denne v. Light* (1857), 8 De G. M. & G. 774, C. A.; see *Tomlinson v. Manchester and Birmingham Rail. Co.* (1840), 2 Ry. & Can. Cas. 104; title SALE OF LAND, Vol. XXV., p. 303.

(*q*) *Hope v. Walter*, [1900] 1 Ch. 257, C. A., reversing S. C., [1899] 1 Ch. 879 (where a counterclaim for rescission and return of deposit failed).

(*r*) *Wedgwood v. Adams* (1844), 6 Beav. 600.

(*s*) *Mortlock v. Buller* (1804), 10 Ves. 292; *White v. Cuddon* (1842), 8 Cl. & Fin. 766, H. L.; see title TRUSTS AND TRUSTEES.

(*t*) *Watson v. Marston* (1853), 4 De G. M. & G. 230, C. A. Such a sale would open the foreclosure; see title MORTGAGE, Vol. XXI., p. 299. For other cases of hardship, see *Ely (Dean and Chapter) v. Stewart* (1740), 2 Atk. 44 (covenant to leave buildings in repair); *Talbot v. Ford* (1842), 13 Sim. 173; *Hamilton v. Grant* (1815), 3 Dow, 33, H. L.; *Kimberley v. Jennings* (1836), 6 Sim. 340; *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1853), 4 De G. M. & G. 115; affirmed (1857), 6 H. L. Cas. 113 (where the parties were companies).

(*a*) *Tilly v. Peers* (1791), cited 10 Ves. 301; *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77; *Savile v. Savile* (1721), 1 P. Wms. 745; *Vaughan v. Thomas* (1783), 1 Bro. C. C. 556; see *Nott v. Hill* (1682), 2 Cas. in Ch. 120.

SECT. 5.
Oppressive-
ness of
Contract.

Determining
time.

Consideration
determined by
third party.

consideration is not in itself a ground for resisting specific performance unless it is so gross as to amount to conclusive evidence of fraud (*b*), or there are other circumstances which, combined with the inadequacy, will induce the court not to enforce the contract (*c*). The same principle seems now to apply to sales of reversions (*d*).

Whenever the question of inadequacy of consideration is raised it must be determined as at the date of the contract, and not in the light of subsequent events (*e*).

It is further clear that the court is not debarred from considering the question of inadequacy simply by reason of the fact that the consideration has been determined by a valuer to whom the parties have referred it (*f*).

SECT. 6.—*Misrepresentation, Fraud, and Mistake (g).*

SUB-SECT. 1.—*Misrepresentation and Fraud.*

Misrepresenta-
tion as a
bar.

72. In actions for specific performance, the broad rule is that

(*b*) *Stilwell v. Wilkins* (1821), Jac. 280, 282; *Harrison v. Guest* (1855), 6 De G. M. & G. 424; affirmed (1860), 8 H. L. Cas. 481; *Coles v. Trecothick* (1804), 9 Ves. 234, 246; *White v. Damon* (1802), 7 Ves. 30; *Underhill v. Horwood* (1804), 10 Ves. 209; *Burrowes v. Look* (1805), 10 Ves. 470; *Lowther v. Lowther (Lord)* (1806), 13 Ves. 95, 103; *Collier v. Brown* (1788), 1 Cox, Eq. Cas. 428; *Bower v. Cooper* (1843), 2 Hare, 408; *Borell v. Dann* (1843), 2 Hare, 440; *Griffith v. Spratley* (1787), 1 Cox, Eq. Cas. 383; *Stephens v. Hotham* (1855), 1 K. & J. 571; *Holmes v. Howes* (1872), 20 W. R. 310. In *Abbott v. Sworder* (1852), 4 De G. & Sm. 448, inadequacy of consideration alleged by the purchaser (£5,000 for an estate worth £3,500) was held to be no defence. *Faleke v. Gray* (1859), 4 Drew. 651, is contrary to the course of authority. As to unconscionable bargains, generally, see titles EQUITY, Vol. XIII., pp. 20 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111 *et seq.*; MONEY AND MONEY-LENDING, Vol. XXI., pp. 53 *et seq.*

(*c*) For instances, see *Deane v. Rastron* (1792), 1 Anst. 64 (deliberate suppression of true value); *Young v. Clerk* (1720), Prec. Ch. 538 (ignorance); compare *Lewis v. Lechmere (Lord)* (1722), 10 Mod. Rep. 503; *Cockell v. Taylor* (1852), 15 Beav. 103 (great undervalue coupled with illiteracy and humble circumstances); *Callaghan v. Callaghan* (1841), 8 Cl. & Fin. 374, H. L. (transaction held to be in nature of a gift, not a sale). As regards transactions with a tenant for life carried out in pursuance of statutory powers, see title SETTLEMENTS, Vol. XXV., p. 669.

(*d*) The Sales of Reversions Act, 1867 (31 & 32 Vict. c. 4), provides that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall be refused or set aside merely on the ground of undervalue. The statute in terms refers to cases of rescission, but the same principle seems necessarily to apply to cases of specific performance. The statute leaves unaffected the jurisdiction of the court to relieve against catching bargains with infants and expectant heirs; see titles EQUITY, Vol. XIII., pp. 20, 21; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111, 112; and see Fry on Specific Performance, 5th ed., p. 230; *Kendall v. Beckett* (1830), 2 Russ. & M. 88; *Hincksman v. Smith* (1827), 3 Russ. 433, as illustrating that the same principles apply to the refusal of specific performance of such bargains as to rescission. As to the element of consideration in the case of family arrangements, see title FAMILY ARRANGEMENTS, Vol. XIV., p. 547.

(*e*) *Mortimer v. Capper* (1782), 1 Bro. C. C. 156.

(*f*) *Parken v. Whitby* (1823), Turn. & R. 366; *Emery v. Wase* (1803), 8 Ves. 505.

(*g*) As to misrepresentation, fraud, and mistake generally, see titles

misrepresentation, whether wilful (that is, fraudulent) or innocent, is a bar to the enforcement of the contract induced thereby (*h*), and parol evidence is admissible to prove such misrepresentation (*a*). Even when the misrepresentation relates to part only of the contract it operates on the entire contract, and performance is not compelled, even with compensation, against the defendant's will (*b*), though, should the defendant consent, specific performance with compensation in respect of the matter which is the subject of the misrepresentation is decreed (*c*). That the party making the misrepresentation believed it to be true is not material in an action of this nature, since it would be inequitable to allow a party to enforce performance of a contract obtained by a representation which he admits to be incorrect (*d*); nor is it material for this purpose whether the representation was made by the party or his agent, or whether, if made by the agent, it was within that agent's actual authority, since it would be inequitable in any case for the party to profit by his agent's misstatement (*e*).

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

73. Certain conditions, however, must be fulfilled to constitute misrepresentation:—

(1) Apart from cases of fraudulent suppression, an actual statement must be made, mere silence not being sufficient; and such statement must be untrue in its ordinary significance (*f*).

Essential
features of
misrepresentation.
Actual
statement.

MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.*, 754 *et seq.* (misrepresentation as a defence), 737 *et seq.* (proceedings for rescission); MISTAKE, Vol. XXI., pp. 1 *et seq.* It is here intended merely to refer to these subjects in so far as actions for specific performance, in which the peculiar and extraordinary powers of the court are invoked, seem to require special treatment in this connexion.

(*h*) *Brereton v. Cowper* (1724), 1 Bro. Parl. Cas. 211 (value of land); *Wall v. Stubbs* (1815), 1 Madd. 80; *Evans v. Edmonds* (1853), 13 C. B. 777; *Lachlan v. Reynolds* (1853), Kay, 52 (property described as in occupation of tenant, who was, in fact, tenant of an adverse claimant); *Higgins v. Samels* (1862), 2 John. & H. 460, 466; *Peek v. Gurney* (1873), L. R. 6 H. L. 377; see *Phillips v. Bucks (Duke)* (1684), 1 Vern. 227 (surprise and circumvention); *Webb v. Kirby* (1856), 7 De G. M. & G. 376; *Hannah v. Hodgson* (1861), 30 Beav. 19 (imperfect deed); *Turquand v. Rhodes* (1868), 37 L. J. (CH.) 830 (misdescription); *Roots v. Snelling* (1883), 48 L. T. 216 (material misrepresentation as to price).

(*a*) *Flood v. Finlay* (1811), 2 Ball & B. 9, 15; *Winch v. Winchester* (1812), 1 Ves. & B. 375 (land short in quantity).

(*b*) *Clermont (Viscount) v. Tasburgh* (1819), 1 Jac. & W. 112, 119; compare *Rawlins v. Wickham* (1858), 3 De G. & J. 304, C. A.; but see *Charlesworth v. Jennings* (1864), 11 L. T. 439 (partnership).

(*c*) *Connor v. Potts*, [1897] 1 I. R. 534; as to specific performance with compensation, see pp. 99 *et seq.*, *post*.

(*d*) *Redgrave v. Hurd* (1881), 20 Ch. D. 1, C. A.

(*e*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; *Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387, C. A.; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Re Hull and London Life Assurance Co., Gibson's Case* (1858), 2 De G. & J. 275, C. A.; see *Winch v. Winchester*, *supra*; *Mullins v. Miller* (1882), 22 Ch. D. 194 (false representation by agent); Fry on Specific Performance, 5th ed., p. 230; title AGENCY, Vol. I., p. 214.

(*f*) *Clarke v. Dickson* (1859), 6 C. B. (N. S.) 453; *Smith v. Chadwick* (1884), 9 App. Cas. 187. As to silence and fraudulent suppression, see, further, pp. 46, 47, *post*.

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

Representation
an
inducement
to contract.

Acting on
fraudulent
statement.

(2) The representation must have been made in relation to the contract, and by way of inducement thereto (g).

(3) The other party must in fact have been induced to contract by reason of the representation (h), but it is not necessary that it should be the sole inducement (i). If the party to whom the representation was made in fact relied upon it, it is immaterial that he had the means of checking the accuracy of the representation, or had other means of knowledge (k). The vagueness of the representation is material in considering whether or not the party to whom it was made was induced by it; there must be a statement of fact; a mere opinion or vague commendation is not sufficient (l). If, however, the party to whom the

(g) See *Attwood v. Small* (1838), 6 Cl. & Fin. 232, 444, H. L.; *Smith v. Kay* (1859), 7 H. L. Cas. 750; *Harris v. Kemble* (1827), 1 Sim. 111, 122, 128 (necessity that as a rule it should be made during the negotiations and not with reference to some other transaction); *National Exchange Co. of Glasgow v. Drew and Dick* (1855), 2 Macq. 103, H. L. (dealings held to be part of a single transaction); *Peek v. Gurney* (1873), L. R. 6 H. L. 377 (representations in prospectus issued to induce public to apply for shares from the company could not be relied on by party who has bought such shares on the market); distinguish *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., where it was held that the purchase was within the contemplation of the prospectus; compare *Scott v. Dixon* (1859), 29 L. J. (ex.) 62, n. *Bedford v. Bagshawe* (1859), 4 H. & N. 538, was disapproved of in *Peek v. Gurney*, *supra*, at pp. 397, 398; see also *Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387, C. A.

(h) *Attwood v. Small*, *supra*, at p. 447; *Redgrave v. Hurd* (1881), 20 Ch. D. 1, C. A.; *Smith v. Chadwick* (1884), 9 App. Cas. 187, 196; *Smith v. Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A.; *Arnison v. Smith* (1889), 41 Ch. D. 348, 369, C. A. Whether or not the misrepresentation actually operated as an inducement is a question of fact. In *Redgrave v. Hurd*, *supra*, JESSEL, M.R., said that if the representation were material, its operation was an inference of law; this seems to go too far, though the materiality would constitute strong evidence of inducement.

(i) *Clarke v. Dickson* (1859), 6 C. B. (N. S.) 453; *Re Royal British Bank, Nicol's Case*, *supra*.

(k) *Central Rail. Co. of Venezuela (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99; *Smith v. Land and House Property Corporation*, *supra*; *Redgrave v. Hurd*, *supra*; *Aaron's Reefs v. Twiss*, [1896] A. C. 273; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 726. But in *Attwood v. Small*, *supra*, it was held that reliance was not placed on the representation; see also *Jennings v. Broughton* (1854), 5 De G. M. & G. 126, C. A.; *Aberaman Ironworks v. Wickens* (1868), 4 Ch. App. 101, reversing S. C. (1868), L. R. 5 Eq. 485; *Farebrother v. Gibson* (1857), 1 De G. & J. 602, C. A.; *Haywood v. Cope* (1858), 25 Beav. 140; *Jefferys v. Fairs* (1876), 4 Ch. D. 448; *Loundes v. Lane* (1789), 2 Cox, Eq. Cas. 363. Much depends in deciding such questions on the nature of the subject-matter and the relative knowledge of the parties; see *Clapham v. Shillito* (1844), 7 Beav. 146, *per* Lord LANGDALE, M.R., at pp. 149, 150; compare *Clarke v. Mackintosh*, *Mackintosh v. Clarke* (1862), 7 L. T. 558; *Colby v. Gadsden* (1867), 17 L. T. 97.

(l) Here, again, the respective knowledge of the parties may be important (see *Smith v. Land and House Property Corporation*, *supra*), but it is otherwise if the statement is so ambiguous as to mislead (see *Martin v. Cotter* (1846), 3 Jo. & Lat. 496, 507), or is a statement of a definite fact (*Higgins v. Samels* (1862), 2 John. & H. 460). As instances of vague commendation, see *Jennings v. Broughton*, *supra*; *Trower v. Newcome* (1813), 3 Mer. 704; *Scott v. Hanson* (1826), 1 Sim. 13; *Dimmock v. Hallett* (1866), 2 Ch. App.

representation was made knew, when it was made, that it was incorrect, he cannot resist specific performance on the ground of misrepresentation (*m*); and the same result follows if, with knowledge of the incorrectness of the statement, he has continued to proceed on the footing of the contract (*n*).

(4) The statement must, it seems, be one of fact and not of law (*o*); but, should the representation be matter of mixed fact and law, as is often the case in regard to matters of title, the defence prevails (*p*).

(5) The representation must be as to a matter material to the contract (*q*).

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

Statement
of fact, not
of law.

Representa-
tion material.

21; *Fenton v. Browne* (1807), 14 Ves. 144; *Brealey v. Collins* (1831), You. 317; *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare, 298; and title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 670, 671.

(*m*) See, for instance, *Nene Valley Drainage Commissioners v. Dunkley* (1876), 4 Ch. D. 1, C. A.

(*n*) See, for instance, *Harris v. Kemble* (1831), 5 Bli. (N. S.) 730; *Vigers v. Pike* (1842), 8 Cl. & Fin. 562, H. L.; *Hume v. Pocock* (1865), L. R. 1 Eq. 423, affirmed (1866), 1 Ch. App. 379; *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505 (where the defect was patent); *Anglesey (Earl) v. Annesley* (1742), 1 Bro. Parl. Cas. (part performance and standing-by on part of person alleging fraud); see also titles EQUITY, Vol. XIII., p. 169; MISREPRESENTATION AND FRAUD, Vol. XX., p. 726. Actual knowledge of the incorrectness must be shown; see *Drysdale v. Mace* (1854), 2 Sm. & G. 225, 230; *Jones v. Rimmer* (1880), 14 Ch. D. 588, C. A.; *Price v. Macaulay* (1852), 2 De G. M. & G. 339, C. A.; *Wilson v. Short* (1848), 6 Hare, 366, 378; *Leyland v. Illingworth* (1860), 2 De G. F. & J. 248, C. A.; *Cox v. Middleton* (1854), 2 Drew. 209. In *Wilson v. Short*, *supra*, it was contended, without success, that a general statement inconsistent with the particular representation ought to have put the party on inquiry; see *Reynell v. Sprye* (1852), 1 De G. M. & G. 660, 710, C. A., where the party making the representation was held to be bound by it though he advised the other party to seek independent advice; *Van v. Corpe* (1834), 3 My. & K. 269, where the doctrine that the purchaser of a lease has implied notice of the covenants did not nullify a misrepresentation by the vendor; compare *Flight v. Barton* (1832), 3 My. & K. 282 (see title LANDLORD AND TENANT, Vol. XVIII., p. 410); *Pope v. Garland* (1841), 4 Y. & C. (EX.) 394 (see title SALE OF LAND, Vol. XXV., p. 304). In *Nelson v. Stocker* (1859), 4 De G. & J. 458, C. A., it was held that a principal could not rely on a misstatement made to his agent of the falsity of which he, though not the agent, was aware.

(*o*) The point does not appear to have been decided; it has been decided to the above effect in actions for rescission or for making good a representation in *Beattie v. Ebury (Lord)* (1874), L. R. 7 H. L. 102; *Legge v. Croker* (1811), 1 Ball & B. 506; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 669; compare *Wauton v. Coppard*, [1899] 1 Ch. 92, 97; and, as to mistakes of law, see pp. 49, 50, *post*.

(*p*) *Edwards v. M'Leay* (1818), 2 Swan. 287; *Turner v. West Bromwich Union Guardians* (1860), 9 W. R. 155; *Hart v. Swaine* (1877), 7 Ch. D. 42. But in other cases representations as to title were held not to constitute a defence; see, for instance, *Legge v. Croker*, *supra*; *Hume v. Pocock* (1866), 1 Ch. App. 379; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 937; see also *Wilde v. Gibson* (1848), 1 H. L. Cas. 605 (rescission of executed conveyance); compare *Cresswell v. Jeffreys* (1912), 29 T. L. R. 90, C. A. (misstatement of law).

(*q*) *Fellowes v. Gwydyr (Lord)* (1826), 1 Sim. 63; affirmed (1829), 1 Russ. & M. 83. As to whether it is necessary, where misrepresentation is raised as a defence to specific performance, to show that the representee would suffer loss by adhering to the contract, see, on the one hand, the cases cited

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

Wilful
deception or
fraudulent
intention :
silence or
suppression.

74. The question whether there has been wilful deception or fraudulent intent is for present purposes mainly material if the ground of complaint is not positive misstatement, but silence or suppression. Mere silence, where there is no duty to disclose or no such partial disclosure as to render the silence deceptive, is no ground of defence to a claim for specific performance (r). Silence may, however, be a ground of defence if it involves a breach of a duty to disclose, as in the case of certain fiduciary relationships (s) and certain contracts which from their nature are held to impose a duty to make disclosure (a), or by reason of an antecedent wrong committed by one party against the other party in relation to the subject-matter of the contract (b). Silence is also a ground of defence if one party, having during the progress of the negotiations made certain statements and subsequently discovered their falsity, allows the other party to enter into the contract on the faith of those statements without attempting to correct them (c). A statement, true as far as it goes, may be intentionally misleading by reason of what it omits (d); and there may be fraud where

in title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 738, 756; and, on the other hand, *Cadman v. Horner* (1810), 18 Ves. 10; compare *Flint v. Woodin* (1852), 9 Hare, 618; *Archer v. Stone* (1898), 78 L. T. 34.

(r) *Chadwick v. Manning*, [1896] A. C. 231, 238, P. C.; *Turner v. Green*, [1895] 2 Ch. 205, 208; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Re Ward and Jordan's Contract*, [1902] 1 L. R. 73; *Percival v. Wright*, [1902] 2 Ch. 421. But *Ellard v. Llandaff (Lord)* (1810), 1 Ball & B. 241, seems to be a case where silence not fraudulent prevented specific performance on the ground that enforcement would be unfair; see *Robinson v. Wall* (1847), 2 Ph. 372, per Lord COTTENHAM, L.C.; see also title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 684, 685; and compare *ibid.*, p. 681.

(s) Such as principal and agent (see title AGENCY, Vol. I., p. 189), partner and partner (see title PARTNERSHIP, Vol. XXII., pp. 47, 69), solicitor and client (see title SOLICITORS, Vol. XXVI.), trustee and *cestui que trust* (see title TRUSTS AND TRUSTEES). For examples, see *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189; *Dunne v. English* (1874), L. R. 18 Eq. 524.

(a) As, for instance, contracts of insurance (see title INSURANCE, Vol. XVII., pp. 404, 532, 550, 572), or for the formation of a partnership (see title PARTNERSHIP, Vol. XXII., p. 47), or a contract to purchase shares from a company (see title COMPANIES, Vol. V., pp. 128 *et seq.*). Similarly, there is an obligation on a vendor to disclose a latent defect known to himself (*Carlisch v. Salt*, [1906] 1 Ch. 335 (sale of land); *Horsfall v. Thomas* (1862), 1 H. & C. 90 (sale of chattel); see titles SALE OF GOODS, Vol. XXV., p. 157; SALE OF LAND, Vol. XXV., pp. 299, 302, 405.

(b) *Phillips v. Homfray*, *Fothergill v. Phillips* (1871), 6 Ch. App. 770 (purchase with object of covering up a wrongful trespass).

(c) *Reynell v. Sprye* (1852), 1 De G. M. & G. 660, 703, C. A.; *Traill v. Baring* (1864), 4 De G. J. & Sm. 318, 329, C. A.; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 950; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 691.

(d) *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.; *Dringbier v. Wood*, [1899] 1 Ch. 393; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 680, 681. Similarly, purchasers have been debarred from enforcing their contracts by a slight suggestion of what was false coupled with silence as to the rest; see *Turner v. Harvey* (1821), Jac. 169, 178; *Walters v. Morgan* (1861), 3 De G. F. & J. 718, 723, 724; *Davies v. Cooper* (1840), 5 My. & Cr. 270; *Davis v. Abraham* (1857), 5 W. R. 465.

there is deliberate concealment(e), even in the case of a sale with all faults (f).

75. A special case of fraud is the employment of a “puffer” at a sale by auction of land or goods. In the absence of a special reservation by the seller of a right to bid, any such employment renders the contract unenforceable (g).

76. It seems that the fraud of a third party, even without the privity of the plaintiff, renders the contract unenforceable if it was intended to operate, and did operate, as matter of inducement to the contract (h).

77. The fact that performance would involve a fraud on the public may also be a ground for refusing specific performance (i).

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.
—
“Puffing”
at auctions.

Fraud of
third party.

Fraud on
public.

SUB-SECT. 2.—*Mistake (k).*

(i.) *Mistake which Excludes Consent.*

78. Mistake may be in equity a ground for resisting specific performance of a contract, whether the mistake is that of both parties or of the defendant only (l).

79. The common error of both parties to a contract as to the substance of the transaction is a ground for refusing specific performance altogether (m).

Mistake.

Common
error as to
substance.

(e) *Shirley v. Stratton* (1785), 1 Bro. C. C. 440; *Deane v. Rastron* (1792), 1 Anst. 64; *Hill v. Gray* (1816), 1 Stark. 434 (as to which see *Keates v. Cadogan (Earl)* (1851), 10 C. B. 591; *Peek v. Gurney* (1873), L. R. 6 H. L. 877, 391); see also *Phillips v. Homfray*, *Fothergill v. Phillips* (1871), 6 Ch. App. 770. For cases where specific performance was refused owing to the wilful concealment by one party of the fact that he was contracting in pursuance of a secret agreement on behalf of another, see *O’Herlihy v. Hedges* (1803), 1 Sch. & Lef. 123; *Smith v. Wheatecroft* (1878), 9 Ch. D. 223; *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298.

(f) *Ward v. Hobbs* (1878), 4 App. Cas. 13; *Baglehole v. Walters* (1811), 3 Camp. 154; *Schneider v. Heath* (1813), 3 Camp. 506.

(g) See titles AUCTION and AUCTIONEERS, Vol. I., pp. 508, 509, 512; SALE OF GOODS, Vol. XXV., pp. 280, 281; SALE OF LAND, Vol. XXV., pp. 319, 320; and see also *Dimmock v. Hallett* (1866), 2 Ch. App. 21.

(h) Fry on Specific Performance, 5th ed., p. 360: compare *Cobbett v. Brock* (1855), 20 Beav. 524; *Union Bank v. Munster* (1887), 37 Ch. D. 51.

(i) *Post v. Marsh* (1880), 16 Ch. D. 395; see *Oldham v. James* (1863), 14 I. Ch. R. 81.

(k) See, generally, title MISTAKE, Vol. XXI., pp. 1 *et seq.*; *Wilding v. Sanderson*, [1897] 2 Ch. 534, C. A.; *Scott v. Coulson*, [1903] 2 Ch. 249, C. A.; *Saunders v. Brading Harbour Improvement Railway and Works Co.* (1885), 52 L. T. 426.

(l) As to mistake alleged as a defence to specific performance, see title MISTAKE, Vol. XXI., pp. 24, 25; and see *ibid.*, p. 14.

(m) *Cochrane v. Willis* (1865), 34 Beav. 359; affirmed (1865), 1 Ch. App. 58 (contract on the footing that a deceased tenant for life was still alive); *Baxendale v. Seale* (1855), 19 Beav. 601 (sale of a manor which turned out to include valuable property); see *Murrell v. Goodyear* (1860), 1 De G. F. & J. 432, 449, C. A.; *Watson v. Marston* (1853), 4 De G. M. & G. 230, C. A. As to rescission on like grounds, see *Torrance v. Bolton* (1872), L. R. 14 Eq. 124; affirmed (1872), 8 Ch. App. 118. As to common mistake in the case of completed contracts, see *Jones v. Clifford* (1876), 3 Ch. D. 779, 793; *Scott v. Coulson*, *supra*.

SECT. 6.

Misrepresentation,
Fraud, and
Mistake.Error of
defendant
aided by
plaintiff.Error of
defendant
not contri-
buted to by
plaintiff.Plaintiff's
option in
case of
defendant's
mistake.Refusal of
relief.

80. Where the error is that of the defendant only it may be an error contributed to by the plaintiff (*n*), in which case the plaintiff cannot enforce the contract (*o*).

81. The error of the defendant may, on the other hand, be one to which the plaintiff did not contribute (*p*). In this case the contract is not enforced if the mistake of the defendant was due to some ambiguity (*q*), or if there was some misconception on the part of an agent (*r*), or some special circumstances rendering the mistake of the defendant excusable (*s*), or where the plaintiff must have known of the defendant's mistake (*t*). If, however, the defendant cannot rely on some such excuse as the foregoing, and if the mistake is simply the result of his own carelessness, he is not allowed to evade performance simply by alleging that he made a mistake (*u*).

82. Where the mistake is that of the defendant only, the court may give the plaintiff the option of having his action dismissed or of having specific performance in the terms of the contract as understood by the defendant (*w*).

So the effect of mistake may be to lead the court to refuse specific

(*n*) Whether intentionally or not; see *Baskcomb v. Beckwith* (1869), L. R. 8 Eq. 100; *Caballero v. Henty* (1874), 9 Ch. App. 447; *Bray v. Briggs* (1872), 20 W. R. 962; *Wilding v. Sanderson*, [1897] 2 Ch. 534, C. A.

(*o*) *Mason v. Armitage* (1806), 13 Ves. 25 (plaintiff leading defendant to believe that he would not bid at an auction); see *Pym v. Blackburn* (1796), 3 Ves. 34; *Day v. Wells* (1861), 30 Beav. 220; *Higginson v. Clowes* (1808), 15 Ves. 516 (conditions of sale ambiguous); *Moxey v. Bigwood* (1862), 4 De G. F. & J. 351; *Denny v. Hancock* (1870), 6 Ch. App. 1 (error of defendant contributed to by vendor's plan).

(*p*) See *Jones v. Rimmer* (1880), 14 Ch. D. 588, 592, C. A.

(*q*) *Calverley v. Williams*, *Williams v. Calverley* (1790), 1 Ves. 210; *Clowes v. Higginson* (1813), 1 Ves. & B. 524; *Neap v. Abbott* (1838), Coop. Pr. Cas. 333; *Manser v. Back* (1848), 6 Hare, 443, 447; *Butterworth v. Walker* (1864), 13 W. R. 168; *Tamplin v. James* (1880), 15 Ch. D. 215, 217, C. A.

(*r*) *Malins v. Freeman* (1837), 2 Keen, 25 (reckless bidding by agent for wrong lot); compare *Van Praagh v. Everidge*, [1903] 1 Ch. 434, C. A., reversing S. C., [1902] 2 Ch. 266; see also *Manser v. Back* (1848), 6 Hare, 443 (mistake of auctioneer); *Re Hore and O'More's Contract*, [1901] 1 Ch. 93 (similar case); *Wycombe Rail. Co. v. Donnington Hospital* (1866), 1 Ch. App. 268; *Morrison v. Barrow* (1860), 1 De G. F. & J. 633, C. A.

(*s*) As in *Leslie v. Thompson* (1851), 9 Hare, 268 (erroneous description based on report of surveyor); see *Alvanley v. Kinnaird* (1849), 2 Mac. & G. 1, 7; *Helsham v. Langley* (1841), 1 Y. & C. Ch. Cas. 175; *Neap v. Abbott* (1838), Coop. Pr. Cas. 333; *Durham (Earl) v. Legard* (1865), 34 Beav. 611; *Richards v. North London Rail. Co.* (1871), 20 W. R. 194; *Howell v. George* (1815), 1 Madd. 1.

(*t*) *Webster v. Cecil* (1861), 30 Beav. 62 (vendor inadvertently inserting a wrong price in an offer of sale); see *Tamplin v. James* (1880), 15 Ch. D. 215, 221, C. A.

(*u*) *Tamplin v. James*, *supra*; *Swaissland v. Dearsley* (1861), 29 Beav. 430; *Morley v. Clavering* (1860), 29 Beav. 84; *Powell v. Smith* (1872), L. R. 14 Eq. 85; *Goddard v. Jeffreys* (1881), 30 W. R. 269; *Dyas v. Stafford* (1881), 7 L. R. Ir. 590 (mistake in quantity); compare *Grissel v. Pelo* (1854), 2 Sm. & G. 39 (mistake in parcels).

(*w*) *Preston v. Luck* (1884), 27 Ch. D. 497, C. A.; see title MISTAKE, Vol. XXI., p. 25.

performance altogether, or to grant it solely if the plaintiff will accept performance in the terms of the contract as understood by the defendant (*a*).

83. It is to be noted that mistake, at least if set up by the defendant, may be proved by parol evidence, though the admission of such evidence may appear contrary to the Statute of Frauds (*b*).

(ii.) *Mistake in the Expression of Consent.*

84. The fact that there has been a mistake in the reduction into writing of a previous parol contract is a ground for refusing specific performance of the written contract (*c*); but the evidence with regard to the parol agreement must be very clear (*d*). In such a case the court may also either enforce the contract according to its original terms as agreed by parol (*e*), or put the plaintiff to his choice either to have the contract enforced as altered in accordance with the parol agreement or the claim dismissed (*f*). Each case depends on its special circumstances (*g*).

85. With regard to the question whether a mistake of law is a ground on which the court should act or refuse to act, it may be taken as a rule that mistakes as to the general law, as, for example, the construction of a contract, do not affect the rights of the parties (*h*), while, on the other hand, mistakes as to private rights which indeed may involve the application of general principles of law to the

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

Proof.

Refusal of
relief or
enforcement
with variation.

Mistake
of law.

(*a*) *London and Birmingham Rail. Co. v. Winter* (1840), Cr. & Ph. 57; *McKenzie v. Hesketh* (1877), 7 Ch. D. 675.

(*b*) 29 Car. 2, c. 3; see *Joynes v. Statham* (1746), 3 Atk. 388; *Ramsbottom v. Gosdon* (1812), 1 Ves. & B. 165, 168; *Clowes v. Higginson* (1813), 1 Ves. & B. 524; *Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 328; *Manser v. Back* (1848), 6 Hare, 443; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 39; see also *Clarke v. Grant* (1807), 14 Ves. 519; titles *EQUITTY*, Vol. XIII., p. 12; *MISTAKE*, Vol. XXI., pp. 25 *et seq.* As to the position of a plaintiff suing for specific performance with a parol variation, see p. 50, *post*.

(*c*) *Joynes v. Statham*, *supra*; *Ramsbottom v. Gosdon*, *supra*; *Garrard v. Grindling* (1818), 2 Swan. 244; *Fife v. Clayton* (1807), 13 Ves. 546; *Gwynn v. Lethbridge* (1808), 14 Ves. 585; *Watson v. Marston* (1853), 4 De G. M. & G. 230, C. A.; *Smith v. Wheatcroft* (1878), 9 Ch. D. 223; and see title *MISTAKE*, Vol. XXI., p. 14.

(*d*) *Dear v. Verity* (1869), 17 W. R. 567.

(*e*) *Joynes v. Statham*, *supra*; *Fife v. Clayton*, *supra*; *Smith v. Wheatcroft*, *supra*; see *Lindsay v. Lynch* (1804), 2 Sch. & Lef. 1, 10.

(*f*) *Ramsbottom v. Gosdon*, *supra*; *Clarke v. Grant*, *supra*; *Gordon (Lord W.) v. Hertford (Marquis)* (1817), 2 Madd. 106; *Clarke v. Moore* (1844), 1 Jo. & Lat. 723.

(*g*) See *London and Birmingham Rail. Co. v. Winter*, *supra*; *Barnard v. Cave* (1858), 26 Beav. 253; *Donald v. Scott* (1860), 10 I. Ch. R. 496; see also *Ricketts v. Bell* (1847), 1 De G. & Sm. 335 (stipulation inserted as being implied by reasonable understanding); *Davis v. Hone* (1805), 2 Sch. & Lef. 341.

(*h*) *Powell v. Smith* (1872), L. R. 14 Eq. 85; *Midland Great Western Railway of Ireland (Directors etc.) v. Johnson* (1858), 6 H. L. Cas. 798, 810; see title *MISTAKE*, Vol. XXI., p. 4; compare *Evershed v. Evershed* (1882), 46 L. T. 690 (agreement to compromise); distinguish *Griffin v. Coleman* (1873), 28 L. T. 493, where the parties being at variance as to the meaning of an ambiguous agreement, it was held that there was no *consensus ad idem*.

SECT. 6.
Misrepresentation,
Fraud, and
Mistake.

Rectification
and specific
performance.

subject-matter may be such as afford a defence to an action for specific performance (*i*).

86. Mistake may bring into effect the equitable jurisdiction of the court to rectify a written contract where the parties, having mutually agreed on the terms, have by common mistake failed to express these terms with accuracy in the written contract (*k*). Where the court has ordered rectification of a contract on this ground, it can in the same action order specific performance of the contract as rectified, at all events in cases where the Statute of Frauds (*l*) is not a bar (*m*).

SECT. 7.—*Defects in Subject-matter of Contract.*

Defect apart
from fraud.

87. The existence of a defect in the subject-matter of the contract is in certain cases, apart from any question of fraud (*n*) or misrepresentation (*o*), a ground for refusing specific performance (*p*).

The defect
must be
latent.

88. The defect relied on as a defence to the claim must be latent (*q*), that is, not obvious on reasonable examination (*r*). It

(*i*) *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149; *Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 223, 234; *Stone v. Godfrey* (1854), 5 De G. M. & G. 76, C. A.; *Daniell v. Sinclair* (1881), 6 App. Cas. 181, 190, P. C.; *Re Saxon Life Assurance Society, Anchor Case* (1862), 2 John. & H. 408; and compare title MISTAKE, Vol. XXI., pp. 4, 5. The mere accident of a clerical error is not a ground for refusing specific performance; see *Crosby v. Middleton* (1711), Prec. Ch. 309 (omission of name).

(*k*) As to rectification, see title MISTAKE, Vol. XXI., pp. 20 *et seq.* as to rescission on the ground of mistake, see *ibid.*, p. 17; as to rescission or variation of contracts, see also p. 97, *post*.

(*l*) 29 Car. 2, c. 3; see p. 28, *ante*. As to parol evidence of mistake, see title MISTAKE, Vol. XXI., pp. 25 *et seq.*

(*m*) *Olley v. Fisher* (1886), 34 Ch. D. 367; followed in *Shrewsbury and Talbot Cab and Noiseless Tyre Co., Ltd. v. Shaw* (1890), 89 L. T. Jo. 274; compare, however, *May v. Platt*, [1900] 1 Ch. 616; followed in *Thompson v. Hickman*, [1907] 1 Ch. 550. As to these latter cases, see titles EQUITY, Vol. XIII., p. 63; MISTAKE, Vol. XXI., p. 21, note (*a*); and see *ibid.*, p. 26, note (*l*). Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7), it was held that the court could not take the course indicated in the text; see *Woollam v. Hearn* (1802), 7 Ves. 211; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 38; *Squire v. Campbell* (1836), 1 My. & Cr. 459, 480; *Manser v. Back* (1848), 6 Hare, 443, 447; *A.-G. v. Sitwell* (1835), 1 Y. & C. (ex.) 559; *Davies v. Fitton* (1842), 2 Dr. & War. 225; but it seems that the effect of the statute is to abrogate the old rule; see *Olley v. Fisher*, *supra*; Fry on Specific Performance, 5th ed., p. 398, where the earlier authorities are fully discussed.

(*n*) As to the effect of fraud, see pp. 42 *et seq.*, *ante*.

(*o*) As to misrepresentation as a ground for refusing relief, see pp. 42 *et seq.*, *ante*.

(*p*) *Bentley v. Craven* (1853), 17 Beav. 204; *Whitmel v. Farrel* (1749), 1 Ves. Sen. 256 (marriage settlement); compare *Crosse v. Keene* (1852), 9 Hare, 469; *Crosse v. Lawrence* (1852), 9 Hare, 462 (copyhold land and timber). As to mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 547.

(*q*) *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505 (farm described as in a ring fence; seen by purchaser before the contract: specific performance decreed); compare *Bowles v. Round* (1801), 5 Ves. 508. As to latent defects, see *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609 (water easements); see also titles SALE OF GOODS, Vol. XXV., p. 164, note (*p*); SALE OF LAND, Vol. XXV., p. 299.

(*r*) See *Denny v. Hancock* (1870), 6 Ch. App. 1, *per* JAMES, L.J., at p. 12.

may consist either in the physical nature of the subject-matter of the contract (s), or in the fact that the subject-matter is subject to unusual or onerous covenants or circumstances (t). On the same principles any substantial variation between the description in the contract and the subject-matter of the contract may be set up in answer to the claim for specific performance, even though the variation is beneficial to the defendant rather than in the nature of a defect (a).

SECT. 7.
Defects in
Subject-
matter of
Contract.

89. The defect or variation must be essential (b). A defect cannot be relied on if there is a provision in the contract excluding reliance on defects, as when the sale is "with all faults" (c), or if the contract is so framed as in terms to leave uncertain the matter complained of (d); nor, as a rule, can a defect be relied on in reply to a claim for specific performance if, at the date of the contract, its existence was unknown to the plaintiff as well as to the defendant (e).

The defect
must be
essential and
known to
plaintiff.

(s) As in *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505.

(t) As, for instance, the sale of leaseholds where the vendor is silent as to unusual and onerous covenants (*Hampshire v. Wickens* (1878), 7 Ch. D. 555; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487, C. A.), unless the purchaser ought himself to have ascertained their existence (*Reeve v. Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re White and Smith's Contract*, [1896] 1 Ch. 637), since it is the vendor's duty in a case relating to real estate to disclose any material defect not ascertainable in the ordinary course by the purchaser (*Carlsh v. Salt*, [1906] 1 Ch. 335; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; see title SALE OF LAND, Vol. XXV., pp. 297 *et seq.*; see also *Stevens v. Adamson* (1818), 2 Stark. 422 (fact of notice of re-entry not disclosed to purchaser of leaseholds); *Ballard v. Way* (1836), 1 M. & W. 520; *Heywood v. Mallatieu* (1883), 25 Ch. D. 357 (claim to an easement stated by vendor to be negligible); *Darlington v. Hamilton* (1854), Kay, 550 ("leaseholds" held by underlease, the head lease comprising other property); *Turner v. Turner*, [1881] W. N. 70; *Re Lloyds Bank, Ltd., and Lillington's Contract*, [1912] 1 Ch. 601).

(a) *Ayles v. Cox* (1852), 16 Beav. 23 (land sold as copyhold, actually freehold); compare *Stanton v. Tattersall* (1853), 1 Sm. & G. 529.

(b) *Shepherd v. Croft*, [1911] 1 Ch. 521; otherwise specific performance is granted with compensation; see pp. 99 *et seq.*, *post*.

(c) See *Ward v. Hobbs* (1878), 4 App. Cas. 13; *Baglehole v. Walters* (1811), 3 Camp. 154; *Pickering v. Dowson* (1813), 4 Taunt. 779. In such cases, however serious and latent the defect, the purchaser is bound, unless it has been concealed from him by some positive act (*Baglehole v. Walters*, *supra*; *Schneider v. Heath* (1813), 3 Camp. 506), or has been the subject of fraudulent misrepresentation (see pp. 42 *et seq.*, *ante*), or constitutes a breach of an express warranty; compare *Early v. Garret* (1829), 9 B. & C. 928; and see titles CONTRACT, Vol. VII., pp. 520, 521; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 682, 684, 685; SALE OF GOODS, Vol. XXV., pp. 149, 150; SALE OF LAND, Vol. XXV., pp. 298, 299.

(d) See, for instance, *Monro v. Taylor* (1852), 3 Mac. & G. 713 (property sold generally as freehold and leasehold, exact boundaries between the two tenures unascertainable); distinguish *Davis v. Shepherd* (1866), 1 Ch. App. 410.

(e) *Lucas v. James* (1849), 7 Hare, 410; but see *Hope v. Walter*, [1900] 1 Ch. 257, C. A., reversing S. C., [1899] 1 Ch. 879, where specific performance was refused of a sale of freeholds, which the lessee in fact used as a brothel, though the vendor was ignorant of it; the purchaser might have become subject to criminal proceedings; and see title SALE OF LAND, Vol. XXV., p. 298.

SECT. 8.
Non-Per-
formance
of Condi-
tions on
Plaintiff's
Part.

Failure to
be ready and
willing to
perform con-
tract.

Relief only
granted if
conditions
precedent
performed.

Condition
express or
implied.

SECT. 8.—*Non-performance of Conditions on Plaintiff's Part.*

SUB-SECT. 1.—*In General.*

90. A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract (*f*); subject to certain exceptions to be mentioned (*g*), any failure on his part bars his claim to specific performance (*h*).

SUB-SECT. 2.—*Conditions Precedent.*

91. The plaintiff must show performance or fulfilment of conditions precedent (*i*), whether to be performed by him or not, since until such performance or fulfilment the contract has not become absolute and the plaintiff is not entitled to enforce it (*k*). As illustrations of such conditions the following may be cited:—a condition to the taking of the lease of a public-house that the lessor should use his best endeavours to obtain a licence and that a licence should be obtained (*l*); a condition, in the case of a covenant to renew a lease, that repairing covenants should have been performed (*m*).

To be within the above rule a condition need not be express, but may be implied from the terms of the contract; thus, where a contract is to grant a lease to a nominee to be named by the plaintiff, his

(*f*) Compare *Measures Brothers, Ltd. v. Measures*, [1910] 2 Ch. 248, C. A.; *General Bill Posting Co., Ltd. v. Atkinson*, [1909] A. C. 118; and see *Statford v. Aldborough (Earl)* (1786), 1 Ridg. Parl. Cas. 287; *Acraman v. Price, Davies v. Price* (1870), 18 W. R. 540. Repudiation by the defendant does not excuse the plaintiff from showing performance or readiness to perform on his part; see *Ellis v. Rogers* (1884), 50 L. T. 660 (building lease).

(*g*) See pp. 56, 58, *post*.

(*h*) *Hooper v. Bromet* (1904), 90 L. T. 234, C. A. There is an apparent exception in cases where the separate parts of an agreement are severable and in truth amount to separate contracts: in such cases, failure by the plaintiff to fulfil conditions as to one part does not bar his claim for performance of a separate part, in respect of which he has fulfilled his obligations; see *Wilkinson v. Clements* (1872), 8 Ch. App. 96 (building agreement). As a rule, however, a contract must be specifically performed as a whole, or the court will entirely refuse to enforce it; see *Ford v. Stuart* (1852), 15 Beav. 493 (mortgage and settlement); *Wood v. Rowe* (1820), 2 Bli. 595, H. L. (agreement to settle litigation).

(*i*) As to conditions precedent generally, see title CONTRACT, Vol. VII., pp. 433 *et seq.*; see also title LANDLORD AND TENANT, Vol. XVIII., pp. 379, 380.

(*k*) *Scott v. Liverpool Corporation* (1858), 1 Giff. 216; affirmed 3 De G. & J. 334; *Abbot v. Blair* (1860), 8 W. R. 672; *Douglas v. Sidmouth Railway and Harbour Co.* (1866), 14 W. R. 361; compare *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575, 586.

(*l*) *Modlen v. Snowball* (1861), 29 Beav. 641; affirmed 4 De F. & J. 143. A different principle applies in the case of an existing licence where the contract contains no express condition (*Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705; compare *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73).

(*m*) *Bastin v. Bidwell* (1881), 18 Ch. D. 238; *Greville v. Parker*, [1910] A. C. 335, P. C. In *Stankey v. Barton*, [1909] 1 Ch. 284, no default was committed.

naming a nominee is a condition precedent (*n*): so also contracts relating to the purchase of lands and payment of compensation by railway companies may be treated as conditional on the construction of the line (*o*).

92. Non-performance of a condition precedent does not constitute a defence if performance has been waived by the party entitled to require it (*p*), provided the condition is solely for that party's benefit (*q*) and has been waived intentionally and with full knowledge (*r*).

93. A particular case in which non-performance of a condition by the plaintiff is a bar to his action is where he is a vendor of land suing for specific performance of the contract, but is unable to prove a good title (*s*). It is only here necessary to refer to the special rules adopted by the court in regard to cases where, while not deciding that the title is bad, the court considers that the title is doubtful, and on that ground ought not to be enforced upon an unwilling purchaser (*t*).

It is difficult to define with precision what degree of doubt as to the title will lead the court to refuse specific performance (*a*). The following rules, however, may be suggested (*b*):—

(1) Specific performance is refused when there is a probability of

SECT. 8.
Non-Per-
formance
of Condi-
tions on
Plaintiff's
Part.

Waiver by
defendant.

Sale of land:
proof of title.

Doubtful title
as a cause of
refusal of
relief.

Probable
litigation.

(*n*) *Williams v. Brisco* (1882), 22 Ch. D. 441, C. A.

(*o*) *Webb v. Direct London and Portsmouth Rail. Co.* (1852), 1 De G. M. & G. 521, C. A., reversing S. C. (1851), 9 Hare, 129; *Stuart (Lord James) v. London and North-Western Rail. Co.* (1852), 1 De G. M. & G. 721, C. A.; *Gage v. Newmarket Rail. Co.* (1852), 18 Q. B. 457; *Scottish North-Eastern Rail. Co. v. Stewart* (1859), 3 Macq. 382, H. L.; compare *Edinburgh, Perth and Dundee Rail. Co. v. Philip* (1857), 2 Macq. 514, H. L. The doubts expressed in *Hawkes v. Eastern Counties Rail. Co.* (1852), 1 De G. M. & G. 737; affirmed (1855), 5 H. L. Cas. 331, seem to refer rather to jurisdiction than construction.

(*p*) *Beatson v. Nicholson* (1842), 6 Jur. 620.

(*q*) *Hawksley v. Outram*, [1892] 3 Ch. 359, C. A.; compare *Lloyd v. Nowell*, [1895] 2 Ch. 744 (condition held not solely for plaintiff's benefit).

(*r*) *Darnley (Earl) v. London, Chatham and Dover Rail. Co. (Proprietors etc.)* (1867), L. R. 2 H. L. 43.

(*s*) As to title generally, see title SALE OF LAND, Vol. XXV., pp. 341 *et seq.*; as to the practice on reference of title, see pp. 85 *et seq.*, *post*.

(*t*) For a statement of the general principle, see *Re Nichols' and Van Joel's Contract*, [1910] 1 Ch. 43, C. A., *per* COZENS-HARDY, M.R., at p. 46; *Parker v. Tootal* (1865), 11 H. L. Cas. 143, *per* Lord WESTBURY, L.C., at p. 158; *Marlow v. Smith* (1723), 2 P. Wms. 198; *Shapland v. Smith* (1780), 1 Bro. C. C. 75; *Cooper v. Denne* (1792), 4 Bro. C. C. 80; 1 Ves. 565; *Sheffield v. Mulgrave (Lord)* (1795), 2 Ves. 526; *Roake v. Kidd* (1800), 5 Ves. 647; *Vancouver v. Bliss* (1805), 11 Ves. 458, 465; *Jervoise v. Northumberland (Duke)* (1820), 1 Jac. & W. 559, 568; *Willcox v. Bellaers* (1823), Turn. & R. 491. The practical justification of the rule is that the decision of the court in an action of specific performance would not bind third parties not present before the court; see *Osborne to Rowlett* (1880), 13 Ch. D. 774, *per* JESSEL, M.R., at p. 781; *Glass v. Richardson* (1852), 9 Hare, 698, *per* TURNER, V.-C., at p. 701; compare *Re Reilly and Brady's Contract*, [1910] 1 I. R. 258.

(*a*) As illustrating the difficulties felt by the court, see *Jervoise v. Northumberland (Duke)*, *supra*; *Sheffield v. Mulgrave (Lord)*, *supra*;

(*b*) For note (*b*) see p. 54, *post*.

SECT. 8.
Non-Per-
formance
of Condi-
tions on
Plaintiff's
Part.

Decision of
another court.

Ambiguous
document.

litigation owing to the chance of adverse claims by third parties against the purchaser, if this probability is great, and especially if the decision of such claims depends on disputed issues of fact (*c*). If, however, the probability of litigation against the purchaser is not great, the court enforces the contract (*d*).

(2) The existence of a decision of a court of co-ordinate jurisdiction which the court thinks wrong leads the court to refuse performance both where such decision is adverse to the title and where it is in favour of it (*e*). In the case of a decision of an inferior court which a higher court thinks wrong, the higher court does not treat the title as doubtful if the decision of the inferior court was adverse to the title (*f*), though, on the other hand, the title is treated as doubtful if the decision was in its favour (*g*).

(3) Where the title depends on the particular words of an inartistic and ambiguous document, the court treats the title as doubtful (*h*),

Braybroke (Lord) v. Inskip (1803), 8 Ves. 417, 428; *Pyrke v. Waddingham* (1852), 10 Hare, 1, 8; *Williams v. Scott*, [1900] A. C. 499, P. C.; *Price v. Strange* (1820), Madd. & G. 159; *Rogers v. Waterhouse* (1858), 4 Drew. 329; *Rose v. Calland* (1800), 5 Ves. 186; *Collier v. McBean* (1865), 1 Ch. App. 81; *Hamilton v. Buckmaster* (1866), L. R. 3 Eq. 323; see also *Mullings v. Trinder* (1870), L. R. 10 Eq. 449; *Bull v. Hutchens* (1863), 32 Beav. 615; *Wrigley v. Sykes* (1856), 21 Beav. 337; *Highgate Archway Co. v. Jeakes* (1871), L. R. 12 Eq. 9; *Bell v. Holtby* (1873), L. R. 15 Eq. 178; *Austin v. Tawney* (1867), 2 Ch. App. 143; *Wise v. Piper* (1880), 13 Ch. D. 848; *Beioley v. Carter* (1869), 4 Ch. App. 230; *Alexander v. Mills* (1870), 6 Ch. App. 124; *Radford v. Willis* (1871), 7 Ch. App. 7, reversing S. C. (1871), L. R. 12 Eq. 105; *Palmer v. Locke* (1881), 18 Ch. D. 381, C. A. The doubt which influences the court may be one of general law (*Sloper v. Fish* (1813), 2 Ves. & B. 145; *Blosse v. Clanmorris (Lord)* (1821), 3 Bli. 62, H. L.; *Re Thackwray and Young's Contract* (1888), 40 Ch. D. 34), or of the construction of the particular documents (*Lincoln (Earl) v. Arcedeckne* (1844), 1 Coll. 98; *Bristow v. Wood* (1844), 1 Coll. 480), or of facts on the title or extrinsic thereto (*Pyrke v. Waddingham, supra*); and the facts may be doubtful either as not being satisfactorily established (*Smith v. Death* (1820), 5 Madd. 371), or as being negative and not admitting of satisfactory proof (*Lowes v. Lush* (1808), 14 Ves. 547).

(b) See Fry on Specific Performance, 5th ed., p. 437.

(c) *Cattell v. Corral* (1840), 4 Y. & C. (EX.) 228, 237; *Price v. Strange, supra*; *Sharp v. Adcock* (1828), 4 Russ. 374; *Heseltine v. Simmons* (1858), 6 W. R. 268; *Pegler v. White* (1864), 33 Beav. 403; *Potter v. Parry* (1859), 7 W. R. 182; *Burnell v. Firth* (1867), 15 W. R. 546; compare *Williams v. Scott, supra*; *Re New Land Development Association and Gray*, [1892] 2 Ch. 138, C. A.; *Re Calcott and Elvin's Contract* (1898), 67 L. J. (CH.) 327. As further illustrations, see *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; *Re Hollis' Hospital (Trustees) and Hague's Contract*, [1899] 2 Ch. 540; *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202; *Re Verrell's Contract*, [1903] 1 Ch. 65.

(d) *Lyddall v. Weston* (1740), 2 Atk. 19 (mathematical certainty impossible); *Seaman v. Vawdrey* (1810), 16 Ves. 390, 393; *Martin v. Cotter* (1846), 3 Jo. & Lat. 496; *Spencer v. Topham* (1856), 22 Beav. 573; *Falkner v. Equitable Reversionary Society* (1858), 4 Drew. 352; *Noyes v. Paterson*, [1894] 3 Ch. 267; *Hepworth v. Pickles*, [1900] 1 Ch. 108; *Re Summerson, Downie v. Summerson* (1899), [1900] 1 Ch. 112, n. In *George v. Thomas* (1904), 90 L. T. 505, the action was adjourned to give a third person, who was a claimant, an opportunity of establishing his claim.

(e) *Mullings v. Trinder, supra*.

(f) *Sheppard v. Doolan* (1842), 3 Dr. & War. 1, 8; *Beioley v. Carter, supra*.

(g) *Mullings v. Trinder, supra*.

(h) *Alexander v. Mills* (1870), 6 Ch. App. 124, per JAMES, L.J., at p. 132.

but not if the difficulty can be solved by the application of general rules of construction (*i*), or if it depends on the general law of the land (*j*).

(4) Where the proof of the title depends on doubtful facts as to which no clear presumption in favour of the title can be drawn (*k*), or as to which the presumption, though not necessarily conclusive, is adverse (*l*), the title is treated as doubtful: but the title is not treated as doubtful where there is a presumption in favour of the facts supporting the title (*m*), or where the objection amounts simply to a suspicion of bad faith, so that the presumption in favour of good faith may be invoked (*n*).

94. The court has in certain cases compelled a purchaser to take a title depending on adverse possession (*o*); but he was not compelled to take a leap in the dark (*p*). In those cases, objections apparent on the face of the title as shown were covered by the possession (*q*).

95. Performance of a condition may have become impossible by reason of events subsequent to the contract (*r*). Again, matters subsequent to the making of the contract may determine the existence of the contract on the ground of express or implied

SECT. 8.
Non-Per-
formance
of Condi-
tions on
Plaintiff's
Part.

Presumption
not in favour
of title.

Title depend-
ing on adverse
possession.

Supervening
circumstances.

(*i*) *Radford v. Willis* (1871), 7 Ch. App. 7.

(*j*) *Alexander v. Mills* (1870), 6 Ch. App. 124; *Forster v. Abraham* (1874), L. R. 17 Eq. 351; *Osborne to Rowlett* (1880), 13 Ch. D. 774; *Re Thompson and M'Williams' Contract*, [1896] 1 I. R. 356; *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, C. A., overruling *Re Briggs and Spicer*, [1891] 2 Ch. 127; compare *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, 609, C. A.; *Mogridge v. Clapp*, [1892] 3 Ch. 382, C. A.

(*k*) *Lowes v. Lush* (1808), 14 Ves. 547 (no creditor able to take advantage of act of bankruptcy); *Freer v. Hesse* (1853), 4 De G. M. & G. 495, C. A. (absence of notice of incumbrance); *Eyton v. Dicken* (1817), 4 Price, 303 (presumption from mere fact of possession); *Re Handman and Wilcox's Contract*, *supra* (absence of notice); *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296 (complicated and ambiguous facts). The same principle is illustrated by the old rules as to a title depending on the invalidity of a voluntary settlement, as to which see the cases cited in title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 100, note (*t*).

(*l*) *Warde v. Dixon* (1858), 28 L. J. (CH.) 315.

(*m*) *Emery v. Grocock* (1821), Madd. & G. 54; *Barnwell v. Harris* (1809), 1 Taunt. 430; *Prosser v. Watts* (1821), Madd. & G. 59; *Causton v. Macklew* (1828), 2 Sim. 242; *Magennis v. Fallon* (1829), 2 Moll. 561.

(*n*) *Cattell v. Carrall* (1840), 4 Y. & C. (EX.) 228, criticising *dicta* in *Hartley v. Smith* (1819), Buck, 368; *M'Queen v. Farquhar* (1805), 11 Ves. 467; *Green v. Pulsford* (1839), 2 Beav. 70; *Grove v. Bastard* (1848), 2 Ph. 619; (1851), 1 De G. M. & G. 69; *Re Huish's Charity* (1870), L. R. 10 Eq. 5; *Alexander v. Mills*, *supra*. Where title depends on a will, the absence of the heir and the fact that the will has not been proved against him are not in themselves enough to prevent performance; see *Colton v. Wilson* (1733), 3 P. Wms. 190; *Morrison v. Arnold* (1813), 19 Ves. 670; *Weddall v. Nixon* (1853), 17 Beav. 160.

(*o*) *Scott v. Nixon* (1843), 3 Dr. & War. 388.

(*p*) *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, 402; affirmed, [1906] 1 Ch. 386, C. A.; see title SALE OF LAND, Vol. XXV., p. 351, note (*g*).

(*q*) *Games v. Bonnor* (1884), 54 L. J. (CH.) 517, C. A.; *Re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1, C. A.; and see, further, title LIMITATION OF ACTIONS, Vol. XIX., pp. 155, 156.

(*r*) From such cases must be distinguished those in which no contract has ever come into existence by reason of mistake, the parties having con-

SECT. 8.
Non-Per-
formance
of Condi-
tions on
Plaintiff's
Part.

Effect of sub-
sequent
impossibility.

terms (*s*), such as destruction of the subject-matter (*t*), subsequent illegality (*a*), or non-existence of a state of things in contemplation of which the parties mutually contracted so that the contract is conditional thereon (*b*). On the other hand, the contract may be such that the subsequent events do not affect the validity of the contract, which is absolute apart from them, or the right to specific performance; thus, a contract for the sale of a house is not affected because, before completion, the house is burnt down (*c*), and the same principle applies to the purchase of an annuity (*d*) or of shares in a company which is wound up after the date of the contract but before completion (*e*). Where the impossibility, though of a nature to affect the right to performance, relates to subsidiary matters or merely to literal fulfilment, the court seeks to grant performance with compensation (*f*). Similarly, if after substantial performance by a plaintiff of his obligation it has, without any default on his part, become impossible for him to make complete performance, but he has altered his position by the previous performance, the court enforces performance by the other party; but not if the plaintiff's position has not been altered by his actual performance (*g*).

tracted with reference to a state of things which at the date of the contract did not exist, so that the contract is thereby void; see title MISTAKE, Vol. XXI., pp. 7, 8; and compare the similar rule at common law where specific goods are sold which at the date of the contract do not exist, the parties being ignorant; see title SALE OF GOODS, Vol. XXV., p. 145. The parties may, however, have expressly contracted so as to exclude any such question (*Hanks v. Pulling* (1856), 6 E. & B. 659).

(*s*) Compare *Krell v. Henry*, [1903] 2 K. B. 740, C. A.; and, as to the whole question of such impossibility of performance, see title CONTRACT, Vol. VII., pp. 426 *et seq.*

(*t*) *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Howell v. Coupland* (1876), 1 Q. B. D. 258, C. A.

(*a*) *Atkinson v. Ritchie* (1809), 10 East, 530; *Barker v. Hodgson* (1814), 3 M. & S. 267; *Esposito v. Bowden* (1855), 4 E. & B. 963; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180.

(*b*) *Krell v. Henry*, *supra*; *Chandler v. Webster*, [1904] 1 K. B. 493, C. A.; *Elliott v. Crutchley*, [1906] A. C. 7; *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K. B. 683, C. A.

(*c*) *Harford v. Purrier* (1816), 1 Madd. 532, 538 (a good title must eventually be made out); distinguish *Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83, where the contract was conditional on completion of a warehouse, and the fire occurred before that was done. As to the general principle, see also *Revell v. Hussey* (1813), 2 Ball & B. 280, 287; *Paine v. Meller* (1801), 6 Ves. 349. As to the position as between vendor and purchaser in the case of loss by fire of property subject to a contract still *in fieri*, see titles INSURANCE, Vol. XVII., pp. 520, 521; SALE OF GOODS, Vol. XXV., p. 224; SALE OF LAND, Vol. XXV., p. 369.

(*d*) *Mortimer v. Capper* (1782), 1 Bro. C. C. 156; *Jackson v. Lever* (1792), 3 Bro. C. C. 605. *Pope v. Roots* (1774), 1 Bro. Parl. Cas. 370, seems to have been decided on the ground of hardship. As to the enforcement of agreements to grant rentcharges, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 472.

(*e*) As further illustrations of the same principle, see *Carter v. Carter* (1733), Cas. temp. Talb. 271; *Akhurst v. Jackson* (1818), 1 Swan. 85; compare *Coles v. Trecothick* (1804), 9 Ves. 234, 246.

(*f*) *Norris v. Jackson* (1862), 3 Giff. 396; see pp. 99 *et seq.*, *post*.

(*g*) See Gilbert, History and Practice of Chancery, pp. 240—242, citing *Faversham (Earl) v. Watson* (1680), Cas. temp. Finch, 445; *Medith v.*

SUB-SECT. 3.—*Obligations of Plaintiff.*

96. In addition to conditions (*h*), the plaintiff must also show performance by him of all terms of the contract which he has undertaken to perform, whether expressly or by implication (*i*), and which he ought to have performed at the date of the writ in the action. This rule, however, only applies to terms which are essential and considerable (*k*). The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term (*l*), though in such cases it may grant compensation (*m*).

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim (*n*).

97. If representations as to future acts have been made by the plaintiff, though not embodied in the contract as conditions or terms, and the contract has been concluded on the faith of them, he is not granted specific performance if the representations have not been fulfilled (*o*).

SECT. 8.

Non-Performance of Conditions on Plaintiff's Part.

Effect of non-performance of terms of contract.

Undertaking to perform not accepted.

Representations as to future acts.

Wynn (1711), 1 Eq. Cas. Abr. 70; see also 1 Fonblanque, Treatise of Equity, Book 1, c. 6, s. 3; Story, s. 772.

(*h*) As to conditions, see pp. 52 *et seq.*, *ante*.

(*i*) *Tildesley v. Clarkson* (1862), 30 Beav. 419; distinguish *Chappell v. Gregory* (1864), 34 Beav. 250, where no such term was held to be implied.

(*k*) *Modlen v. Snowball* (1861), 4 De G. F. & J. 143; *Reeves v. Greenwiche Tanning Co., Ltd.* (1864), 2 Hem. & M. 54.

(*l*) Though the plaintiff might on that ground have failed in an action at law (*Davis v. Hone* (1805), 2 Sch. & Lef. 341, 347; see *Lord v. Stephens* (1835), 1 Y. & C. (EX.) 222; *Craven v. Tickell* (1789), 1 Ves. 60 (small deviation from agreed plan)). *Oxford v. Provand* (1868), L. R. 2 P. C. 135, ought, it seems, to be considered as emphasising the distinction between essential and non-essential terms.

(*m*) See pp. 99 *et seq.*, *post*.

(*n*) *Williams v. Brisco* (1882), 22 Ch. D. 441, C. A.; compare *Holmes v. Trench*, [1898] 1 I. R. 319.

(*o*) *Lamare v. Dixon* (1873), L. R. 6 H. L. 414. This is so although the representations do not constitute a guarantee, and would not justify an action at law for their non-performance; see *Beaumont v. Dukes* (1822), Jac. 422, where the vendor represented that he would improve the access to the property; *Myers v. Watson* (1851), 1 Sim. (N. S.) 523, where the vendor represented that a church would be built. Where a plan is exhibited by the vendor at the time of the contract showing a contemplated arrangement of roads, the vendor is not entitled to change that arrangement so as to attract a different population, though the contract is silent on the point (*Peacock v. Penson* (1848), 11 Beav. 355; distinguish *Whitehouse v. Hugh*, [1906] 2 Ch. 283, C. A., where there was express power to depart from the plan). But the exhibition of such a plan, if it is not referred to in the formal contract, does not constitute a contractual obligation (*Heriot's Hospital (Feoffees) v. Gibson* (1814), 2 Dow. 301, H. L.; *Squire v. Campbell* (1836), 1 My. & Cr. 459; distinguish *Nene Valley Drainage Commissioners v. Dunkley* (1876), 4 Ch. D. 1, C. A., where the plan was held to be incorporated in the contract; *Re Lindsay and Forder's Contract* (1895), 72 L. T. 832; *Gordon Cumming v. Houldsworth*, [1910] A. C. 537), and an exact performance of what appears on such a plan cannot be demanded (*Nurse v. Seymour (Lord)* (1851), 13 Beav. 254; *Tucker v. Fowles*, [1893] 1 Ch. 195, 208; *Randall v. Hall* (1851), 4 De G. & Sm. 343).

SECT. 8.
Non-performance
of Conditions on
Plaintiff's
Part.

Separate
and collateral
contract.

Waiver or
wrongful act
of defendant.

Terms and
conditions
in futuro.

Effect of
bankruptcy.

98. Where the plaintiff's non-performance is of a separate and collateral contract, although relating to the same subject-matter and entered into simultaneously with the agreement which it is sought to enforce, it does not constitute a defence (*p*): thus, there may be independent (*q*) covenants in the same contract or deed, non-performance of one of which does not prevent enforcement of performance of the other (*r*).

99. Non-performance by the plaintiff cannot be relied on by the defendant where he has waived performance (*s*), or where it has been caused by breach of contract or by prevention on the part of the defendant (*t*).

100. Not only must the plaintiff have performed, or been ready to perform, all terms and conditions performance of which was due before or at the date of the writ in the action, but he must be ready and willing to perform terms and conditions to be fulfilled in future under the contract; thus, the commission of an act of bankruptcy by the plaintiff prevents him from enforcing a contract of sale, either as purchaser or vendor; in the former case, because he may not be able to pay the money (*a*), in the latter case, because he may not be capable of conveying the estate (*b*). Similarly, a trustee in bankruptcy is unable to enforce a contract of the debtor involving onerous covenants, unless on the terms of the trustee assuming

The rule as to plans applies similarly to private Acts of Parliament (*North British Rail. Co. v. Tod* (1846), 12 Cl. & Fin. 722, H. L.; *Beardmer v. London and North Western Rail. Co.* (1849), 1 Mac. & G. 112; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 22, 23), unless the plan is incorporated and referred to, when effect must be given to it accordingly (*A.-G. v. Tewkesbury and Malvern Rail. Co.* (1863), 1 De G. J. & Sm. 423, C. A.; *Little v. Newport, Abergavenny and Hereford Rail. Co.* (1852), 12 C. B. 752).

(*p*) *Phipps v. Child* (1857), 3 Drew. 709; as to the cases where a contract is entered into in consideration of a collateral antecedent contract, compare title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447.

(*q*) As to dependent and independent covenants generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 489 *et seq.*

(*r*) *Green v. Low* (1856), 22 Beav. 625 (contract for lease, and also for option to purchase, held independent); compare *Raffety v. Schofield*, [1897] 1 Ch. 937; *Starkey v. Barton*, [1909] 1 Ch. 284; see also *Gibson v. Goldsmid* (1854), 5 De G. M. & G. 757, C. A., reversing S. C. (1853), 18 Beav. 584; distinguish *Measures Brothers, Ltd. v. Measures*, [1910] 2 Ch. 248, C. A. (interdependent covenants). Breach of an intended covenant in a lease may prevent a lessee obtaining a lease (*Coatsworth v. Johnson* (1886), 55 L. J. (Q. B.) 220, C. A.); see title LANDLORD AND TENANT, Vol. XVIII., pp. 367, 540.

(*s*) *Lamare v. Dixon* (1873), L. R. 6 H. L. 414; see *Strong v. Stringer* (1889), 61 L. T. 470 (acceptance of rent after breach of covenant).

(*t*) *Hotham v. East India Co.* (1787), 1 Term Rep. 638; *Murrell v. Goodyear* (1860), 1 De G. F. & J. 432, C. A. (purchaser preventing vendor from completing title); and see title CONTRACT, Vol. VII., pp. 423, 436.

(*a*) *Franklin v. Brownlow* (Lord) (1808), 14 Ves. 550.

(*b*) *Lowes v. Lush* (1808), 14 Ves. 547; *McNally v. Gradwell* (1866), 16 L. Ch. R. 512. So also where the act of bankruptcy by the vendor was committed after the contract was signed but before the date of completion (*Powell v. Marshall, Parkes & Co.*, [1899] 1 Q. B. 710, C. A.); see title SALE OF LAND, Vol. XXV., pp. 383, 403.

personal liability for such covenants (*c*). Performance is enforced against a vendor's trustee in bankruptcy (*d*), but not against the purchaser's trustee (*e*).

In the same way, a plaintiff, though he is not bankrupt and has not assigned his property for the benefit of his creditors, may be disentitled to performance on the ground that he is insolvent and unable to perform the obligations resting on him (*f*). If the contract has been assigned, the material insolvency in a case of this nature is that of the assignee, not that of the assignor (*g*).

The felony of a plaintiff would also bar specific performance (*h*).

Inability of a vendor to produce the deeds of the property may prevent him from enforcing the contract (*i*).

SECT. 8.
Non-performance of Conditions on Plaintiff's Part.

Insolvency.

Conviction.

Inability to produce deeds.

SECT. 9.—Repudiation by Plaintiff.

101. It is obvious that a plaintiff who has expressly and in terms repudiated his obligations under the contract is debarred from claiming specific performance of the contract by the other party (*k*). The same principles apply where the plaintiff, though he has not in express terms refused to perform his part of the contract, has done acts which evince an intention no longer to be bound thereby, and which amount to a complete and total repudiation of everything which has to be done by him (*l*). Thus, where an employer has wrongfully dismissed his servant, he is not allowed to enforce against the servant, by specific performance or injunction, a restrictive covenant contained in the contract of employment (*m*).

Effect of repudiation by plaintiff.

(*c*) *Re Changeur, Ex parte Sutton* (1814), 2 Rose, 86; *Willingham v. Joyce* (1796), 3 Ves. 168; *Powell v. Lloyd* (1828), 2 Y. & J. 372; *Weatherall v. Geering* (1806), 12 Ves. 513; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 162, note (*h*). Where it is sought to enforce the covenant against the trustee, he need only covenant to bind the property, not himself personally (*Stephens v. Hotham* (1855), 1 K. & J. 571); and see title LANDLORD AND TENANT, Vol. XVIII., p. 380.

(*d*) *Pearce v. Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122; *Re Taylor, Ex parte Norvell*, [1910] 1 K. B. 562, C. A. (where the purchaser was allowed to set off against the purchase price a debt due to him by the bankrupt).

(*e*) *Holloway v. York* (1877), 25 W. R. 627. This follows from the trustee's right of disclaiming onerous contracts; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191 *et seq.*

(*f*) *Crosbie v. Tooke* (1833), 1 My. & K. 431; *Price v. Assheton* (1835), 1 Y. & C. (EX.) 441; *Neale v. Mackenzie* (1837), 1 Keen, 474; *Willingham v. Joyce* (1796), 3 Ves. 168; *M'Nally v. Gradwell* (1866), 16 I. Ch. R. 512; compare *Buckland v. Hall* (1803), 8 Ves. 92. The above cases refer to, but do not decide, the effect of insolvency followed by affluence.

(*g*) *Crosbie v. Tooke*, *supra*.

(*h*) *Willingham v. Joyce*, *supra*. As to actions by convicts, see title PRISONS, Vol. XXIII., p. 252, note (*t*).

(*i*) *Bryant v. Busk* (1827), 4 Russ. 1. Secondary evidence may, however, supply the defect; see *Moulton v. Edmonds* (1859), 1 De G. F. & J. 246; and title SALE OF LAND, Vol. XXV., p. 350.

(*k*) Compare pp. 52 *et seq.*, *ante*; and the text, *supra*.

(*l*) See titles CONTRACT, Vol. VII., p. 423; INJUNCTION, Vol. XVII., p. 247; and see *Freeth v. Burr* (1874), L. R. 9 C. P. 208, 213; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434.

(*m*) See the cases cited in title MASTER AND SERVANT, Vol. XX., p. 96, note (*b*); see also *ibid.*, p. 110, note (*g*); and see titles INJUNCTION, Vol. XVII., p. 247; TRADE AND TRADE UNIONS, p. 581, *post*.

SECT. 10.
Acts by
Plaintiff
Incon-
sistent with
Contract.

Effect of acts
done in con-
travention
of contract.

Acts neces-
sary to bar
relief.

SECT. 10.—*Acts by Plaintiff Inconsistent with Contract.*

102. Where a plaintiff claiming specific performance is not merely in default under the contract, but has actually done acts in contravention of its terms, the court may refuse to enforce the contract in his favour; thus, where a vendor, who has agreed to give immediate possession, retakes possession, he is not entitled to specific performance (*n*). Similarly, in the case of an agreement for a lease, where the lessee commits breaches of the terms of the agreement, such as waste (*o*), failure to insure or repair (*p*), or, if the agreement is for a sub-lease, knowingly commits acts which are inconsistent with the covenants of the head lease (*q*), the contract is not enforced (*r*). So, also, a covenant to renew is not enforced where the lessee has been guilty of breaches of the expiring lease (*s*).

It has been said that such acts, to constitute a bar to specific performance, must be gross and wilful (*t*); and in the case of leases they must, as a rule, be not only such as would work a forfeiture of the legal interest, but also such that the court would not relieve against the forfeiture (*u*).

(*n*) *Knatchbull v. Grueber* (1815), 1 Madd. 153; (1817), 3 Mer. 124; compare *Royou v. Paul* (1858), 28 L. J. (CH.) 555 (vendor giving notice of intention to resell), explained in *Laughton v. Port Erin Commissioners*, [1910] A. C. 565, P. C.; *Bedford and Cambridge Rail. Co. v. Stanley* (1862), 2 John. & H. 746 (railway company agreeing to purchase land, then resorting to compulsory powers: held, that such resort was inconsistent with the agreement and a bar to the company's enforcing it); and see *Blackett v. Bates* (1865), 1 Ch. App. 117, where it was doubted whether proceedings to set aside an award would not be a bar to a subsequent claim to enforce it specifically.

(*o*) See *Hill v. Barclay* (1811), 18 Ves. 56, 63; *Lewis v. Bond* (1853), 18 Beav. 85; *Gregory v. Wilson* (1852), 9 Hare, 683; and see title LANDLORD AND TENANT, Vol. XVIII., p. 380. Apparently, a gross case of waste would have this result even in a case where the lease, if executed, would not have contained a proviso for re-entry (*Gourlay v. Somerset (Duke)* (1812), 1 Ves. & B. 68, 73).

(*p*) *Gregory v. Wilson*, *supra*; *Nunn v. Truscott* (1849), 3 De G. & Sm. 304.

(*q*) *Lewis v. Bond*, *supra*.

(*r*) In certain cases where breaches had been alleged, the court while granting specific performance ordered execution of the lease as at the date of the contract, the lessee undertaking to admit that the lease was executed on that date so that the question of the alleged breaches could be tried in an action at law. Probably under the modern practice the court would decide the whole case (*Pain v. Coombs* (1857), 1 De G. & J. 34, C. A.; *Lillie v. Legh* (1858), 3 De G. & J. 204, C. A.; *Rankin v. Lay* (1860), 2 De G. F. & J. 65; *Poyntz v. Fortune* (1859), 27 Beav. 393; *Browne v. Sligo (Marquis)* (1859), 10 L. Ch. R. 1; *Cartan v. Bury* (1860), 10 L. Ch. R. 387; *Fry on Specific Performance*, 5th ed., p. 479); but see *M'Iroy v. Traill*, [1898] 1 L. R. 459.

(*s*) *Thompson v. Guyon* (1831), 5 Sim. 65; *Greville v. Parker*, [1910] A. C. 335, P. C.; see title LANDLORD AND TENANT, Vol. XVIII., pp. 462, 463.

(*t*) *Parker v. Taswell* (1858), 2 De G. & J. 559; *Hare v. Burges* (1857), 5 W. R. 585.

(*u*) As to relief against forfeiture, see title LANDLORD AND TENANT, Vol. XVIII., pp. 539 *et seq.*

Specific performance is not refused where the wrongful acts have been waived (*a*), or are trifling in character (*b*), or, in the case of leases, such that the court would relieve against a forfeiture of the legal estate (*c*).

SECT. 10.
Acts by
Plaintiff
Incon-
sistent with
Contract.

SECT. 11.—*Personal Incapacity of Defendant to Make or Perform the Contract.*

103. The legal incapacity of the defendant to bind himself by contract is a defence to an action for specific performance. What constitutes incapacity in various cases is discussed elsewhere (*d*).

Legal
incapacity.

104. Even where the defendant was at the time of the contract possessed of legal capacity to contract, he may by supervening causes have become incapable in law of performing what he has contracted to do, and on this ground an action for specific performance will fail (*e*).

Supervening
incapacity.

SECT. 12.—*Performance by Defendant Impossible by Reason of Circumstances.*

105. Impossibility of performance by the defendant is a defence to a claim for specific performance, even though the contract is unconditional both in terms and in intention (*f*), and even

Impossibility
and the time
for deter-
mining it.

(*a*) See *Gregory v. Wilson* (1852), 9 Hare, 683; compare *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167 (failure to complain before action).

(*b*) *Besant v. Wood* (1879), 12 Ch. D. 605 (separation deed); see *Holmes v. Eastern Counties Rail. Co.* (1857), 3 Jur. (N. S.) 737; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Parker v. Taswell* (1858), 2 De G. & J. 559; *Gorton v. Smart* (1822), 1 Sim. & St. 66; *Hare v. Burges* (1857), 5 W. R. 585; *Trant v. Dwyer* (1828), 2 Bli. (N. S.) 11, H. L.

(*c*) *Parker v. Taswell*, *supra*. As to relief against forfeiture, see titles EQUITY, Vol. XIII., pp. 153, 154; LANDLORD AND TENANT, Vol. XVIII., pp. 539 *et seq.*

(*d*) See, generally, title CONTRACT, Vol. VII., pp. 341, 342; as to incapacity in specified cases, see titles ALIENS, Vol. I., pp. 310, 311; BANKRUPTCY AND INSOLVENCY, Vol. II., p. 268; COMPANIES, Vol. V., pp. 285 *et seq.*, 301, 302; CORPORATIONS, Vol. VIII., pp. 379, 385, 386; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*; INFANTS AND CHILDREN, Vol. XVII., pp. 63 *et seq.*, 67, 73, 74, 80; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.* As to enforcing against corporations contracts not under seal when there has been part performance, see titles CORPORATIONS, Vol. VIII., pp. 385, 386; LOCAL GOVERNMENT, Vol. XIX., p. 268; *Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sm. 475, 476, C. A.; *Crook v. Seaford Corporation* (1871), L. R. 10 Eq. 678; *Marshall v. Queenborough Corporation* (1823), 1 Sim. & St. 520; *Hoare v. Kingsbury Urban Council*, [1912] 2 Ch. 452 (where part performance was held not to prevent the application of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174).

(*e*) For instance, a contract to convey land may become incapable of performance through the contractor becoming insane and unable to execute a personal covenant for quiet enjoyment; see *Re Pagani (a Person of Unsound Mind)*, *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A., where, however, the court made a vesting order. As to cases of contracting parties becoming alien enemies, see titles ALIENS, Vol. I., p. 310; CONFLICT OF LAWS, Vol. VI., p. 232, 233; bankrupts, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 60 *et seq.*; felons, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429. As to the vesting of a convict's property, see *ibid.*, pp. 429 *et seq.*; title PRISONS, Vol. XXIII., pp. 261 *et seq.*

(*f*) *Columbine v. Chichester* (1846), 2 Ph. 27 (claim against company for delivery of scrip certificates: dismissed on ground that there was no

SECT. 12.
Perform-
ance by
Defendant
Impossible
by Reason
of Circum-
stances.

Impossibility
not relating to
substance.

though the impossibility is due to the defendant's own act (*g*). The time at which such impossibility is to be judged is the proper time for performance, not the date of the contract (*h*).

If, however, the impossibility does not relate to the substance of the contract, the court may order the defendant to perform it so far as he can (*i*) and pay compensation for the part unperformed (*k*).

allegation that company had scrip to deliver); compare *Green v. Smith* (1738), 1 Atk. 572, 573; *Ferguson v. Wilson* (1866), 2 Ch. App. 77; *Smith v. Morris* (1788), 2 Bro. C. C. 311 (covenant to work colliery); *Denton v. Stewart* (1786), 1 Cox, Eq. Cas. 258 (sale by vendor to third person); *Hallett v. Middleton* (1826), 1 Russ. 243 (claim for production of deeds not in defendant's power); *Ellis v. Colman, Bates and Husler* (1858), 25 Beav. 662 (contract by directors contrary to law); *Wycombe Rail. Co. v. Donnington Hospital* (1866), 1 Ch. App. 268 (contract by charitable body without necessary consents); *Howell v. George* (1815), 1 Madd. 1 (vendor of fee in fact only tenant for life); *Beister v. Stutely* (1858), 27 L. J. (CH.) 156 (agreement for lease, refusal of existing lessee to surrender); *Castle v. Wilkinson* (1870), 5 Ch. App. 534 (refusal by wife to convey real estate, her separate property, under a contract by her and her husband: claim for specific performance against husband dismissed). As to the earlier practice of decreeing against the husband that he obtain the wife's consent or be committed, see *Morris v. Stephenson, Stephenson v. Morris* (1802), 7 Ves. 474; as to the later practice to refuse to interfere where the wife declined to consent, see *Emery v. Wase* (1803), 8 Ves. 505.

(*g*) See *Seawell v. Webster* (1859), 29 L. J. (CH.) 71, *per* KINDERSLEY, V.-C., at p. 73. Where an action for damages is brought at law on a contract, the fact that performance has become impossible is only a defence if, by the express terms of the contract, or by reason of a term which is implied from the nature of the case as intended by the parties, supervening impossibility constitutes an excuse for non-performance: otherwise, notwithstanding the impossibility, the defendant is liable in damages; see title CONTRACT, Vol. VII., pp. 426 *et seq.*

(*h*) For instance, if a man enters into a contract which at the time he is not able to perform, but afterwards becomes able to do so, he is bound to perform it; thus, a person may contract to convey an estate on a future day though he is not owner of the estate at the date of the contract, or similarly may contract to sell goods which are not then his property; such contracts would be enforced if the vendor has become possessed of the land or goods; see *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Carne v. Mitchell* (1846), 10 Jur. 909; *Browne v. Warner* (1808), 14 Ves. 409, 412; titles SALE OF GOODS, Vol. XXV., pp. 144, 171; SALE OF LAND, Vol. XXV., p. 342; and as to the validity of such contracts at law, see *De Medina v. Norman* (1842), 9 M. & W. 820; *Hibblewhite v. M'Morine* (1839), 5 M. & W. 462; *Cuddee v. Rutter* (1722), 5 Vin. Abr. 538, pl. 21 (which appears inconsistent with the later authorities); and compare *Clayton v. Newcastle (Duke)* (1682), 2 Cas. in Ch. 112. Similarly, where contracts dealing with property require parliamentary sanction for their performance, the court protects the property while the sanction is being obtained (*Great Western Rail. Co. v. Birmingham and Oxford Junction Rail. Co.* (1848), 2 Ph. 597; *Hawkes v. Eastern Counties Rail. Co.* (1852), 1 De G. M. & G. 737; *Devenish v. Brown* (1857), 2 Jur. (N. S.) 1043; *Frederick v. Coxwell* (1829), 3 Y. & J. 514). In *Walker v. Barnes* (1818), 3 Madd. 247, where an indemnity was to be secured on real estate, the court rejected the plea that the contractor had not sufficient realty, and ordered him to purchase sufficient to enable him to give the security; compare *Carey v. Stafford* (1725), 3 Swan. 427, n.

(*i*) *Errington v. Aynsley* (1788), 2 Bro. C. C. 341 (contract to build a bridge where foundations impossible: relief on building bridge on nearest possible site, and making compensation); compare *Paxton v. Newton*

(*k*) For note (*k*) see p. 63, *post*.

Similarly, if though the substance of a contract is legal it involves elements of illegality, the court may model a contract so as to obviate the objection of illegality and order performance of the contract as so modelled (*l*). The same principle has also been applied when the specific performance of the contract literally would have been refused on grounds other than illegality (*m*).

106. Where a contract is in the alternative, the contractor having the option which alternative he will perform, and one alternative becomes impossible, different rules apply according to the nature of the case (*n*):—

(1) If at the date of the contract one alternative is impossible or void, the contractor must perform the other (*o*).

(2) If both are possible at the date of the contract, but subsequently one alternative is rendered impossible by the act of God, it depends on the intention of the parties whether the contractor can be compelled to perform the other (*p*).

(3) Where one alternative has been rendered impossible by the act of the contractee, the contractor is entirely absolved (*q*).

(4) Where one alternative has been prevented by the act of a stranger, the contractor must perform the other (*r*).

(1854), 2 Sm. & G. 437 (apparently, a contract by a copyholder to grant a lease longer than the customary term is enforceable by an order that he executes leases from time to time to complete the term); *A.-G. v. Day* (1749), 1 Ves. Sen. 218, *per* Lord ELDON, L.C., at p. 224 (apparently, on the death of one tenant in common who has joined with the other tenant in a contract to convey an estate, the survivor may be ordered to convey a moiety on payment of one half of the purchase price); *Barnes v. Wood* (1869), L. R. 8 Eq. 424 (contract of husband to sell fee of wife's land).

(*k*) As to compensation, see pp. 99 *et seq.*, *post*.

(*l*) As to illegality generally, see p. 36, *ante*. The substance of the contract must be legal; see *Jenkins v. Green* (No. 2) (1859), 27 Beav. 440 (incumbent with statutory power to grant lease at quarterly rent, agreed to grant lease at rent payable half-yearly: held, that the agreement as to rent was a substantial part of the contract, and the court refused to re-model the agreement so as to make the rent payable quarterly): but where a lessee contracted to pay a sum for rent and also the tithe rent-charge, the court treated both sums as payable by way of rent, though it was unlawful to stipulate that a tenant should pay the tithe rentcharge (*Carolan v. Brabazon* (1846), 3 Jo. & Lat. 200); compare *Bettesworth v. St. Paul's* (*Dean and Chapter*) (1728), 1 Bro. Parl. Cas. 240; and see title LANDLORD AND TENANT, Vol. XVIII., p. 476, note (*a*).

(*m*) *Frederick v. Coxwell* (1829), 3 Y. & J. 514 (contract "to use best endeavours" to procure Act of Parliament re-modelled into contract to allow use of names for that purpose); compare *Stanley v. Chester and Birkenhead Rail. Co.* (1838), 3 My. & Cr. 773, with *Greenhalgh v. Manchester and Birmingham Rail. Co.* (1838), 3 My. & Cr. 784.

(*n*) See Fry on Specific Performance, 5th ed., p. 494.

(*o*) Com. Dig., tit. "Condition" (K. 2.); *Wigley v. Blackwal* (1600), Cro. Eliz. 780; *Da Costa v. Davis* (1798), 1 Bos. & P. 242; *Simmonds v. Swaine* (1809), 1 Taunt. 549; see title CONTRACT, Vol. VII., p. 429.

(*p*) *Studholme v. Mandell* (1697), 1 Ld. Raym. 279, commenting on *Laughter's Case* (1595), 5 Co. Rep. 21 b; see also *Barkworth v. Young* (1856), 4 Drew. 1, 24; *Drummond v. Bolton* (*Duke*) (1755), Say. 243; *Jones v. How* (1850), 7 Hare, 267; title CONTRACT, Vol. VII., pp. 428, 429.

(*q*) Com. Dig., tit. "Condition" (K. 2.); *Grenningham v. Ewer* (1597), Cro. Eliz. 396, 539; *Bassett v. Bassett* (1677), 1 Mod. Rep. 264; S. C., *sub nom.* *Basket v. Basket*, 2 Mod. Rep. 200.

(*r*) Compare *Grenningham v. Ewer*, *supra*, at p. 397, citing a case of 4 Hen. 7 (1488).

SECT. 12.
Perform-
ance by
Defendant
Impossible
by Reason
of Circum-
stances.

Illegality as
to part of
subject-
matter.

Contracts in
the alter-
native.

SECT. 12.
Performance by
Defendant
Impossible
by Reason
of Circum-
stances.

(5) If the contractor has elected to perform one alternative, which thereafter becomes impossible, the contractor cannot be ordered to perform the other, though, as a rule, he is liable in damages (s).

SECT. 13.—*Rescission or Variation of Contract.*

Rescission
as a bar.

Rescission
by parol.

107. The fact that the contract has been rescinded is a bar to any claim to enforce it (t).

108. Such rescission may be by mutual consent (u); for this purpose a parol agreement is sufficient even if the contract is by deed (v) or is in writing (w); and even though the contract is one coming within the Statute of Frauds (x). All that the court insists upon is clear and precise evidence of a mutual intention to determine and abandon the contract (y). Such evidence may be afforded by conduct (z).

Variation as
distinguished
from rescis-
sion.

109. As regards variation as distinct from rescission, if the contract is such as by law is required to be in writing, parol evidence of an agreement to vary its terms cannot be admitted (a) unless there has been part performance (b). But it seems clear on principle that, even in cases within the Statute of Frauds (c), if the new contract

(s) *Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853.

(t) As to the rescission of contracts, see titles CONTRACT, Vol. VII., pp. 421 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*; MISTAKE, Vol. XXI., p. 17.

(u) Compare *Hill v. Gomme* (1839), 1 Beav. 540; affirmed, 5 My. & Cr. 250 (specific performance refused though interest of third party, a boy of tender years, affected, the contract being unexecuted and the boy's position in life unaltered).

(v) *Hill v. Gomme*, *supra*; *Lanesborough (Lady) v. Ockshott* (1720), 1 Bro. Parl. Cas. 151; see title CONTRACT, Vol. VII., p. 423.

(w) *Davis v. Symonds* (1787), 1 Cox, Eq. Cas. 402; see *Vezev v. Rashleigh*, [1904] 1 Ch. 634; *Price v. Dyer* (1810), 17 Ves. 356; *Robinson v. Page* (1826), 3 Russ. 114. As to parol rescission of a severable part, see *Jordan v. Sawkins* (1791), 1 Ves. 402, 404.

(x) 29 Car. 2, c. 3; see *Goman v. Salisbury* (1684), 1 Vern. 240; *Inge v. Lippingwell* (1772), 2 Dick. 469; *Ex parte Ilchester (Earl)* (1803), 7 Ves. 348, 377; compare *Backhouse v. Mohun* (1736), 3 Swan. 434, n.; *Buckhouse v. Crosby* (1737), 2 Eq. Cas. Abr. 32. As to cases within the Statute of Frauds (29 Car. 2, c. 3), s. 4, see titles CONTRACT, Vol. VII., p. 361; GUARANTEE, Vol. XV., pp. 458 *et seq.*; and see p. 28, *ante*.

(y) *Robinson v. Page*, *supra*; *Buckhouse v. Crosby*, *supra*; *Carolan v. Brabazon* (1846), 3 Jo. & Lat. 200; *Whittaker v. Fox* (1865), 14 W. R. 192; *Harrison v. Brown* (1861), 14 W. R. 193, n.; *Clifford v. Kelly* (1858), 7 I. Ch. R. 333; *Cartan v. Bury* (1860), 10 I. Ch. R. 387, 400.

(z) *Carter v. Ely (Dean)* (1835), 7 Sim. 211; *Rosse (Earl) v. Sterling* (1816), 4 Dow, 442, H. L. As to conduct not amounting to rescission, but disentitling from insistence on specific performance, see *Price v. Assheton* (1834), 1 Y. & C. (ex.) 82; *Price v. Dyer* (1810), 17 Ves. 356.

(a) *Vezev v. Rashleigh*, [1904] 1 Ch. 634; *O'Connor v. Spaight* (1804), 1 Sch. & Lef. 305; *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587 (agreement to pay composition); *Price v. Dyer*, *supra*; *Robinson v. Page*, *supra*.

(b) *Legal v. Miller* (1750), 2 Ves. Sen. 299; see *Price v. Dyer*, *supra*, at p. 364; see also p. 28, *ante*; title CONTRACT, Vol. VII., p. 422.

(c) 29 Car. 2, c. 3, s. 4; see p. 28, *ante*.

completely replaces the original one, it may be set up, even if made by parol only, as a defence to a claim for specific performance of the original contract on the ground that the latter has been rescinded by mutual consent (*d*).

SECT. 13.
Rescission
or Variation
of Contract.

110. Thus, specific performance is refused where the contract has been rescinded by novation; that is, where the parties have come to a fresh agreement which from its nature must be presumed to be in substitution for the former agreement (*e*). The fresh agreement must have been made for good consideration (*f*).

Novation.

Novation is also effected where the parties to the original contract agree to substitute for that contract a new contract between one of them and a third party, with the effect of discharging the original contract (*g*).

New contract
with third
party.

111. Where the contract is one which may be validly made by parol, the new contract is not invalid, if by parol, merely because the original contract was in writing or under seal (*h*); and in proper cases a new agreement may be inferred from the conduct of the parties (*i*).

New parol
contract
in place of
written
contract.

112. A form of rescission which has frequently come in question in suits for specific performance is rescission in exercise of an express power under the contract (*j*). In such cases, in order that the rescission may be effective, the exact limits of the power must be observed (*k*). Such a power is not construed as giving an

Rescission
by vendor
under express
contractual
power.

(*d*) See Fry on Specific Performance, 5th ed., p. 508; compare *Woollam v. Hearn* (1802), 7 Ves. 211, where a defendant was permitted to set up by way of defence a parol variation of the written contract; *Williams v. Jones* (1888), 36 W. R. 573; *Bunning v. Bunning* (1822), 1 L. J. (o. s.) (CH.) 56 (contract of sale).

(*e*) *Moore v. Marrable* (1866), 1 Ch. App. 217; see title CONTRACT, Vol. VII., pp. 423, 505 *et seq.*

(*f*) *Robson v. Collins* (1802), 7 Ves. 130.

(*g*) *Morton's Case* (1873), L. R. 16 Eq. 104 (discharge of shareholder by company accepting transfer to new shareholder; see title COMPANIES, Vol. V., pp. 688, 689); *Re Kollman's Railway, Locomotive and Carriage Improvement Co., Ex parte Beresford* (1850), 2 Mac. & G. 197; *Shaw v. Fisher* (1855), 5 De G. M. & G. 596; *Hall v. Laver* (1838), 3 Y. & C. (EX.) 191; *Stanley v. Chester and Birkenhead Rail. Co.* (1838), 9 Sim. 264; on appeal, 3 My. & Cr. 773 (new company taking over obligations of former). As to dealings on the Stock Exchange, illustrating this principle, see title STOCK EXCHANGE, p. 242, *post*; as to novation generally, see title CONTRACT, Vol. VII., pp. 505 *et seq.*

(*h*) *Const v. Harris* (1824), Turn. & R. 496, *per* Lord ELDON, L.C., at p. 523; *Geddes v. Wallace* (1820), 2 Bli. 270, H. L.; *Jackson v. Sedgwick* (1818), 1 Swan. 460; *Smith v. Jeyes* (1841), 4 Beav. 503; see title PARTNERSHIP, Vol. XXII., p. 22.

(*i*) *Moore v. Marrable*, *supra*; *Clarke v. Moore* (1844), 1 Jo. & Lat. 723 (mere abatement of rent not enough to show intention to change nature of tenancy; the conduct must be sufficiently clear to justify the inference); see title LANDLORD AND TENANT, Vol. XVIII., pp. 467, 550; compare *Monro v. Taylor* (1850), 8 Hare, 51 (mere suggestion of mutual concessions).

(*j*) For a full discussion of such cases in contracts for the sale of land, see title SALE OF LAND, Vol. XXV., pp. 324 *et seq.*

(*k*) For examples, see the cases cited in title SALE OF LAND, Vol. XXV., pp. 325, notes (*e*), (*h*), (*l*), 326, note (*o*). Such a power is not inconsistent with a clause for compensation (*Painter v. Newby* (1853), 11 Hare,

SECT. 13. arbitrary or capricious right (*l*), and must be exercised before it has been waived (*m*). The party seeking to rescind may by his conduct lose the right to do so (*n*).

Rescission by purchaser. **113.** A purchaser of land has a right of rescission where the vendor has sold property which he has no power to convey, or of which he has no power to compel the conveyance from others (*o*).

Repudiation. **114.** Where one party has by words or by conduct evinced an intention no longer to be bound by the contract, the other party is entitled to treat the words or conduct as a repudiation or refusal to perform on the part of the former party, and to accept such repudiation (*p*). The contract is then as much determined as by rescission by consent, subject to the injured party's right of action for damages (*q*). The wrongdoing party's conduct may be either a default going to the root of the contract (*r*), or acts rendering performance impossible (*s*). In such cases neither party can claim specific performance (*t*).

26; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; affirmed, 6 Ch. App. 91; *Ashburner v. Sewell*, [1891] 3 Ch. 405, and may be exercised without notice of an intention to do so (*Duddell v. Simpson* (1866), 2 Ch. App. 102; *Re Dames and Wood* (1885), 29 Ch. D. 626, C. A.).

(*l*) For examples, see *Duddell v. Simpson*, *supra*; *Re Dames and Wood*, *supra*; *Re Starr-Bowkett Building Society and Sibun's Contract* (1889), 42 Ch. D. 375, C. A.; *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, C. A.; *Quinion v. Horne*, [1906] 1 Ch. 596 (which cases show that where a vendor has the power to rescind, if unwilling to comply with a purchaser's objections, it is enough, if he acted in good faith, to show reasonable grounds of difficulty or expense); compare *Woolcott v. Peggie* (1889), 15 App. Cas. 42, P. C.; and see title SALE OF LAND, Vol. XXV., p. 326.

(*m*) *Tanner v. Smith* (1840), 10 Sim. 410 (by election not to rescind); *Morley v. Cook* (1842), 2 Hare, 106 (by negotiating); *Cutts v. Thodey* (1842), 13 Sim. 206 (waiver of time); *Hunter v. Daniel* (1845), 4 Hare, 420 (waiving forfeiture by receipt of payment due before accrual of right); see also *Warwick v. Hooper* (1850), 3 Mac. & G. 60; *Langridge v. Payne* (1862), 2 John. & H. 423. As to rescission pending litigation, see title SALE OF LAND, Vol. XXV., p. 327.

(*n*) *Re Jackson and Haden's Contract*, *supra*.

(*o*) *Bellamy v. Debenham*, [1891] 1 Ch. 412, C. A.; see pp. 10 *et seq.*, *ante*; as to the exercise of this right, see title SALE OF LAND, Vol. XXV., pp. 402, 403.

(*p*) A refusal may be given before performance is due (*Hochster v. De la Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1872), L. R. 7 Exch. 111, Ex. Ch.; *Freeth v. Burr* (1874), L. R. 9 C. P. 208; *Johnstone v. Milling* (1886), 16 Q. B. D. 460, C. A.); see title CONTRACT, Vol. VII., p. 438.

(*q*) Compare *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, C. A., *per* BOWEN, L.J., at p. 365.

(*r*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Cornwall v. Henson*, [1900] 2 Ch. 298, C. A., reversing S. C., [1899] 2 Ch. 710. As to the effect of a party's insolvency, see *Re Edwards*, *Ex parte Chalmers* (1873), 8 Ch. App. 289.

(*s*) *Planché v. Colburn* (1831), 8 Bing. 14; *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515 (by secret agreement with servant of other contracting party). As to acts rendering performance impossible, see pp. 61 *et seq.*, *ante*.

(*t*) See the cases cited in note (*s*), *supra*.

115. There is in certain cases a statutory power to rescind a contract on the bankruptcy of a party (*a*).

SECT. 13.
Rescission
or Variation
of Contract.

SECT. 14.—*Lapse of Time.*

116. Delay by a plaintiff in performing his part of the contract is a bar to his enforcing specific performance, provided that

(1) time was in equity originally of the essence of the contract; or
(2) was made so by subsequent notice; or

(3) the delay has been so great as to be evidence of an abandonment of the contract. In any such case, however, delay has no such effect if it has been caused by the circumstances of the case or waived by the conduct of the parties (*b*).

Rescission on
bankruptcy.

Delay in
performance
as a bar to
relief.

117. Time is in equity deemed to have been originally of the essence of the contract either by virtue of an express term to that effect or because such a term is to be implied from a consideration of the real intention of the parties inferred from the nature of the contract. The Court of Chancery, after some doubtful decisions (*c*), adopted the opinion that a clear expression of intention to treat time as essential must receive effect (*d*); but the intention must be clearly expressed (*e*). If a party has stipulated that, as to certain provisions in his favour, time is to be of the essence of the contract, the court will *prima facie* hold time as essential in respect of other provisions which are against him (*f*). Even apart

When time
originally of
the essence of
the contract.

(*a*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 194, 195.

(*b*) As to time of performance generally, see title CONTRACT, Vol. VII., pp. 412 *et seq.*; see also titles EQUITY, Vol. XIII., pp. 168 *et seq.*; LIMITATION OF ACTIONS, Vol. XIX., p. 144. At common law, a plaintiff would fail unless he could show strict compliance with stipulations as to time, or, if no express stipulation appeared, performance or willingness to perform conditions precedent within a reasonable time; see *Noble v. Edwardes*, *Edwardes v. Noble* (1877), 5 Ch. D. 378, C. A. But in equity, if such stipulations were to receive effect, it was necessary to show that time was of the essence of the contract; see *Seton v. Slade*, *Hunter v. Seton* (1802), 7 Ves. 265. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7), the rules of equity in this respect prevail in all courts; see title EQUITY, Vol. XIII., p. 154.

(*c*) Compare *Gibson v. Patterson* (1738), 1 Atk. 12 (as to which, see *Lloyd v. Collett* (1793), 4 Bro. C. C. (Belt's ed.) 469, n. (3)); *Gregson v. Riddle* (1784), cited by Romilly, *arguendo*, 7 Ves. 268; *Makreth v. Marlar* (1786), 1 Cox, Eq. Cas. 259; *Seton v. Slade*, *Hunter v. Seton*, *supra*, at p. 270; *Hudson v. Bartram* (1818), 3 Madd. 440.

(*d*) *Hudson v. Temple* (1860), 29 Beav. 536 (liberty to rescind if purchase not completed by date specified); *Baynham v. Guy's Hospital* (1796), 3 Ves. 295 (right of renewal of lease forfeited); *Honeyman v. Marryat* (1855), 21 Beav. 14; *Barclay v. Messenger* (1874), 43 L. J. (CH.) 449 (which shows that if time is originally of the essence, but is extended, the substituted time is also essential).

(*e*) Merely specifying a date for performance is not enough (*Hearne v. Tenant* (1807), 13 Ves. 287; *Roberts v. Berry* (1852), 16 Beav. 31; affirmed (1853), 3 De G. M. & G. 284, C. A.; *Parkin v. Thorold* (1851), 2 Sim. (N. S.) 1; *Vernon v. Stephens* (1722), 2 P. Wms. 66); and see title SALE OF LAND, Vol. XXV., p. 332.

(*f*) *Seaton v. Mapp* (1846), 2 Coll. 556, 564 ("the plaintiffs' proposition is that the purchaser shall be held by a cable, and the vendors by a skein of silk"); *Upperton v. Nickolson* (1871), 6 Ch. App. 436

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Lapse of
Time.
—

from an express term, the court may infer an intention of the parties to treat time as essential by reason of the nature of the contract. Such an intention is inferred in the case of a contract in respect of a reversionary interest (*g*), or contracts for the sale of land to be used directly for purposes of trade and commerce (*h*), and, in particular, public-houses as going concerns (*i*), and of mines (*k*), or contracts relating to things which are subject to fluctuations in value from time to time (*l*). A similar intention may be inferred from the surrounding circumstances in contemplation of which the contract is made, as, for example, the purchase of a house for immediate occupation as a residence (*m*); also where delay by one party would involve hardship to the other (*n*).

Time not
originally of
the essence,
but made so
by notice.

118. Even though time has not been originally of the essence of the contract, it may be made so by notice given by one party, provided that the other party has been guilty of such delay as can be regarded as gross, vexatious or unnecessary (*o*). Such notice must be clear and unequivocal (*p*). It may, it seems, be by

(where time was specified to be of the essence in the case of the purchaser's obligation, but not of the vendor's); compare *Re Todd and M'Fadden's Contract*, [1908] 1 I. R. 213.

(*g*) *Newman v. Rogers* (1793), 4 Bro. C. C. 391; *Spurrier v. Hancock* (1799), 4 Ves. 667; compare *Levy v. Stogdon*, [1899] 1 Ch. 5, C. A.; distinguish *Patrick v. Milner* (1877), 2 C. P. D. 342 (special conditions).

(*h*) *Walker v. Jeffreys* (1842), 1 Hare, 341; *Coslake v. Till* (1826), 1 Russ. 376; *Wright v. Howard* (1823), 1 Sim. & St. 190 (mills); *Dyas v. Rooney* (1890), 27 L. R. Ir. 4, C. A. (pasture land for stocking).

(*i*) *Cowles v. Gale* (1871), 7 Ch. App. 12; compare *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705, per ROMER, J., at p. 711; *Day v. Luhke* (1868), L. R. 5 Eq. 336; *Claydon v. Green* (1868), L. R. 3 C. P. 511; *Seaton v. Mapp* (1846), 2 Coll. 556.

(*k*) *Parker v. Frith* (1819), 1 Sim. & St. 199, n.; *City of London v. Mitford* (1807), 14 Ves. 58; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Alloway v. Braine* (1859), 26 Beav. 575; *Eads v. Williams* (1854), 4 De G. M. & G. 674; *Olegg v. Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Huxham v. Llewellyn* (1873), 21 W. R. 570, 766; *Glasbrook v. Richardson* (1874), 23 W. R. 51; *Nicholson v. Smith* (1882), 22 Ch. D. 640; see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 548.

(*l*) *Withy v. Cottle* (1823), Turn. & R. 78 (annuities); *Doloret v. Rothschild* (1824), 1 Sim. & St. 590 (Government stock); *Pollard v. Clayton* (1855), 1 K. & J. 462 (coal); *Payne v. Banner* (1846), 15 L. J. (CH.) 227 (contract relating to patents). Similarly in contracts relating to shares; see *Sparks v. Liverpool Waterworks Co.* (1807), 13 Ves. 428; *Campbell v. London and Brighton Rail. Co.* (1846), 5 Hare, 519; *Re Schwabacher, Stern v. Schwabacher, Koritschoner's Claim* (1908), 98 L. T. 127, 129. Where no time is fixed, the obligation is to deliver in a reasonable time (*De Waal v. Adler* (1886), 12 App. Cas. 141, P. C.); see title COMPANIES, Vol. V., p. 697.

(*m*) *Seaton v. Mapp*, *supra*; *Tilley v. Thomas* (1867), 3 Ch. App. 61; but this inference may be excluded by the conditions of the contract; see *Webb v. Hughes* (1870), L. R. 10 Eq. 281.

(*n*) *Carter v. Ely* (*Dean and Chapter*) (1835), 7 Sim. 211; *Coslake v. Till*, *supra*; *Roberts v. Berry* (1853), 3 De G. M. & G. 284, C. A.; *Green v. Sevin* (1880), 13 Ch. D. 589; see title SALE OF LAND, Vol. XXV., pp. 332, 333.

(*o*) *Taylor v. Brown* (1839), 2 Beav. 180; *King v. Wilson* (1843), 6 Beav. 124; *Pegg v. Wisden* (1852), 16 Beav. 239; *Green v. Sevin*, *supra*; *Compton v. Bagley*, [1892] 1 Ch. 313.

(*p*) *Reynolds v. Nelson* (1821), Madd. & G. 18. The notice should require

parol (*q*). It must limit a time within which the party in default must perform his obligation, and, if the notice so given fixes a time which in all the circumstances is reasonable, the time so fixed becomes engrafted into the essence of the contract (*r*).

SECT. 14.

Lapse of Time.

119. Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance (*s*). The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract (*t*). A much shorter period of delay, however, suffices if it is delay in declaring an option or exercising any other unilateral right (*a*); and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance (*b*).

Delay such as to constitute evidence of abandonment.

completion by the date named, and state that in default the contract will be rescinded (*Hatten v. Russell* (1888), 38 Ch. D. 334, 346).

(*q*) *Nokes v. Kilmorey* (Lord) (1847), 1 De G. & Sm. 444.

(*r*) On the question of reasonableness, see *King v. Wilson* (1843), 6 Beav. 124; *Crawford v. Toogood* (1879), 13 Ch. D. 153; *Pegg v. Wisden* (1852), 16 Beav. 239; *Parkin v. Thorold* (1851), 2 Sim. (N. S.) 1; *Wells v. Maxwell* (No. 1) (1863), 32 Beav. 408; affirmed 9 Jur. (N. S.) 1021; *Nott v. Riccard* (1856), 22 Beav. 307 (shortness of notice justified by previous refusal of party in default). Where the nature of the contract involves expedition, a notice that would in other cases be unreasonably short may suffice (*Macbryde v. Weekes* (1856), 22 Beav. 533 (contract to grant mining lease, one month's notice good); *Compton v. Bagley*, [1892] 1 Ch. 313 (purchase of farm for purchaser's personal occupation; fourteen days' notice enough)). A notice conditionally waived revives on failure of the condition (*Stewart v. Smith* (1824), 6 Hare, 222, n.).

(*s*) *Rich v. Gale* (1871), 24 L. T. 745; *Moore v. Blake* (1808), 1 Ball & B. 62; *Lloyd v. Collett* (1793), 4 Bro. C. C. 469; *Fordyce v. Ford* (1794), 4 Bro. C. C. 494; *Harrington v. Wheeler* (1799), 4 Ves. 686; *Eads v. Williams* (1854), 4 De G. M. & G. 674, per Lord CRANWORTH, L.C., at p. 691. As to laches, generally, see title EQUITY, Vol. XIII., pp. 168 et seq.

(*t*) *Hertford (Marquis) v. Boore* (1801), 5 Ves. 719 (fourteen months delay not enough); *Eads v. Williams*, *supra* (lease of coal mines; three and a half years' delay a bar); *Southcomb v. Exeter (Bishop)* (1847), 6 Hare, 213 (eighteen months' delay a bar); see *Stuart (Lord James) v. London and North Western Rail. Co.* (1852), 1 De G. M. & G. 721, C. A.; *Moore v. Marrable* (1866), 1 Ch. App. 217.

(*a*) *Brooke v. Garrod* (1857), 3 K. & J. 608; *Ranelagh (Lord) v. Melton* (1864), 2 Drew. & Sm. 278; *Weston v. Collins* (1865), 13 W. R. 510; compare *Austin v. Tawney* (1867), 2 Ch. App. 143; *Nicholson v. Smith* (1882), 22 Ch. D. 640; *Darnley (Lord) v. London, Chatham, and Dover Rail. Co.* (1862), 1 De G. J. & Sm. 204, C. A.; S. C. (1865), 3 De G. J. & Sm. 24, C. A.; S. C. (1867), L. R. 2 H. L. 43; and see titles EQUITY, Vol. XIII., pp. 152, 153; LANDLORD AND TENANT, Vol. XVIII., p. 391. The rule does not apply if no time is fixed originally (*Moss v. Barton* (1866), L. R. 1 Eq. 474; *Buckland v. Papillon* (1866), 2 Ch. App. 67; *Re Adams and Kensington Vestry* (1883), 24 Ch. D. 199; affirmed (1884), 27 Ch. D. 394, C. A.).

(*b*) *Heaphy v. Hill* (1824), 2 Sim. & St. 29; *Watson v. Reid* (1830), 1 Russ. & M. 236; *Huzham v. Llewellyn* (1873), 21 W. R. 570, 766; *Parkin v. Thorold* (1852), 16 Beav. 59, 73; *Lehmann v. McArthur* (1868), 3 Ch. App. 496.

SECT. 14.

Lapse of Time.

When delay is no bar to relief.

Waiver.

120. Such delay as has been under consideration does not, however, bar a claim to specific performance if the plaintiff has been in substantial possession of the benefits under the contract, and is merely claiming the completion of the legal estate (c), or if the delay is due to negotiations between the parties on the question in dispute (d), nor can the benefit of delay be claimed by the party causing it by reason of improper objections taken by him (e).

The objection of delay is waived if, after such a lapse of time as would entitle a party to object on that ground to specific performance, the party so entitled proceeds to deal with the other party regardless of the delay (f); but the party so entitled is not held to have waived the objection unless he acted with full knowledge of the facts (g).

Part IV.—Particular Contracts.

SECT. 1.—Contingent and Expectant Interests.

Enforcement of contracts relating to contingent and expectant interests.

121. The court enforces a contract to convey a contingent or expectant interest (h), provided that there is valuable consideration for the contract, but a voluntary contract, even under seal, to convey such interest is not enforced (i). As illustrations of the

(c) *Clarke v. Moore* (1844), 1 Jo. & Lat. 723 (tenant in possession under agreement: delay no bar to claiming specific performance of agreement to accept lease); *Burke v. Smyth* (1846), 3 Jo. & Lat. 193; *Sharp v. Milligan* (1856), 22 Beav. 606; *Shepherd v. Walker* (1875), L. R. 20 Eq. 659. But such possession must purport to be under the contract and be recognised as such (*Mills v. Haywood* (1877), 6 Ch. D. 196, C. A.; compare *Lamare v. Dixon* (1873), L. R. 6 H. L. 414 (objections by intending lessee not waived by continuing in possession and paying rent under protest)). The mere leaving a deposit does not constitute acquiescence on the part of a purchaser (*Watson v. Reid* (1830), 1 Russ. & M. 236).

(d) *Southcomb v. Exeter (Bishop)* (1845), 6 Hare, 213; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Gee v. Pearse* (1848), 2 De G. & Sm. 325.

(e) *Monro v. Taylor* (1852), 3 Mac. & G. 713; *Morse v. Merest* (1821), Madd. & G. 26; *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1850), 2 Mac. & G. 324.

(f) *King v. Wilson* (1843), 6 Beav. 124; *Seton v. Slade*, *Hunter v. Seton* (1802), 7 Ves. 265 (examining abstract after time expired); compare *Pincke v. Curteis* (1793), 4 Bro. C. C. 329; *Hipwell v. Knight* (1835), 1 Y. & C. (EX.) 401; *Pegg v. Wisden* (1852), 16 Beav. 239; *Hudson v. Bartram* (1818), 3 Madd. 440 (waiver by accepting payment after forfeiture by non-payment); *Re Eastern Counties Railway Act, Ex parte Gardner* (1841), 4 Y. & C. (EX.) 503; *Webb v. Hughes* (1870), L. R. 10 Eq. 281; see title SALE OF LAND, Vol. XXV., p. 402, note (a). Other instances of waiver by conduct are: *Cutts v. Thodey* (1842), 13 Sim. 206; *Eads v. Williams* (1854), 4 De G. M. & G. 674; *Boehm v. Wood* (1820), 1 Jac. & W. 419, 420; but see *Barclay v. Messenger* (1874), 43 L. J. (CH.) 449 (no waiver of time of payment by giving possession before such time).

(g) *Darnley (Lord) v. London, Chatham, and Dover Rail. Co.* (1862), 1 De G. J. & Sm. 204, C. A.; see title EQUITY, Vol. XIII., pp. 165, 166.

(h) *Alexander v. Wellington (Duke)* (1831), 2 Russ. & M. 35.

(i) *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697, following *Meek v. Kettlewell* (1842), 1 Hare, 464; compare *Re Tilt, Lampet v. Kennedy*

enforcement of such contracts, reference may be made to the cases of specific performance of a covenant to settle after-acquired property (*k*), of a covenant to settle an estate in which the covenantor has merely an expectancy (*l*), of a contract between two parties for the equal division of what property should come to either of them under a will not actually made at the time (*m*), of a covenant to charge an annuity on a similar expectancy (*n*), or of a contract as to the ultimate division of a lunatic's property (*o*). The court may withhold its assistance in such cases should it deem it inequitable to enforce the agreement (*p*).

SECT. 1.
Contingent
and
Expectant
Interests.

SECT. 2.—*Separation Deeds.*

122. Specific performance of an executory agreement for present separation (*q*) between husband and wife (*a*) may be granted by the court, provided that there is a binding contract (*b*) for valuable consideration (*c*), and provided that such contract neither contains provisions which are void as being against public policy (*d*), nor is objectionable on the ground of duress or other like ground (*e*).

Separation
deeds.

(1896), 74 L. T. 163. As to the necessity of consideration, compare *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

(*k*) *Lewis v. Madocks* (1803), 8 Ves. 150; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348, 352, 355, C. A.; *Re Turcan* (1888), 40 Ch. D. 5, C. A.; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, 781, C. A. As to such covenants, see title SETTLEMENTS, Vol. XXV., pp. 548 *et seq.*

(*l*) *Wiseman v. Roper* (1846), 1 Rep. Ch. 84 [158].

(*m*) *Beckley v. Newland* (1723), 2 P. Wms. 182; see *Hobson v. Trevor* (1723), 2 P. Wms. 191; *Wright v. Wright* (1750), 1 Ves. Sen. 409; *Wethered v. Wethered* (1828), 2 Sim. 183; *Hyde v. White* (1832), 5 Sim. 524; *Houghton v. Lees* (1854), 3 W. R. 135.

(*n*) *Lyde v. Mynn* (1833), 1 My. & K. 683; compare *Flower v. Buller* (1880), 15 Ch. D. 665.

(*o*) *Persse v. Persse* (1840), 7 Cl. & Fin. 279, H. L.

(*p*) *Morse v. Faulkner* (1792), 3 Swan. 429, n.; *Ryan v. Daniel* (1841), 1 Y. & C. Ch. Cas. 60.

(*q*) As to contracts for separation between husband and wife, see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 439 *et seq.*

(*a*) The jurisdiction of the court in this respect was established in *Wilson v. Wilson* (1848), 1 H. L. Cas. 538; see also *Gibbs v. Harding* (1870), 5 Ch. App. 336 (deed of separation); *Evershed v. Evershed* (1882), 46 L. T. 690 (agreement to compromise).

(*b*) Which may be verbal (*McGregor v. McGregor* (1888), 21 Q. B. D. 424, C. A.; *Sweet v. Sweet*, [1895] 1 Q. B. 12); compare title HUSBAND AND WIFE, Vol. XVI., p. 441.

(*c*) As to what constitutes consideration in such cases, see title HUSBAND AND WIFE, Vol. XVI., pp. 443, 444.

(*d*) For instance, as to custody of children, as to which see now Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 2; title INFANTS AND CHILDREN, Vol. XVII., pp. 106, 107; compare *Besant v. Wood* (1879), 12 Ch. D. 605; *Hart v. Hart* (1881), 18 Ch. D. 670. In *Vansittart v. Vansittart* (1858), 4 J. & K. 62; affirmed on appeal, 2 De G. & J. 249, it was held that, where the agreement was executory, the presence of any unlawful stipulation would be a bar to a decree, whereas in *Hamilton v. Hector* (1872), L. R. 13 Eq. 511, where the suit was on a deed, relief by injunction was granted in respect of covenants which were valid, irrespective of void covenants also contained in the deed.

(*e*) See title HUSBAND AND WIFE, Vol. XVI., p. 442.

SECT. 3.

Arbitration
and Awards.Agreements
to refer.SECT. 3.—*Arbitration and Awards (f).*

123. The court does not enforce the specific performance of agreements to refer to arbitration (*g*). An indirect method of enforcing performance of such an agreement is, however, provided by the Arbitration Act, 1889 (*h*), which gives the court discretion to stay an action in respect of any dispute which the parties have by written submission agreed to refer to arbitration (*i*).

Awards.

124. The performance of an award, however, may be specifically enforced by the judgment of the court, if that which is ordered by the award is a matter which, if the subject of an agreement, would have been proper for specific performance (*k*), and, where a reference has been ordered by the court, the award may be enforced before it has been made a rule of court (*l*). Where an action is brought for the specific performance of an award, the defendant may raise such grounds of defence as would be available on general principles in resisting such an action; thus, he may object that the award is invalid in law (*m*), or is uncertain (*n*), or is in excess of the arbitrator's authority (*o*), or does not fully deal with the matters submitted (*p*), or that the agreement of submission, because of unfairness, unreasonableness or other like grounds, is not such as the court

(*f*) See, generally, title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*g*) *Street v. Rigby* (1802), 6 Ves. 815; *Gourlay v. Somerset (Duke)* (1815), 19 Ves. 429; *Agar v. Macklew* (1825), 2 Sim. & St. 418; *Gervais v. Edwards* (1842), 2 Dr. & War. 80; *South Wales Rail. Co. v. Wythes* (1854), 5 De G. M. & G. 880, C. A.; see *Clay v. Rufford* (1849), 8 Hare, 281 (partnership). Compare, as to the similar rule with reference to valuations, *Wilkes v. Davis* (1817), 3 Mer. 507; *Darbey v. Whitaker* (1857), 4 Drew. 134; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529.

(*h*) 52 & 53 Vict. c. 49.

(*i*) *Ibid.*, s. 4; see, further, title ARBITRATION, Vol. I., pp. 451 *et seq.*; see also *Cheslyn v. Dalby* (1836), 2 Y. & C. (EX.) 170, as illustrating how refusal to perform an agreement to refer may raise an equity to which the court will give effect.

(*k*) *Norton v. Mascall* (1687), 2 Vern. 24; *Hall v. Hardy* (1733), 3 P. Wms. 187; *Walters v. Morgan* (1792), 2 Cox, Eq. Cas. 369; *Wood v. Griffith* (1818), 1 Swan. 43; *Reignolds v. Latham* (1579), Cary, 151; *Barker v. Barker* (1577), Cary, 80. As to the necessity for notice of award before specific performance will be decreed, see *Wakefield v. Hawson* (1577), Cary, 91; compare *Thompson v. Noel* (1738), 1 Atk. 60, 62. In *Blackett v. Bates* (1865), 1 Ch. App. 117, specific performance was refused on the ground that the order would have involved the enforcing of continuous performance; see p. 8, *ante*. As to the effect of part performance of an award, see *Norton v. Mascall*, *supra*; compare *Webster v. Bishop* (1703), 1 Eq. Cas. Abr. 51 (award under rule of court). As to the methods of enforcing an award generally, see title ARBITRATION, Vol. I., pp. 473 *et seq.*

(*l*) *Wood v. Taunton* (1849), 11 Beav. 449.

(*m*) *Blundell v. Brettargh* (1810), 17 Ves. 232, not following *Norton v. Mascall*, *supra*. As to various grounds of invalidity, see title ARBITRATION, Vol. I., pp. 468 *et seq.*, 478 *et seq.* An invalidity may be waived (*Hawksworth v. Brammall* (1840), 5 My. & Cr. 281).

(*n*) *Wakefield v. Llanelly Railway and Dock Co.* (1865), 3 De G. J. & Sm. 11, C. A.

(*o*) *Nickels v. Hancock* (1855), 7 De G. M. & G. 300, C. A.

(*p*) *Ibid.*

would enforce (*g*). It would seem that a party cannot claim specific performance of an award after taking proceedings to set it aside (*r*).

SECT. 3.
Arbitration
and Awards.

SECT. 4.—*Money and Shares.*

125. As regards money, specific performance is not ordered of a contract to pay money (*s*), or of a contract to make or take a loan of money, whether the loan is to be on security or not (*t*).

Contracts
relating to
money.

Specific performance may, however, be ordered of a contract with a company to take and pay for debentures (*a*); and where a company borrows money, agreeing to give debentures as security, the lender is in equity entitled to the debentures (*b*). So, where money has been previously advanced, specific performance is ordered of an agreement by the borrower to execute a mortgage (*c*).

Agreement as
to debentures
and mort-
gages.

126. As regards shares, it has already been shown that it is the rule of the court to grant specific performance of contracts to take shares in companies (*d*). Where contracts are made for the purchase of shares, not by way of allotment from the company, but between an existing shareholder and an intending shareholder by purchase from the former by the latter, certain special rules apply in such cases of specific performance, partly from the nature of the property sold, but principally by reason of the practice of the London Stock Exchange, if, as is generally the case, the contract is made subject to its rules (*e*).

Contracts
relating to
shares.

In general and apart from the exigencies of the Stock Exchange, where judgment is given in a seller's action for specific performance of a contract of this nature, it is directed that the plaintiff and all proper parties do execute a proper deed of transfer and that the defendant do concur in the steps necessary for registration, and further, if the plaintiff is the seller, he is granted an indemnity against liabilities for calls attaching to the shares after the purchaser became owner in equity (*f*).

Form of
judgment.

(*g*) *Nickels v. Hancock* (1855), 7 De G. M. & G. 300, C. A. Distinguish the unreasonableness of the award itself, if not involving invalidity, as to which see *Wood v. Griffith* (1818), 1 Swan. 43 (the parties, having chosen their tribunal, must stand by its decision).

(*r*) *Blackett v. Bates* (1865), 1 Ch. App. 117. As to the doubtful jurisdiction regarding an award, confirmed by a decree of the court, in the case of a charity, see *A.-G. v. Clements* (1823), Turn. & R. 58 (renewal of lease).

(*s*) *Crampton v. Varna Rail. Co.* (1872), 7 Ch. App. 562.

(*t*) See the cases cited in title MORTGAGE, Vol. XXI., p. 75, note (*b*). As to loans of money generally, see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 50 *et seq.*

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 105; see title COMPANIES, Vol. V., p. 352.

(*b*) *Re Queensland Land and Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181; *Pegge v. Neath and District Tramways Co., Ltd.*, [1898] 1 Ch. 183; see title COMPANIES, Vol. V., p. 352, note (*h*).

(*c*) *Ashton v. Corrigan* (1871), L. R. 13 Eq. 76; *Hermann v. Hodges* (1873), L. R. 16 Eq. 18; see title MORTGAGE, Vol. XXI., p. 75.

(*d*) See p. 14, *ante*; title COMPANIES, Vol. V., p. 184. As to time being of the essence of the contract, see pp. 67 *et seq.*, *ante*.

(*e*) See, further, title STOCK EXCHANGE, pp. 253, 254, *post*.

(*f*) For the form of judgment, see *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Paine v. Hutchinson* (1868), 3 Ch. App. 388; see also *Sheppard v. Murphy* (1867), 1 I. R. Eq. 490; S. C. (1868), 2 I. R. Eq. 544; approved in *Grissell v.*

SECT. 4.
Money and
Shares.

Practice of
London
Stock
Exchange.

127. Under the practice of the London Stock Exchange, on a sale on the Stock Exchange, the jobber who has made the contract of purchase is entitled to pass to the selling broker the name of the ultimate purchaser, who is to complete the contract (*g*). This rule is important as determining against whom the action for specific performance is to be brought. It is clear that the original purchaser, the jobber, by passing such a name becomes released from his original liability on the contract, and the person whose name is passed, becoming the ultimate purchaser, becomes liable for performance of the contract (*h*), and the action is properly brought against him. The following conditions, however, must have been fulfilled: (1) the person whose name is so passed must be capable of contracting (*i*); (2) he must have authorised the passing of his name (*k*); (3) he must be a person to whom no reasonable objection can be taken (*l*). It is immaterial whether such person is a sub-vendee so long as the above conditions are fulfilled (*m*). The new or substituted contract which binds such person comes into existence, it seems, when the seller accepts him by delivering the transfer on payment of the price (*n*). The person whose name is ultimately passed may be the last of a series of intermediate purchasers starting from the original purchaser; the contract cannot be enforced against these intermediate purchasers, nor has the seller any equitable right against them, but only against the person whose name is finally passed and accepted (*o*). Where, however, the original contract has contained a provision by the original purchaser guaranteeing that registration under the sale will duly take place, the original purchaser remains liable for specific performance and indemnity unless and until the registration is duly effected by the ultimate purchaser (*p*).

Bristowe (1868), L. R. 4 C. P. 36, Ex. Ch.; and see 3 Seton, Judgments and Orders, 7th ed., pp. 2209.

(*g*) For a statement as to this practice, see *Nickalls v. Merry* (1875), L. R. 7 H. L. 530; compare *Re Plumbly, Ex parte Grant* (1880), 13 Ch. D. 667, C. A.; and see title STOCK EXCHANGE, pp. 239 *et seq.*, *post*.

(*h*) The purchase by the jobber or original purchaser is a contract from which he may be discharged either by performance, or by passing the name of a nominee, on whom the liability then rests.

(*i*) Thus, the name of an infant does not serve (*Nickalls v. Merry, supra*; affirming *Merry v. Nickalls* (1872), 7 Ch. App. 733, which reversed the decision of BACON, V.-C., and overruled *Rennie v. Morris* (1872), L. R. 13 Eq. 203; *Heritage v. Paine* (1876), 2 Ch. D. 594).

(*k*) *Maxted v. Paine* (1869), L. R. 4 Exch. 81.

(*l*) See *Allen v. Graves* (1870), L. R. 5 Q. B. 478. This objection, by the practice of the London Stock Exchange, must be taken within ten days; see title STOCK EXCHANGE, pp. 239, 240, *post*.

(*m*) *Maxted v. Paine* (1871), L. R. 6 Exch. 132, Ex. Ch.

(*n*) *Grissell v. Bristowe* (1868), L. R. 4 C. P. 36, 51, Ex. Ch.; *Merry v. Nickalls, supra*, at p. 751. In any event, the acceptance by the seller is essential; see *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309, 328, Ex. Ch.; *Davis v. Haycock* (1869), L. R. 4 Exch. 373, 384.

(*o*) *Torrington v. Lowe* (1868), L. R. 4 C. P. 26. *Castellan v. Hobson* (1870), L. R. 10 Eq. 47, seems inconsistent and not law; see also *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Maxted v. Paine, supra*; title CONTRACT, Vol. VII., p. 333.

(*p*) *Cruse v. Paine* (1869), 4 Ch. App. 441, affirming S. C. (1868), L. R. 6 Eq. 641.

Independently of the Stock Exchange, consequences similar in effect to the foregoing may result from the special bargain or contract of the parties (*q*).

SECT. 4.
Money and
Shares.

128. Where a seller, having a good title to shares, has executed a valid transfer thereof, and the transaction is on the London Stock Exchange on ordinary terms, but the company's directors refuse in exercise of their powers to register the transfer, it is clear that the seller has performed his contract, since he does not undertake to give an absolute right to registration (*r*). The same rule appears to apply to contracts outside the Stock Exchange (*s*), unless there is some special term to the contrary (*t*). In general, it appears that the duty of obtaining registration of the transfer rests with the purchaser (*a*). Clearly a defendant resisting specific performance on the ground of non-registration will fail if non-registration is due to his own default or neglect (*b*).

Special con-
tract.
Regulation :
obligation to
perform.

129. The fact that the company is being wound up may have an effect on the grant of relief by the court. This depends on whether the winding-up petition was presented when the contract was made, neither party being aware of the fact, in which case the contract is not enforced (*c*); but it seems that if the petition is only presented after the contract was made the purchaser is liable, and, even if specific performance ought not to be granted, the vendor will be entitled to an indemnity (*d*).

Effect of
winding up.

130. The fact that a plaintiff is not the legal registered owner of shares, but merely the equitable owner, is not a bar to his suing for specific performance (*e*).

Plaintiff
equitable
owner.

(*q*) See *Shepherd v. Gillespie* (1868), L. R. 5 Eq. 293; *Shaw v. Fisher* (1855), 5 De G. M. & G. 596; *Morton's Case* (1873), L. R. 16 Eq. 104.

(*r*) *Remfry v. Butler* (1858), E. B. & E. 887; *Stray v. Russell* (1859), 1 E. & E. 888; *Skinner v. City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A.; *London Founders Association v. Clarke* (1888), 20 Q. B. D. 576, C. A.; *Casey v. Bentley*, [1902] 1 I. R. 376, C. A. Of course, the seller must not prevent or delay registration (*Hooper v. Herts*, [1906] 1 Ch. 549, C. A.).

(*s*) *Hawkins v. Maltby* (1867), 3 Ch. App. 188, *per* Lord CHELMSFORD, L.C., at p. 194; compare *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Poole v. Middleton* (1861), 29 Beav. 646. Expressions to the contrary effect by Lord ROMILLY, M.R., in *Re Waterloo Life etc. Assurance Co., Birmingham v. Sheridan* (No. 4) (1864), 33 Beav. 660, cannot, it seems, be supported.

(*t*) See *Wilkinson v. Lloyd* (1845), 7 Q. B. 27; compare *Stray v. Russell*, *supra*, at p. 900.

(*a*) Compare *Sheppard v. Murphy* (1867), 1 I. R. Eq. 490; (1868), 2 I. R. Eq. 544; *Stray v. Russell*, *supra*; *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Hodgkinson v. Kelly*, *supra*; *Skinner v. City of London Marine Insurance Corporation*, *supra*.

(*b*) *Evans v. Wood*, *supra*; *Paine v. Hutchinson* (1868), 3 Ch. App. 388.

(*c*) *Emmerson's Case* (1866), 1 Ch. App. 433; see title COMPANIES, Vol. V., p. 486.

(*d*) *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Taylor v. Stray* (1857), 2 C. B. (N. S.) 175; *Cruse v. Paine* (1868), L. R. 6 Eq. 641; see also *Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Paine v. Hutchinson*, *supra*; *Hawkins v. Maltby*, *supra*. *Re Waterloo Life etc. Assurance Co., Birmingham v. Sheridan* (No. 4), *supra*, cannot be supported.

(*e*) *Paine v. Hutchinson*, *supra*; *Loring v. Davis* (1886), 32 Ch. D. 625.

SECT. 4.

Money and Shares.

Call on shares before contract.

Enforcement of agreements relating to partnership.

131. It appears that a call made on the shares before the date of the contract, the purchaser being ignorant thereof, is not a ground for resisting specific performance (*f*).

SECT. 5.—Partnership (*g*).

132. The court does not as a general rule enforce an agreement to form and carry on a partnership (*h*), even though there is no particular objection on the ground of illegality (*i*), fraud or other impropriety (*k*). The court does, however, enforce such an agreement by ordering the parties to execute a formal deed where the parties have actually entered on performance by carrying on the partnership business (*l*), and it also enforces a contract for the purchase of a share in partnership (*m*), or for an option to enter into partnership (*n*). It seems doubtful whether the court would specifically enforce a contract to execute a deed of partnership as distinguished from a contract to enter into a partnership (*o*).

SECT. 6.—Contracts to Leave Property by Will.

Contracts to leave property by will.

133. A contract in writing for good consideration to leave by will a definite property to a particular person may be enforced as against all persons claiming as volunteers under the person who so agreed (*p*). Specific performance is not, however, ordered where the person who entered into the contract was merely acting in exercise

(*f*) See *Hawkins v. Maltby* (1867), L. R. 4 Eq. 572; 3 Ch. App. 188; (1868), L. R. 6 Eq. 505; (1869), 4 Ch. App. 200.

(*g*) See, further, title PARTNERSHIP, Vol. XXII., pp. 16 *et seq*.

(*h*) *Scott v. Rayment* (1868), L. R. 7 Eq. 112; *Sichel v. Mosenthal* (1862), 30 Beav. 371. Where the proposed partnership is at will, interference by the court would in any event be nugatory, since either party could instantly dissolve; compare *Hercy v. Birch* (1804), 9 Ves. 357; *Sheffield Gas Consumers' Co. v. Harrison* (1853), 17 Beav. 294; *Newbery v. James* (1817), 2 Mer. 446 (partnership to make secret medicine).

(*i*) *Knowles v. Houghton* (1805), 11 Ves. 168; see title PARTNERSHIP, Vol. XXII., p. 17.

(*k*) *Maxwell v. Port Tennant Patent Steam Fuel and Coal Co.* (1857), 24 Beav. 495; *Vivers v. Tuck* (1863), 1 Moo. P. C. C. (N. S.) 516.

(*l*) *Crowley v. O'Sullivan*, [1900] 2 I. R. 478; *England v. Curling* (1844), 8 Beav. 129; *Hibbert v. Hibbert* (1807), Collyer on Partnership, 133; see also title PARTNERSHIP, Vol. XXII., p. 22.

(*m*) *Dodson v. Downey*, [1901] 2 Ch. 620 (the court inserts the term that the vendor indemnifies the purchaser against the liabilities of the business); see *Charlesworth v. Jennings* (1864), 11 L. T. 439 (partnership; misrepresentation).

(*n*) *Lisle v. Reeve*, [1902] 1 Ch. 53, C. A.; affirmed, *sub nom.* *Reeve v. Lisle*, [1902] A. C. 461.

(*o*) See Fry on Specific Performance, 5th ed., p. 741.

(*p*) *Synge v. Synge*, [1894] 1 Q. B. 466, 470, 471, C. A.; see *Goilmere v. Battison* (1682), 1 Vern. 48; *Fortescue v. Hennah* (1812), 19 Ves. 67; *Needham v. Smith* (1828), 4 Russ. 318; *Ridley v. Ridley* (1865), 34 Beav. 478; *Dashwood v. Jermyn* (1879), 12 Ch. D. 776; *Alderson v. Maddison* (1880), 5 Ex. D. 293; reversed on the facts (1881), 7 Q. B. D. 174, C. A.; S. C., *sub nom.* *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Re Broadwood, Edwards v. Broadwood* (1912), 56 Sol. Jo. 703, C. A.; and compare titles CONTRACT, Vol. VII., p. 364; WILLS. As to voluntary contracts, see pp. 7, 8, *ante*.

of a testamentary power of appointment(*q*), and an agreement to make ample provision for a person by will is too vague to be enforced (*r*).

SECT. 6.
Contracts to Leave
Property
by Will.

Part V.—Proceedings for Specific Performance.

SECT. 1.—*Institution of Proceedings.*

SUB-SECT. 1.—*Courts having Jurisdiction.*

134. Actions for the specific performance of contracts between vendors and purchasers of real estate, including contracts for leases, are expressly assigned to the Chancery Division (*s*), but actions for the specific performance of contracts of any other nature may be instituted at the plaintiff's option in either the Chancery or the King's Bench Division of the High Court of Justice (*t*) in England (*u*), subject to the powers of transfer from one division to the other (*a*).

The High
Court of
Justice.

Under the jurisdiction given to the High Court to order rectification of the register of shareholders of a company (*b*), the court may in effect grant specific performance (*c*), but this jurisdiction can only be invoked in simple cases (*d*).

(*q*) *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510, 517. As to a covenant not to revoke such a will, see *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799, 804, 805, C. A.; *Robinson v. Ommaney* (1882), 21 Ch. D. 780; as to the exercise of testamentary powers, see title POWERS, Vol. XXIII., pp. 14 *et seq.*; and see *ibid.*, p. 59, note (*i*).

(*r*) *Macphail v. Torrance* (1909), 25 T. L. R. 810.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3); see title COURTS, Vol. IX., pp. 60, 61.

(*t*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 24, 25. See, in particular, *ibid.*, s. 24 (7), which provides that the High Court of Justice and the Court of Appeal shall grant either absolutely or on such reasonable terms and conditions as to them shall appear just all such remedies as any party may seem entitled to whether legal or equitable, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined. On the general effect of this provision, see *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801, C. A., *per* DAVEY, L.J., at pp. 808, 809. The equitable jurisdiction thus given to all branches of the High Court does not differ from or exceed the old equitable jurisdiction, as to which see title EQUITY, Vol. XIII., p. 11.

(*u*) It is otherwise in Ireland; see Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 36 (5).

(*a*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 33, 36; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11; R. S. C., Ord. 99; see also *Hillman v. Mayhew* (1876), 1 Ex. D. 132 (action for recovery of possession, counterclaim for specific performance, transfer ordered to the Chancery Division on the application of the defendant); *Holloway v. York* (1877), 2 Ex. D. 333, C. A.; *London Land Co. v. Harris* (1884), 13 Q. B. D. 540 (action for return of deposit, counterclaim for specific performance); compare *Storey v. Waddle* (1879), 4 Q. B. D. 289, C. A.; and see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 158, 159.

(*b*) See title COMPANIES, Vol. V., pp. 153 *et seq.*

(*c*) See *Ex parte Shaw* (1877), 2 Q. B. D. 463, C. A.

(*d*) *Ward and Henry's Case* (1867), 2 Ch. App. 431, *per* TURNER, L.J., at p. 437; see *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273.

SECT. 1.
Institution
of Pro-
ceedings.

County
court.

135. Where the subject-matter of the contract does not exceed the limits of the county court jurisdiction (*e*) the plaintiff may obtain relief by way of specific performance in a county court. In actions for specific performance of contracts to sell or purchase property, this jurisdiction is limited to cases where the purchase price of such property does not exceed £500 (*f*), and, where the action is brought to enforce a contract to lease property (*g*), to cases where the value of such property is less than that sum (*h*).

Mayor's
Court,
London.

136. The Mayor's Court, London, has unlimited jurisdiction in specific performance where the whole cause of action arises within its local jurisdiction (*i*).

SUB-SECT. 2.—*Nature of Proceedings.*

Form of
proceedings.

137. The proceedings to obtain a judgment for specific performance are usually in the form of an action in the Chancery Division of the High Court, though such proceedings, if they do not relate to a sale or lease of land, may be brought in the King's Bench Division (*k*).

Proceedings for rectification of the register of a company (*l*) are commenced by motion or originating summons (*m*). In the county court the proceedings are of the usual character (*n*).

Special case.

138. Under the Rules of the Supreme Court, the determination of questions relating to contracts for the sale and purchase of real or leasehold estate may be obtained by special case stated in the action (*o*).

Vendor and
purchaser
summons.

139. Questions arising on contracts for the sale of land may be determined by a "vendor and purchaser summons" (*p*), provided

(*e*) See title COUNTY COURTS, Vol. VIII., p. 428.

(*f*) A contract to sell for £75 the equity of redemption of leaseholds worth £1,500, but subject to a charge of £1,100, is within the jurisdiction of a county court (*R. v. Whitehorne (Judge)*, [1904] 1 K. B. 827).

(*g*) *Foster v. Reeves*, [1892] 2 Q. B. 255, C. A.

(*h*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; see *Okins v. Morrison* (1912), 133 L. T. Jo. 9.

(*i*) *Bowler v. Barberton Development Syndicate*, [1897] 1 Q. B. 164, C. A.; see title MAYOR'S COURT, LONDON, Vol. XX., p. 286.

(*k*) See note (*t*), p. 77, *ante*; and title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 89 *et seq.* The machinery of the Chancery Division is the more adapted to this class of action; see *London Land Co. v. Harris* (1884), 13 Q. B. D. 540 (where in an action in the Queen's Bench Division for return of deposit paid on a purchase of land there was a counterclaim by the defendant for specific performance and the action was transferred to the Chancery Division); compare *Storey v. Waddle* (1879), 4 Q. B. D. 289, C. A. (where transfer was refused); see also *Williams v. Snowden*, [1880] W. N. 124.

(*l*) See p. 77, *ante*.

(*m*) See title COMPANIES, Vol. V., p. 155.

(*n*) See title COUNTY COURTS, Vol. VIII., pp. 432, 444, 460.

(*o*) R. S. C., Ord. 34, r. 1; *Sabin v. Heape* (1859), 27 Beav. 553, 561, where the relief granted amounted to a decree for specific performance; see R. S. C., Ord. 34, r. 8; *Evans v. Saunders* (1853), 22 L. T. (o. s.) 43, 51; *Harrison v. Cornwall Minerals Rail. Co.* (1880), 16 Ch. D. 66, 80.

(*p*) Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9; as to proceedings under this provision generally, see title SALE OF LAND, Vol. XXV., pp. 388 *et seq.*

that they do not relate to the existence or validity of the contract (*q*) in its inception (*r*). Such a summons is often an economical and efficient substitute for an action for specific performance (*s*).

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Institution
of Pro-
ceedings.

SUB-SECT. 3.—*Parties.*

140. In proceedings to enforce specific performance of a contract, the parties to the contract are the necessary and sufficient parties to the action (*t*), for the contract constitutes the rights and limits the liabilities of the parties.

The con-
tractors.

141. A stranger to the contract cannot according to the general rule either sue (*a*) or be sued upon it (*b*). This general rule is,

Strangers to
the contract.

(*q*) *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99, C. A., *per* Lord HALSBURY, L.C., at p. 102.

(*r*) *Re Jackson and Woodburn's Contract* (1887), 37 Ch. D. 44; see title SALE OF LAND, Vol. XXV., p. 391.

(*s*) See *Re Waddell's Contract* (1876), 2 Ch. D. 172; *Re Coleman and Jarrom* (1876), 4 Ch. D. 165; *Re Popple and Barratt's Contract* (1877), 25 W. R. 248, C. A.; *Re Kearley and Clayton's Contract* (1878), 7 Ch. D. 615; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, C. A.; *Osborne to Rowlett* (1880), 13 Ch. D. 774; *Drapers Co. v. M'Cann* (1878), 1 L. R. Ir. 13; *Re Harris and Rawlings' Contract*, [1894] W. N. 19; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; affirmed, [1906] 1 Ch. 386, C. A.; *Re Burroughs Lynn and Sexton* (1877), 5 Ch. D. 601, C. A.; see also *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, *per* KEKEWICH, J., at p. 521; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, 157, 160, C. A.; *Re Jackson and Haden's Contract*, [1905] 1 Ch. 603, 608; affirmed, [1906] 1 Ch. 412, C. A.; and see, especially, title SALE OF LAND, Vol. XXV., pp. 389, 390, note (*m*). In *Re Hare and O'More's Contract*, [1901] 1 Ch. 93, 94, there being conflicting evidence, the summons was ordered to be set down as a witness action, the purchaser to be treated as plaintiff in an action for specific performance. As to the enforcement of the order on a vendor and purchaser summons, see title SALE OF LAND, Vol. XXV., p. 397; *Re Wallis and Barnard's Contract*, *supra*, at p. 520.

(*t*) *Mole v. Smith* (1822), Jac. 490; *Tasker v. Small* (1834), 3 My. & Cr. 63, 69; *Wood v. White* (1839), 4 My. & Cr. 460, 483; *Humphreys v. Hollis* (1821), Jac. 73; *Paterson v. Long* (1842), 5 Beav. 186; *Peacock v. Penson* (1848), 11 Beav. 355; *Winchester (Bishop) v. Mid-Hants Rail. Co.* (1867), L. R. 5 Eq. 17, 21; *Lumley v. Timms* (1873), 21 W. R. 319, 494; *Halifax Joint Stock Banking Co. v. Sowerby Bridge Town Hall Co.* (1881), 25 Sol. Jo. 450.

(*a*) The general rule is that a stranger to the contract, even though he takes a benefit under it, cannot sue on it; see *Crow v. Rogers* (1724), 1 Stra. 592; *Ex parte Peele* (1802), 6 Ves. 602, 604; *Re Hughes, Ex parte Williams* (1817), Buck, 13; *Berkeley v. Hardy* (1826), 5 B. & C. 355; *Southampton (Lord) v. Brown* (1827), 6 B. & C. 718; *Colyear v. Mulgrave (Countess)* (1836), 2 Keen, 81, *per* Lord LANGDALE, M.R., at p. 98; *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228, C. A., *per* COTTON, L.J., at p. 242; *Hill v. Gomme* (1839), 5 My. & Cr. 250, 256; *Chesterfield and Midland Silkestone Colliery Co. v. Hawkins* (1865), 3 H. & C. 677; and see titles CONTRACT, Vol. VII., p. 333; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 380.

(*b*) *Hare v. London and North Western Rail. Co.* (1860), 1 John. & H. 252; see also *Robertson v. Great Western Rail. Co.* (1839), 1 Ry. & Can. Cas. 459. The Rules of the Supreme Court have greatly enlarged the powers of the court in joining any party whose presence may be necessary (R. S. C., Ord. 16, rr. 1, 4, 11; Ord. 18, r. 1; compare *Cox v. Barker, Barker v. Cox* (1876), 3 Ch. D. 359, C. A.; *Flower v. Buller* (1879), 15 Ch. D. 665;

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ceedings.

however, subject to certain modifications. Thus, where a party to the contract is trustee for a third party, specific performance of the contract may be obtained at the instance of the third party (c). Similarly, in certain cases of agency (d) and of marriage settlements (e), or where the contract has been so far acted upon as to give a stranger to the contract reasonable expectations founded upon the contract (f), a stranger to the contract may enforce specific performance (g). Again, a stranger to the contract may be made defendant to an action for specific performance where he is in possession of the subject-matter of the contract with notice of the contract (h), or where he claims to be interested in the purchase-money under an arrangement antecedent to the contract (i), or where he is in actual possession of the property and might be

Long v. Crossley (1879), 13 Ch. D. 388; and see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 104 *et seq.*). For exceptions to the rule above stated, which arose under the former practice of the Court of Chancery (i.) in cases of novation, see *Holden v. Hayn and Bacon* (1815), 1 Mer. 47; *Hall v. Laver* (1838), 3 Y. & C. (EX.) 191; *Shaw v. Fisher* (1855), 5 De G. M. & G. 596; *Stanley v. Chester and Birkenhead Rail. Co.* (1838), 9 Sim. 264; *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Hawkins v. Maltby* (1869), 4 Ch. App. 200; (ii.) in cases of an interest arising under a prior contract, see *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *West Midland Rail. Co. v. Nixon* (1863), 1 Hem. & M. 176; (iii.) in cases where it was desirable to avoid multiplicity of suits, see *Mason v. Franklin* (1842), 1 Y. & C. Ch. Cas. 239; *Lowther v. Andover (Viscountess Dowager)* (1784), 1 Bro. C. C. 396; or to allow some parties to sue on behalf of all, see *Fenn v. Craig* (1838), 3 Y. & C. (EX.) 216; *Taylor v. Salmon* (1838), 4 My. & Cr. 134; *Hargreaves v. Wright* (1853), 10 Hare, Appendix, lvi.; *Turner v. Moy* (1875), 32 L. T. 56; or where the objects of the suit were manifold, see *Winchester (Bishop) v. Mid-Hants Rail. Co.* (1867), L. R. 5 Eq. 17; *Cosens v. Bognor Rail. Co.* (1866), 1 Ch. App. 594; *Sedgwick v. Watford and Rickmansworth Rail. Co.* (1867), 36 L. J. (CH.) 379; and see *Gostling v. Smith* (1824), 3 L. J. (O. S.) (CH.) 5 (conduct of stranger held such as to constitute him a party to the agreement).

(c) *Touche v. Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671; see *Page v. Cox* (1852), 10 Hare, 163; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, C. A.; compare *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Gandy v. Gandy* (1885), 30 Ch. D. 57, C. A.; *Kelly v. Larkin*, [1910] 2 I. R. 550; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. 196.

(d) *Hook v. Kinnear* (1743), 3 Swan. 417, n., per Lord HARDWICKE, L.C.

(e) Compare *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228, 242, C. A.

(f) *Hill v. Gomme* (1839), 1 Beav. 540; *Lyons v. Blenkin* (1821), Jac. 245.

(g) If a stranger has an interest in a contract, the court does not grant specific performance at the instance of one of the parties thereto unless such stranger's interest is secured (*Davenport v. Bishopp* (1843), 7 Jur. 1077 (marriage settlement); *Wycherley v. Wycherley* (1763), 2 Eden, 175, 177 (resettlement)).

(h) *Potter v. Sanders* (1846), 6 Hare, 1; compare *Daniels v. Davison* (1811), 17 Ves. 433; *Holmes v. Powell* (1856), 8 De G. M. & G. 572, C. A.; distinguish *Leuty v. Hillas* (1858), 2 De G. & J. 110; *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165.

(i) *West Midland Rail. Co. v. Nixon* (1863), 1 Hem. & M. 176; see *Muston v. Bradshaw* (1846), 15 Sim. 192; compare *Aberaman Iron-works v. Wickens* (1868), 4 Ch. App. 101; *Wilson v. Thomson* (1875), 23 W. R. 744.

affected by part of the relief claimed (*k*), and also in certain cases under the Land Transfer Act, 1875 (*l*).

142. Where a contract for sale of freeholds or leaseholds has been entered into, and, before completion, the vendor or purchaser dies, it seems that, according to the present practice, the contract can *primâ facie* be enforced by or against the personal representatives of the deceased (*m*).

143. Where a contract has been assigned, the assignee may as a general rule enforce specific performance, making the assignor a party to the suit (*n*), and a person who contracts as agent may afterwards disclose himself as principal and enforce specific performance in his own name (*o*). Where, however, there is a personal element in the contract (*p*), or where there is an express proviso

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Death of
parties.

Enforcement
by assignee
of contract.

(*k*) *Winchester (Bishop) v. Mid-Hants Rail. Co.* (1867), L. R. 5 Eq. 17; compare *Churchill v. Salisbury and Dorset Rail. Co.* (1875), 23 W. R. 534, 894.

(*l*) 38 & 39 Vict. c. 87; see p. 82, *post*.

(*m*) See Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4; R. S. C., Ord. 16, r. 8; Daniell's Chancery Practice, 7th ed., p. 1125; titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 4, 5; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 307; see, however, Fry on Specific Performance, 5th ed., p. 98. With regard to the old practice: (i.) in the case of the death of the vendor under a contract for sale of real estate, the heir (*Roberts v. Marchant* (1842), 1 Hare, 547; *Lacon v. Mertins* (1743), 3 Atk. 1; *Hoddel v. Pugh* (1864), 33 Beav. 489; compare *Longinotto v. Mors* (1872), 26 L. T. 828), or the devisee (*Galton v. Emuss* (1844), 1 Coll. 243; *Hale v. Bushill* (1866), 35 Beav. 343; *Purser v. Darby* (1857), 4 K. & J. 41; *London and South Western Rail. Co. v. Bridger* (1864), 12 W. R. 948), was a proper party to an action for specific performance; and, where the vendor left a widow, she, too, was a necessary party to the suit (*Hinton v. Hinton* (1755), 2 Ves. Sen. 631, 638; *Brown v. Raindle* (1796), 3 Ves. 256; see Dower Act, 1833 (3 & 4 Will. 4, c. 105)); this was so whether the contract was sought to be enforced by the purchaser (*Hinton v. Hinton*, *supra*; *Barker v. Hill* (1681), 2 Rep. Ch. 113 [218]), or by the personal representatives of the vendor (*Baden v. Pembroke (Countess)* (1691), 2 Vern. 213): (ii.) in the case of the death of the purchaser before completion, the contract might be enforced either by the vendor against the personal representatives and the heir or devisee of the purchaser, or by the heir or devisee against the vendor, the personal representative being joined as a co-plaintiff, or being made a defendant (*Buckmaster v. Harrop* (1802), 7 Ves. 341; see also *Holt v. Holt* (1694), 2 Vern. 322; *Brafield v. Scriven* (1873), 22 W. R. 202).

(*n*) *Crosbie v. Tooke* (1833), 1 My. & K. 431; *Morgan v. Rhodes* (1834), 1 My. & K. 435; but see *Dowell v. Dew* (1841), 1 Y. & C. Ch. Cas. 345; see also title CONTRACT, Vol. VII., p. 495.

(*o*) *Fellowes v. Gwydyr (Lord)* (1829), 1 Russ. & M. 83; see title AGENCY, Vol. I., p. 226.

(*p*) *Rayner v. Grote* (1846), 15 M. & W. 359, 365; *Gibson v. Carruthers* (1841), 8 M. & W. 321, 343; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1901] 2 K. B. 811, 816; *Barnes v. Wilson* (1913), 29 L. T. R. 639; and see titles CHOSSES IN ACTION, Vol. IV., pp. 369, 370; CONTRACT, Vol. VII., pp. 500 *et seq.* How far the solvency or other personal quality of the intended lessee is relied on by the lessor in the ordinary cases of leases is a question of fact, but that such contracts are assignable appears clearly from *Dowell v. Dew* (1843), 12 L. J. (CH.) 158, *per* Lord LYNDBURST, L.C., at

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ceedings.

Enforcement
against
transferee
of property.

against assignment (*q*), or the assignment is illegal (*r*) or contrary to public policy (*s*), the assignee cannot enforce specific performance.

144. Where there is a contract for the demise or sale of property, which property is afterwards transferred to a third party, the intending purchaser or intending lessee may maintain an action for specific performance against the transferee if the latter took the transfer with notice of the prior contract (*t*), or if the transferee himself or the person who claims to be the transferee has acquired only an equitable title and has no better equity than the purchaser or intending lessee (*u*).

Contract
relating to
registered
land.

145. When an action is brought for the specific performance of a contract relating to registered land or a registered charge (*a*), the court may summon any person interested in such land or charge (*b*) to appear in such suit and show cause why the contract should not be specifically performed (*c*).

Contracts
made by
company
promoters.

146. A contract relative to the purchase of land for a railway entered into by promoters before the incorporation of a company by certificate under the Railways Construction Facilities Act, 1864 (*d*), is binding on and may be enforced against the company when incorporated (*e*).

Other contracts entered into by promoters on behalf of a

p. 164; *Buckland v. Papillon* (1866), 2 Ch. App. 67, *per* Lord CHELMSFORD, L.C., at p. 71; and see title LANDLORD AND TENANT, Vol. XVIII., p. 364.

(*q*) *Wetherall v. Geering* (1806), 12 Ves. 504; compare *Jalabert v. Chandos (Duke)* (1759), 1 Eden, 372; and see *Dowell v. Dew* (1842), 1 Y. & C. Ch. Cas. 345.

(*r*) *In Sharp v. Carter* (1735), 3 P. Wms. 375, and *Hitchins v. Lander* (1807), Coop. G. 34, pleas founded on stat. (1540) 32 Hen. 8, c. 9, were allowed; see also *Doe d. Williams v. Evans* (1845), 1 C. B. 717.

(*s*) *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A.; *Beman v. Rufford* (1851), 1 Sim. (N. S.) 550; *Great Northern Rail. Co. v. Eastern Counties Rail. Co.* (1851), 9 Hare, 306; *Winch v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1852), 5 De G. & Sm. 562; *London, Brighton and South Coast Rail. Co. v. London and South Western Rail. Co.* (1859), 4 De G. & J. 362.

(*t*) *Greaves v. Tofield* (1880), 14 Ch. D. 563, C. A., *per* JAMES, L.J., at p. 572; *Smith v. Phillips* (1837), 1 Keen, 694; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556; compare *Union Bank of London v. Kent* (1888), 39 Ch. D. 238, 246, C. A.; *Mortlock v. Buller* (1804), 10 Ves. 292, 315; and see titles EQUITY, Vol. XIII., p. 87, note (*k*); LANDLORD AND TENANT, Vol. XVIII., pp. 382, 383; SALE OF LAND, Vol. XXV., pp. 452, 453.

(*u*) See title EQUITY, Vol. XIII., pp. 78, 82, 83.

(*a*) See titles MORTGAGE, Vol. XXI., pp. 85, 86; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 315, 317; SALE OF LAND, Vol. XXV., p. 432.

(*b*) That is to say, "Any person who has a registered estate or right in such land or charge, or who has entered up notices, cautions, or inhibitions against the same" (Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 93).

(*c*) *Ibid.* The costs of the parties so appearing, where the action is against a vendor to enforce specific performance of a contract to sell registered land or charges, are taxed between solicitor and client and, unless the court otherwise orders, paid by the vendor (*ibid.*, s. 94).

(*d*) 27 & 28 Vict. c. 121; see title RAILWAYS AND CANALS, Vol. XXIII., pp. 624 *et seq.*

(*e*) Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), s. 30.

company will sometimes be enforced against the company (*f*), but only, it would seem, when the company has taken the benefit of the contract (*g*), and the acts to be performed by it are within the powers of the company when incorporated (*h*).

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Institution
of Pro-
ceedings.

SUB-SECT. 4.—*Pleading.*

147. A plaintiff who seeks to enforce the specific performance of a contract (*i*) may claim in the alternative that the contract may be rescinded (*k*), provided that the alternative relief is based on the same state of facts, though the conclusions of law to be drawn from those facts may be different (*l*).

Specific per-
formance or
rescission.

148. A plaintiff in an action for specific performance of a contract for the sale of land must plead that he is ready and willing to carry out the contract, and repudiation of the contract by the defendant does not relieve the plaintiff from this obligation (*m*).

Plaintiff's
plea that he
is ready and
willing to
convey.

149. In actions by a vendor of land to enforce specific performance by a purchaser of the contract for sale, the defendant may succeed at the trial on the ground of a defect in the plaintiff's title (*n*),

Plea by
defendant
of defect
in title.

(*f*) *Edwards v. Grand Junction Rail. Co.* (1836), 1 My. & Cr. 650; *Stanley v. Chester and Birkenhead Rail. Co.* (1838), 3 My. & Cr. 773; *Petre (Lord) v. Eastern Counties Rail. Co.* (1836), 1 Ry. & Can. Cas. 462. As to contracts entered into by promoters before the incorporation of a company, see, further, the cases cited in title COMPANIES, Vol. V., p. 297.

(*g*) *Goody v. Colchester etc. Rail. Co.* (1852), 17 Beav. 132; *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Rail. Co.* (1853), 17 Beav. 115; *Lindsey (Earl) v. Great Northern Rail. Co.* (1853), 10 Hare, 664; *Eastern Counties Rail. Co. v. Hawkes* (1855), 5 H. L. Cas. 331, 356; see *Williams v. St. George's Harbour Co.* (1858), 2 De G. & J. 547, C. A.; compare *Bedford and Cambridge Rail. Co. v. Stanley* (1862), 2 John. & H. 746, where such a contract was enforced at the instance of the company.

(*h*) *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Rail. Co.* (1856), 5 H. L. Cas. 605, 621; *Shrewsbury (Earl) v. North Staffordshire Rail. Co.* (1865), L. R. 1 Eq. 593; *Caledonian and Dumbartonshire Junction Rail. Co. v. Helensburgh Magistrates* (1856), 2 Macq. 391, H. L.

(*i*) As to pleading contracts implied from a series of letters, see R. S. C., Ord. 19, r. 24; title PLEADING, Vol. XXII., p. 427.

(*k*) *Mosely v. Virgin* (1796), 3 Ves. 184; *Costigan v. Hasler* (1804), 2 Sch. & Lef. 160, 166; *Stapylton v. Scott* (1807), 13 Ves. 425; *Clarke v. Faux* (1827), 3 Russ. 320; *King v. King* (1832), 1 My. & K. 442; *Douglass v. London and North Western Rail. Co.* (1857), 3 K. & J. 173; *Forster v. Great Eastern Rail. Co.*, [1868] W. N. 122; see *Williams v. Shaw* (1825), 3 Russ. 178, n.

(*l*) *Rawlings v. Lambert* (1860), 1 John. & H. 458; see R. S. C., Ord. 20, r. 6; compare *Cawley v. Poole* (1863), 1 Hem. & M. 50; and distinguish *Bagot v. Easton* (1877), 7 Ch. D. 1, C. A.; see, generally, title PLEADING, Vol. XXII., pp. 444, 445.

(*m*) *Ellis v. Rogers* (1884), 50 L. T. 660 (building lease); see title SALE OF LAND, Vol. XXV., p. 412 (action for damages).

(*n*) The title which the vendor must show is a title in himself or in some person whom he has a legal or equitable right to require to join in the conveyance: he is not entitled to force the title of some other person on the purchaser (*Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, C. A.; see *Re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1, C. A.; title SALE OF LAND, Vol. XXV., pp. 402, 403; compare *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238.

SECT. 1.
Institution
of Pro-
ceedings.

Reference
as to title.

Compensa-
tion.

Effect of
undertaking
not to defend.

Default of
appearance
at trial.

Statute of
Frauds.

if such defect has been expressly pleaded (*o*) or if the objection appears on the evidence at the trial (*p*).

Even though no defect in title has been pleaded (*q*), the defendant is entitled to have an inquiry (*r*) directed as to the title of the plaintiff to the land in question. If, however, he has admitted the title of the plaintiff in his pleading, this is an express waiver which excludes the right to a reference of title (*s*). Compensation may be granted for a defect appearing on an investigation of title, though no such claim was made on the pleadings and no such compensation was awarded by the judgment (*t*).

When an undertaking has been given not to deliver a defence, leave may be given to defend if it appears, by reason of a decision subsequent to the undertaking, that there may be a good defence (*u*).

150. The statement of claim should specify in detail the relief sought, and, where specific performance only is sought in an action between vendor and purchaser in which the defendant admits in his defence that he is unwilling to complete, but does not appear at the trial, the plaintiff is only entitled to the usual decree, and not to judgment rescinding the contract and forfeiting the deposit (*w*).

151. Where the defendant relies on the Statute of Frauds (*a*) as a defence to an action for specific performance, this defence must be expressly raised by his pleading (*b*).

(*o*) *Lucas v. James* (1849), 7 Hare, 410, 418; compare *Bates v. Kesterton*, [1896] 1 Ch. 159; and see title SALE OF LAND, Vol. XXV., p. 299, note (*e*).

(*p*) Even though this is a different objection from that on which the defendant had relied (*Baskcomb v. Phillips* (1859), 29 L. J. (CH.) 380).

(*q*) *Jenkins v. Hiles* (1802), 6 Ves. 646. This rule applies also to cases where the defendant admits that he has only one particular objection (*Lesturgeon v. Martin* (1834), 3 My. & K. 255), or no objection at all to the plaintiff's title (*Jenkins v. Hiles, supra*); compare *Fleetwood v. Green* (1809), 15 Ves. 594.

(*r*) For forms, see 3 Seton, Judgments and Orders, 7th ed., pp. 2158, 2190; and see pp. 85 *et seq.*, *post*.

(*s*) It is sufficient for this purpose if the defendant pleads merely a belief that at the date of the contract the plaintiff had a title (*Phipps v. Child* (1857), 3 Drew. 709); but it is not enough for a party relying on waiver to allege facts from which such waiver is an inference of law; he must allege the facts and the waiver; see R. S. C., Ord. 19, rr. 13, 15; *Olive v. Beaumont* (1848), 1 De G. & Sm. 397; *Gaston v. Frankum* (1848), 2 De G. & Sm. 561; and compare *Hughes v. Jones* (1861), 3 De G. F. & J. 307, 316 317, C. A. As to waiver of right to reference, see, further, pp. 87 *et seq.*, *post*. As to acceptance of title, see title SALE OF LAND, Vol. XXV., pp. 363, 364.

(*t*) *Wilson v. Williams* (1857), 3 Jur. (N. S.) 810; *Casamajor v. Strode* (1834), 2 My. & K. 706, 730.

(*u*) *Scott v. Moxon* (1900), 81 L. T. 774.

(*w*) *Stone v. Smith* (1887), 35 Ch. D. 188 (sale of land); and see *Kingdon v. Kirk* (1887), 37 Ch. D. 141 (sale of land).

(*a*) 29 Car. 2, c. 3; see p. 28, *ante*.

(*b*) R. S. C., Ord. 19, rr. 15, 20; see *Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed, [1910] 2 K. B. 531, C. A. No particular section of the statute need be pleaded, but if a particular section is pleaded the defendant is bound by it (*James v. Smith*, [1891] 1 Ch. 384); see *Beatson v. Nicholson* (1842), 6 Jur. 620, *per* WIGRAM, V.-C., at p. 621; *Byrd*

SECT. 2.—*Relief.*SECT. 2.
Relief.SUB-SECT. 1.—*The Judgment for Specific Performance.*

152. The judgment for specific performance generally commences with a declaration that the agreement in question ought to be specifically performed and orders and adjudges the same accordingly. The judgment then usually includes directions consequent on the declaration, which vary according to the circumstances of the case. Thus, the judgment may include an inquiry as to damages suffered by the plaintiff by reason of the defendant's delay (*c*), and a reference to chambers of the vendor's title (*d*). Again, where the vendor's title has been accepted by or forced on the purchaser, the judgment may contain directions for the ascertainment of how much is payable by the purchaser in respect of the purchase-money, whether with or without interest (*e*), and whether with or without compensation or abatement (*f*). It may also contain special directions as to the rents or the deterioration of the property (*g*). On payment of what is due from the purchaser the judgment may direct a conveyance by the vendor, or a vesting order, or the appointment of a person to convey (*h*). Orders dealing with the deposit may also be necessary (*i*), and, in the case of agreements for leases, special forms of order are required (*k*). Form of judgment.

SUB-SECT. 2.—*Reference of Title.*

153. In actions for specific performance it is often necessary Nature and purpose.

v. Nunn (1877), 7 Ch. D. 284, C. A.; R. S. C., Ord. 27, r. 11; see also title PLEADING, Vol. XXII., pp. 447, 448, note (*d*). As to defences in actions for specific performance, see pp. 19 *et seq.*, *ante*; and see titles CONTRACT, Vol. VII., pp. 417 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 754 *et seq.*; MISTAKE, Vol. XXI., p. 14.

(*c*) 3 Seton, Judgments and Orders, 7th ed., p. 2137; see *Baxter v. Middleton*, [1898] 1 Ch. 313 (order vacating *lis pendens* included in judgment); *Bennett v. Stone*, [1902] 1 Ch. 226, 236—238; affirmed, [1903] 1 Ch. 509, C. A. (order for accounts not on footing of wilful default; vendors occupying and farming the land not charged with occupation rent, but with proceeds of crops less expenses of realisation, without allowance for losses in farming). As to a successful purchaser bringing into account, against the purchase-money due to vendor, the costs payable by the vendor, see *Green v. Sevin* (1879), 13 Ch. D. 589, 602; distinguish *Phillips v. Howell*, [1901] 2 Ch. 773, 778 (rule limited to cases where debts are between the parties in the same capacity); and see title SET-OFF AND COUNTERCLAIM, Vol. XXV., p. 499.

(*d*) 3 Seton, Judgments and Orders, 7th ed., p. 2158; see the text, *infra*.

(*e*) 3 Seton, Judgments and Orders, 7th ed., pp. 2170, 2179.

(*f*) *Ibid.*, p. 2190; see pp. 99 *et seq.*, *post*.

(*g*) 3 Seton, Judgments and Orders, 7th ed., pp. 2170, 2173; see pp. 91 *et seq.*, *post*.

(*h*) 3 Seton, Judgments and Orders, 7th ed., pp. 2179, 2217; see *Cooper v. Morgan*, [1909] 1 Ch. 261; and title SALE OF LAND, Vol. XXV., p. 408.

(*i*) 3 Seton, Judgments and Orders, 7th ed., pp. 2177, 2219; see p. 95, *post*.

(*k*) 3 Seton, Judgments and Orders, 7th ed., p. 2202; see *Strelley v. Pearson* (1880), 15 Ch. D. 113; *Eadie v. Addison* (1882), 52 L. J. (CH.) 80. As to specific performance of agreements for leases, see, further, title LANDLORD AND TENANT, Vol. XVIII., pp. 378 *et seq.*

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to determine whether or not the vendor can make a good title (*l*), since the court does not grant the extraordinary remedy of specific enforcement of a sale unless it is satisfied that the vendor has such a title as the purchaser either is willing, or can be forced, to accept. It follows that a reference of title is generally ordered in a vendor's action on the purchaser's application (*m*), and may also, when necessary, be ordered in a purchaser's action (*n*). A vendor cannot be permitted to except to his own title (*o*).

Title the
subject of
the reference.

154. The reference of title, though in general terms, is confined to such title as under the conditions of the contract the vendor is bound to show. Such conditions (*p*) may restrict the purchaser's right to object to the title (*q*), or to make requisitions or inquiries from the vendor as to his title (*r*), or may even preclude the purchaser from inquiring into or objecting to the title

(*l*) As to the extent of the vendor's obligation to make a good title and the mode of investigation and proof of the vendor's title, so far as they relate to contracts for the sale of land, see title SALE OF LAND, Vol. XXV., pp. 341 *et seq.* An inquiry into title may, of course, be directed in other matters than sale of land, such as contracts for sale of shares (*Shaw v. Fisher* (1848), 2 De G. & Sm. 11; *Curling v. Flight* (1848), 2 Ph. 613); but there must be a sale of property to justify such an inquiry.

(*m*) *Jenkins v. Hiles* (1802), 6 Ves. 646 (purchaser admitted he had no specific objection, but inquiry was ordered); *Lesturgeon v. Martin* (1834), 3 My. & K. 255 (general inquiry ordered, though purchaser admitted he had only one particular objection); *Fleetwood v. Green* (1809), 15 Ves. 594. Where a defect of title appears prominently on the pleadings, the court may decide for the defect and against the title without ordering an inquiry; compare *Lucas v. James* (1849), 7 Hare, 410, *per* WIGRAM, V.-C., at p. 425. A delay by a purchaser in raising a patent objection may result in his being ordered to pay the costs of the inquiry; see *Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Curling v. Austin* (1862), 2 Drew. & Sm. 129; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527.

(*n*) The purchaser may, however, have to bear the costs of the inquiry, if it appears that the vendor had at the proper time disclosed a good title (*Lyle v. Yarrowburgh (Earl)* (1859), John. 70), or if he afterwards waives his objections (*Bennett v. Fowler* (1840), 2 Beav. 302; *Freme v. Wright* (1819), 4 Madd. 364).

(*o*) *Bradley v. Munton* (1852), 15 Beav. 460.

(*p*) As to conditions generally with reference to contracts for the sale of land, see title SALE OF LAND, Vol. XXV., pp. 317 *et seq.*

(*q*) See, for instance, *Duke v. Barnett* (1846), 2 Coll. 337 (purchaser, agreeing to accept vendor's title without dispute, debarred from objecting on ground of incumbrance); compare *Wilmot v. Wilkinson* (1827), 6 B. & C. 506; see also *Hanks v. Palling* (1856), 6 E. & B. 659 (purchaser of fee farm rent precluded from objecting that rent was extinguished by reason of Statute of Limitations); *Hopkinson v. Chamberlain*, [1908] 1 Ch. 853 (condition precluding purchaser from requiring satisfaction of mortgage).

(*r*) In such cases the purchaser may, however, show objections to title which he has discovered elsewhere than by inquiries or requisitions from the vendor, as in *Darlington v. Hamilton* (1854), Kay, 550; *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515 (objection to title discovered by purchaser); *Smith v. Robinson* (1879), 13 Ch. D. 148 (defect appearing from deed disclosed by vendor himself); compare *Jones v. Watts* (1890), 43 Ch. D. 574, C. A.; *Re Cox and Neve's Contract*, [1891] 2 Ch. 109; see *Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society*, [1898] 2 Ch. 230 (proof *aliunde* of improper exercise of power of sale); and see title SALE OF LAND, Vol. XXV., pp. 321, 322.

from any source (*s*), or inquiring into certain parts of the title (*t*). Such conditions are binding if not misleading (*a*), and if clearly expressed (*b*).

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155. A reference of title is not ordered where the vendor expressly sells merely such interest as he has (*c*), or such title as he himself bought with (*d*), or where the contract is not so much a contract of sale as a compromise of disputed rights (*e*), or where the contract was for the sale of the vendor's share and interest in property and not the property itself (*f*).

Sale of
interest as
distinguished
from
property.

156. Again, a reference of title is not ordered though the party claiming it is *primâ facie* entitled to have it, if he has waived the right thereto, either expressly (*g*) or by implication (*h*). Such waiver may go to the whole of the title, or merely to some particular objection or objections (*i*).

Waiver as
a bar to
reference.

Where such waiver is to be inferred from conduct the nature of the acts relied on must be considered; if a particular defect is curable by the vendor, the purchaser, with knowledge of the defect, may yet

Implied
waiver.

(*s*) *Hume v. Bentley* (1852), 5 De G. & Sm. 520 (purchaser of leaseholds precluded from objecting that by Act of Parliament lessor was without power of granting leases); see title SALE OF LAND, Vol. XXV., p. 322.

(*t*) *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190 (prior title not to be required, investigated or objected to); compare *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, 626, C. A.; S. C., [1895] 2 Ch. 603, C. A.; *Re Lyons and Carroll's Contract*, [1896] 1 I. R. 383, 389, C. A.

(*a*) *Re Banister, Broad v. Munton* (1879), 12 Ch. D. 131, C. A. (conditions misleading, as requiring purchaser to assume what is known to vendor to be untrue or as stating as not to be accurately known to vendor what he did know); *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A.; compare *Harnett v. Baker* (1875), L. R. 20 Eq. 50; *Blenkhorn v. Penrose* (1880), 29 W. R. 237; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666 (inadequate disclosure by vendor); *Jones v. Clifford* (1876), 3 Ch. D. 779 (objection allowed after purchaser, under a common mistake, had accepted the title). *Best v. Hamand* (1879), 12 Ch. D. 1, C. A., can perhaps be reconciled with *Re Banister, Broad v. Munton*, *supra*, on the ground that the purchaser was merely held to be disentitled to recover his deposit and was not ordered to complete the purchase.

(*b*) See *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515; *Jones v. Clifford*, *supra*; compare *Southby v. Hutt* (1837), 2 My. & Cr. 207; *Anderson v. Higgins* (1844), 1 Jo. & Lat. 718; title SALE OF LAND, Vol. XXV., p. 322.

(*c*) *Southby v. Hutt*, *supra*, at p. 212.

(*d*) *Monro v. Taylor* (1850), 8 Hare, 51; *Re Haedicke and Lipski's Contract*, *supra*, at p. 669; *Re Duthy and Jesson's Contract* (1898), 46 W. R. 300 (best title vendors can give).

(*e*) *Godson v. Turner* (1851), 15 Beav. 46; compare *Ashton v. Wood* (1857), 3 Jur. (N. s.) 1164.

(*f*) *Phipps v. Child* (1857), 3 Drew. 709.

(*g*) Such as by admitting or not denying the plaintiff's title in the defence in an action for specific performance; compare *Phipps v. Child*, *supra*. An express waiver may be either absolute or conditional (*Townley v. Bond* (1834), 4 Dr. & War. 240, 261).

(*h*) The implied waiver must be clear and free from surprise or misrepresentation on the part of the vendor; see *Jenkins v. Hiles* (1802), 6 Ves. 646, 655; *Haydon v. Bell* (1838), 1 Beav. 337; *Blacklow v. Laws* (1842), 2 Hare, 40; title EQUIT, Vol. XIII., pp. 165, 166. As to acceptance of title generally, see, further, title SALE OF LAND, Vol. XXV., pp. 363, 364.

(*i*) *Corless v. Sparling* (1874), 8 I. R. Eq. 335.

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without waiving the objection proceed towards completion, since he may assume that the defect will be cured (*k*). Where, however, the defect is known to be incurable, a purchaser who proceeds without insisting on the objection is generally held to have waived it (*l*). Even taking possession in such cases may not constitute a waiver of the right to object if possession is taken either under the terms of the contract or by subsequent arrangement without prejudice to the right to a good title (*m*). Acts, however, which go beyond mere possession and amount to acts of ownership, either from the length of the possession (*n*) or from the nature of the acts (*o*), constitute a waiver (*p*). A waiver may be inferred where a particular objection, known to the purchaser, was passed over in silence in a subsequent supplemental contract (*q*); but a continuance of negotiations (*r*), or a delay in enforcing the contract (*s*), does not bar a right to investigate title (*t*).

Particular
cases of relief.

In certain cases the court, while holding the facts insufficient to establish a waiver, has ordered payment into court of the purchase price (*a*); and even where the acts of the purchaser have been held

(*k*) *Calcraft v. Roebuck* (1790), 1 Ves. 221.

(*l*) *Fordyce v. —* (1794), 4 Bro. C. C. 494, cited 6 Ves. 679 (purchaser negotiating without objection that land was almost entirely leasehold though sold as freehold with leasehold attached); *Burnell v. Brown* (1820), 1 Jac. & W. 168 (waiver of objection that land was subject to reservation of sporting rights); see *Re Barrington, Ex parte Sidebotham* (1834), 1 Mont. & A. 655; *Re Barrington, Ex parte Barrington* (1835), 2 Mont. & A. 245; *Stanton v. Tattersall* (1853), 1 Sm. & G. 529; *Ellis v. Rogers* (1885), 29 Ch. D. 661, C. A.

(*m*) *Stevens v. Guppy* (1828), 3 Russ. 171 (possession previous to good title by terms of contract); compare *Anspach (Margravine) v. Noel* (1816), 1 Madd. 310; *Burroughs v. Oakley* (1819), 3 Swan. 159 (possession with vendor's consent pending proof of title).

(*n*) *Hall v. Laver* (1838), 3 Y. & C. (ex.) 191 (twenty years' possession); *Wallis v. Woodyear* (1855), 2 Jur. (N. S.) 179 (twenty-six years' possession, also payment of part of purchase-money); *Bown v. Stenson* (1857), 24 Beav. 631 (waiver limited to objections appearing on abstract delivered before possession taken); compare *Pegg v. Wisden* (1852), 16 Beav. 239; *Corbett v. Commissioners of Works and Public Buildings* (1868), 16 W. R. 889. In *Anspach (Margravine) v. Noel*, *supra*, waiver was inferred from possession and further acts. Where the defect known before possession is capable of being cured by the purchaser, a waiver is not necessarily implied (*Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320). As to defects cured by the purchaser, see the text, *infra*.

(*o*) *Anspach (Margravine) v. Noel*, *supra* (altering property and letting it).

(*p*) It is material to consider whether the objection said to be waived was or was not known to the purchaser, especially if it cannot be cured by the vendor; see *Osborne v. Harvey* (1841), 1 Y. & C. Ch. Cas. 116; *Small v. Attwood* (1832), You. 407, 506.

(*q*) *Dawson v. Brinckman* (1849), 3 De G. & Sm. 376; (1850) 3 Mac. & G. 53.

(*r*) *Knatchbull v. Grueber* (1815), 1 Madd. 153 (where the purchaser continued to insist on the objections).

(*s*) *Blachford v. Kirkpatrick* (1842), 6 Beav. 232.

(*t*) Compare *Deverell v. Bolton (Lord)* (1812), 18 Ves. 505, where the purchaser's counsel had approved; distinguish *Corbett v. Commissioners of Works and Public Buildings*, *supra*. As to the lessee's right to inquire into the lessor's title, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 381, 382; SALE OF LAND, Vol. XXV., pp. 342, 343.

(*a*) *Cutler v. Simons* (1816), 2 Mer. 103; *Osborne v. Harvey*, *supra*. As to payment into court, see pp. 94, 95, *post*.

to constitute a waiver of his right to investigate the vendor's title, the court has not enforced the contract where it has appeared *aliunde* that the vendor's title was defective (*b*). Conversely, a purchaser may himself cure a defect, which he will thus be debarred from objecting to, and specific performance will be ordered (*c*).

A waiver must be expressly pleaded (*d*).

157. The reference of title may be expressly limited in accordance with the requirements of the case (*e*), or it may be open and general (*f*). It is directed not merely to the question of whether or not a good title is made out, but also to the time when such title was shown (*g*), and other matters (*h*).

158. The reference of title may be ordered at any stage of the proceedings, and is sometimes ordered on interlocutory motion (*i*).

159. The inquiry takes place in the chambers of the judge (*k*). Evidence of any material facts may be given by affidavit (*l*). The master embodies the result of the inquiry in a certificate (*m*),

SECT. 2.
Relief.

Plea.

Form and
scope of
reference.

When refer-
ence ordered.

Procedure.

(*b*) *Warren v. Richardson* (1830), You. 1.

(*c*) *Murrell v. Goodyear* (1860), 1 De G. F. & J. 432, C. A.

(*d*) *Clive v. Beaumont* (1847), 1 De G. & Sm. 397.

(*e*) *Hume v. Pocock* (1865), L. R. 1 Eq. 423; affirmed (1866), 1 Ch. App. 379; *Saul v. Bolton* (1852), 3 Seton, Judgments and Orders, 7th ed., p. 2159; *Remnant v. Holt* (1847), 3 Seton, Judgments and Orders, 7th ed., p. 2160.

(*f*) *Harnett v. Baker* (1875), L. R. 20 Eq. 50 (conditions held misleading; open reference offered, and, being refused by vendor, bill was dismissed).

(*g*) *Foxlowe v. Amcoat* (1840), 3 Beav. 496; 3 Seton, Judgments and Orders, 7th ed., pp. 2158—2160. Unless such inquiry is omitted by direction of the court for special reasons; see *Gibbins v. North Eastern Metropolitan Asylum District* (1847), 11 Beav. 1 (contract disputed); compare *Bennett v. Rees* (1836), 1 Keen, 405, 409; *Morris v. Wilson* (1859), 5 Jur. (N. S.) 168; *Potter v. Crossley* (1856), 5 W. R. 35. In *Hyde v. Wroughton* (1818), 3 Madd. 279, this inquiry, not having been directed on the original reference, was refused on a second motion. This inquiry is generally necessary for the purpose of determining the date from which interest is payable by the purchaser (see pp. 91, 92, *post*), and also in connexion with the question of liability for costs (see pp. 90, 91, *post*). A good title is shown when the necessary facts and documents are set out in the abstract (*Parr v. Lovegrove* (1857), 4 Drew. 170, 176; see *Sherwin v. Shakspeare* (1853), 17 Beav. 267, 275); see title SALE OF LAND, Vol. XXV., pp. 342, 344, 345.

(*h*) *Wright v. Bond* (1805), 11 Ves. 39 (inquiry whether a good title appeared in the abstract); distinguish *Bennett v. Rees*, *supra* (inquiry refused as to whether abstract perfect); *Jennings v. Hopton* (1816), 1 Madd. 211; *Horniblow v. Shirley* (1804), 3 Seton, Judgments and Orders, 7th ed., p. 2160; *Enraght v. Fitzgerald* (1842), 2 Dr. & War. 43.

(*i*) Under R. S. C., Ord. 32, rr. 2, 6; see titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 194 *et seq.*; PRACTICE AND PROCEDURE, Vol. XXIII., p. 138. A vendor is bound to obtain the reference to title at as early a stage as possible so as to save unnecessary costs; see *Phillipson v. Gibbon* (1871), 6 Ch. App. 428; title SALE OF LAND, Vol. XXV., pp. 316, 317.

(*k*) As to references to the conveyancing counsel, see R. S. C., Ord. 51, r. 7; as to certificates of masters, see R. S. C., Ord. 55, rr. 65—71.

(*l*) See *Phillipson v. Gibbon*, *supra*, where evidence of facts affecting the title newly discovered by purchaser was given by affidavit; compare *Re Burroughs, Lynn and Sexton* (1877), 5 Ch. D. 601, 603, C. A.

(*m*) The certificate should decide positively for or against the title,

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Certificate.

which may be objected to by either party by taking out a summons to discharge or vary the certificate within eight clear days after filing (*n*); otherwise the certificate becomes binding, unless special grounds are shown for reopening it (*o*).

If the certificate is in favour of the title and no application is made to vary it, or the application, if made, has failed (*p*), the court as a rule (*q*) orders specific performance, or the certificate may be referred back to chambers for review (*r*), in which case the vendor has an opportunity of removing objections (*s*), while the purchaser is entitled to bring in further objections (*t*). If the certificate is against the title and no application is made to vary it, or the application, if made, has failed, specific performance is refused (*a*), and the vendor, being plaintiff, may be ordered to repay the deposit with interest at 4 per cent., and the court may declare that the purchaser has a lien on the estate for deposit, interest and costs of the action (*b*). A defect in the title may, however, be cured on the hearing (*c*), or it may appear that the purchaser has cured the defect or acquired the means of curing it (*d*), so that the vendor's claim for specific performance will be allowed (*e*).

Costs.

160. In an action for specific performance, as in other actions (*f*), the costs are in the general discretion of the court (*g*); but as a rule, where the dispute is as to title, the vendor has to pay the costs up to the time when he first showed a good title (*h*). A purchaser,

hence it ought not to state a title as good subject to performance of conditions (*Lewis v. Lozam* (1816), 1 Mer. 179; *Magennis v. Fallon* (1829), 2 Moll. 561; *Esdaile v. Stephenson* (1822), Madd. & G. 366). If against the title, it should state the grounds of defect (*Green v. Monks* (1818), 2 Moll. 325).

(*n*) R. S. C., Ord. 55, r. 70; compare *Howell v. Kightley* (1856), 8 De G. M. & G. 325, C. A.

(*o*) R. S. C., Ord. 55, r. 71.

(*p*) After such failure no further objection can, it seems, be taken (*Brooke v. —* (1819), 4 Madd. 212).

(*q*) Under the old practice the court has refused to force a title on a purchaser if, in the opinion of the court, it was too doubtful; see *Bickner v. Milner* (1842), 1 Hare, 578, n.; *Willcox v. Bellaers* (1823), Turn. & R. 491.

(*r*) *Curling v. Flight* (1848), 2 Ph. 613, 616, 619; *Rhodes v. Ibbetson* (1853), 4 De G. M. & G. 787, C. A.; *Egerton v. Jones* (1830), 1 Russ. & My. 694; *Fildes v. Hooker* (1817), 2 Mer. 424; *Jewdine v. Alcock* (1816), 1 Madd. 597; *Andrew v. Andrew* (1830), 3 Sim. 390.

(*s*) *Portman v. Mill* (1831), 1 Russ. & M. 696.

(*t*) *Brooke v. —*, *supra*.

(*a*) *Pretty v. Solly* (1859), 26 Beav. 606, 613.

(*b*) *Turner v. Marriott* (1867), L. R. 3 Eq. 744; see p. 95, *post*; see also title SALE OF LAND, Vol. XXV., p. 374.

(*c*) *Paton v. Rogers* (1822), Madd. & G. 256. In *Esdaile v. Stephenson*, *supra*, the certificate was referred back to consider whether in fact the defect had been cured.

(*d*) *Hume v. Pocock* (1866), L. R. 1 Eq. 662; *Murrell v. Goodyear* (1860), 1 De G. F. & J. 432, C. A.

(*e*) See the cases cited in notes (*c*), (*d*), *supra*.

(*f*) Distinguish actions tried before a judge and jury; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 180.

(*g*) R. S. C., Ord. 70; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 178.

(*h*) *Freer v. Hesse* (1853), 4 De G. M. & G. 495, 505, C. A.; *Phillipson*

however, who has caused the litigation by his objections may have to pay the costs if these objections are overruled, even though in chambers some defect not hitherto in question has for the first time been raised (*i*); and, similarly, he may be ordered to pay the costs up to and inclusive of the hearing where it was necessitated by defences which he failed to establish, but which prevented the usual reference to title on interlocutory motion (*j*), or where the questions raised are questions of contract only (*k*). Considerations of costs may also turn on whether the case was one proper for determination without an action by a vendor and purchaser summons (*l*).

SECT. 2.
Relief.

SUB-SECT. 3.—*Interest, Rents, Deterioration, and Payment into Court.*

161. On a contract for the sale of real property, the legal estate does not pass until the formal conveyance is executed (*m*). Between the date of the contract, being one of which specific performance can be decreed (*n*), and the conveyance the legal estate remains in the vendor, but the equitable estate passes to the purchaser (*o*); and, as it is inequitable that the same person should enjoy both the rents and profits of the property and also the interest on the purchase-money, up to the time, if any, fixed for completion (*p*), or, if no time is fixed, up to the time at which completion ought to take place, that is, as a rule, when a good title is shown (*q*), the vendor is entitled to the rents and profits and is liable to bear outgoings. After that date the purchaser is, as a rule, entitled to the rents and profits, but is liable to bear the outgoings and to pay the vendor interest at 4 per cent. on the unpaid purchase-money (*r*).

Rights as between vendor and purchaser to rents and profits.

v. Gibbon (1871), 6 Ch. App. 428, 434; *Halkett v. Dudley* (Earl), [1907] 1 Ch. 590, 607.

(*i*) *Phillipson v. Gibbon* (1871), 6 Ch. App. 428, 434; see *Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Bridges v. Longman* (1857), 24 Beav. 27.

(*j*) *Croome v. Lediard* (1835), 2 My. & K. 293; *Hyde v. Dallaway* (1842), 4 Beav. 606.

(*k*) *Banfield v. Picard* (1911), 55 Sol. Jo. 649.

(*l*) See title SALE OF LAND, Vol. XXV., pp. 388 *et seq.*

(*m*) See, for instance, *Fludyer v. Cocker* (1805), 12 Ves. 25, *per* GRANT, M.R., at p. 27.

(*n*) As to contracts specific performance of which is not decreed, see pp. 7 *et seq.*, *ante*; 19 *et seq.*, *ante*.

(*o*) See *Rose v. Watson* (1864), 10 H. L. Cas. 672, *per* Lord WESTBURY, L.C., at p. 678; *Raffety v. Schofield*, [1897] 1 Ch. 937, *per* ROMER, J., at p. 943; *Cornwall v. Henson*, [1899] 2 Ch. 710, *per* COZENS-HARDY, J., at p. 714. If the contract goes off, the equitable estate reverts in the vendor; see *Wall v. Bright* (1820), 1 Jac. & W. 494, *per* PLUMER, M.R., at p. 501. For a fuller discussion of the respective rights of a vendor and purchaser between contract and conveyance, see title SALE OF LAND, Vol. XXV., pp. 364 *et seq.*

(*p*) See *Binks v. Rokeby* (Lord) (1818), 2 Swan. 222, 225; *Carrodus v. Sharp* (1855), 20 Beav. 56, 58; *Wells v. Maxwell* (No. 2) (1863), 32 Beav. 550; *Re Keeble and Stilwell's Fletton Brick Co.* (1898), 78 L. T. 383; *Plews v. Samuel*, [1904] 1 Ch. 464.

(*q*) *Pincke v. Curteis* (1793), 4 Bro. C. C. 329; *Enraght v. Fitzgerald* (1842), 2 Dr. & War. 43; *Carrodus v. Sharp*, *supra*; *Barsh v. Tagg*, [1900] 1 Ch. 231, 235; *Halkett v. Dudley* (Earl), *supra*; see title SALE OF LAND, Vol. XXV., pp. 367, 371.

(*r*) See *Fletcher v. Lancashire and Yorkshire Railway*, [1902] 1 Ch. 901, 908; and see the cases cited in notes (*p*), (*q*), *supra*. For form of order

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Relief.

Interest on
purchase-
money :
vendor in
possession.

Where the purchase price is to be fixed subsequently to the contract, interest does not run until the price is ascertained (s).

162. Apart from the special terms of the contract, the following rules as to interest apply :—

If there is delay in completion which is due to the default of the vendor, and the interest is in excess of the rents, the purchaser is not liable to pay interest during the period of delay, but the vendor retains the rents (t). Where, however, the delay is due to the fault of the purchaser, interest runs from the proper date for completion (a).

If, where completion is delayed, the purchaser appropriates the purchase-money and gives notice of the appropriation to the vendor, the vendor is only entitled to the interest, if any, accruing on the money so appropriated (b).

Express
contractual
provisions.

163. The above rules may be varied by special terms of the contract; for instance, (1) rents until completion may be expressly reserved to the vendor (c); or (2) the contract may provide that the purchaser shall pay interest from the date fixed for completion, notwithstanding delay from any cause whatever, in which case interest is payable even if delay is due to the fault of the vendor (d),

as to interest and rents, see 3 Seton, Judgments and Orders, 7th ed., pp. 2170—2172.

(s) *Catling v. Great Northern Rail. Co.* (1869), 18 W. R. 121.

(t) See the cases cited in title SALE OF LAND, Vol. XXV., p. 375, note (d). In *Burton v. Todd* (1819), 1 Swan. 260, where the vendor retained possession of the estate and of one-third of the purchase-money for fifteen years, owing to his own wrongful delay, the purchaser was given the whole of the rents and interest on one-third of the rents from the date of their accruing. As to the proper date of completion, see title SALE OF LAND, Vol. XXV., p. 367.

(a) *Monro v. Taylor* (1852), 3 Mac. & G. 713.

(b) *Re Riley to Streatfield* (1886), 34 Ch. D. 386; see *Powell v. Martyn* (1803), 8 Ves. 146; *Roberts v. Massey* (1807), 13 Ves. 561; *Dyson v. Hornby, Ex parte Markwell* (1851), 4 De G. & Sm. 481; *Howland v. Norris* (1784), 1 Cox, Eq. Cas. 59; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; *De Visme v. De Visme* (1849), 1 Mac. & G. 336, 352; title SALE OF LAND, Vol. XXV., p. 376.

(c) *Brooke v. Champernowne* (1837), 4 Cl. & Fin. 589, H. L. (in which case the purchaser is absolved from paying interest); and see title SALE OF LAND, Vol. XXV., pp. 375, 376.

(d) *Esdale v. Stephenson* (1822), 1 Sim. & St. 122 (which is inconsistent with *Monk v. Huskisson* (1827), 4 Russ. 121, n.); *Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517, C. A.; *Williams v. Glenton* (1866), 1 Ch. App. 200; see *Rowley v. Adams* (1850), 12 Beav. 476 (vendor's failure to deliver abstract at due date); *Greenwood v. Churchill* (1845), 8 Beav. 413 (great delay on vendor's part: purchaser ordered to pay interest, but left to apply for compensation); *Bannerman v. Clarke* (1856), 3 Drew. 632 (delay through death of vendor); *Palmerston (Lord) v. Turner* (1864), 33 Beav. 524 (delay through proceedings necessary to perfect vendor's power to sell); *Cowpe v. Bakewell* (1851), 13 Beav. 421; *Dyson v. Hornby, Ex parte Markwell, supra*; *Vickers v. Hand* (1859), 26 Beav. 630; and see title SALE OF LAND, Vol. XXV., pp. 333, 334. A purchaser is deemed to be in default if delay arises from an untenable objection taken by him; see *Storrey v. Walsh* (1854), 18 Beav. 559; *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648. As to the effect on a condition of this nature of a deposit by the purchaser of the purchase-money, see title SALE OF LAND, Vol. XXV., p. 334.

so long as there is on his part no bad faith or gross negligence (*e*); or (3) the contract may exempt the purchaser from payment of interest only in the case of wilful default on the part of the vendor, this involving actual default on the part of the vendor, and more than mere mistake or oversight, though not necessarily meaning intentional delay or wilful obstruction (*f*).

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Relief.

A vendor in possession himself (*g*) is charged a fair occupation rent (*h*), unless he simply remained in possession owing to the purchaser's default (*i*). Liability for outgoings as a rule goes with the right to receive rents (*j*).

Vendor's
liabilities.

164. In the above instances (*k*) it has been assumed that the vendor has remained in possession. If, however, the purchaser has taken possession, he pays interest on the unpaid purchase-money from the time of possession (*l*), even though the delay in completion has been due to the vendor's fault, and even though no profits have been made out of the land (*m*). The purchaser may,

Interest on
purchase-
money;
purchaser in
possession.

(*e*) See Fry on Specific Performance, 5th ed., pp. 683—685, discussing *De Visme v. De Visme* (1849), 1 Mac. & G. 336, and the cases cited in note (*d*), p. 92, *ante*.

(*f*) *Bennett v. Stone*, [1902] 1 Ch. 226, 232; affirmed, [1903] 1 Ch. 509, C. A. Contrast the cases referred to in title SALE OF LAND, Vol. XXV., p. 334, in which wilful default was held to be shown, with the following cases where wilful default was not found, namely, *Re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, C. A. (erroneous description of title); *Re Woods and Lewis' Contract*, [1898] 1 Ch. 433; S. C., [1898] 2 Ch. 211, C. A. (unknown defect of title); *North v. Percival*, [1898] 2 Ch. 128 (vendor's unsuccessful resistance to action for specific performance); see also *Bennett v. Stone*, *supra*.

(*g*) As to the liability of a vendor in receipt of rents to account, see title SALE OF LAND, Vol. XXV., p. 373, note (*c*).

(*h*) *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; *Metropolitan Rail. Co. v. Defries* (1877), 2 Q. B. D. 189, 387, C. A.; see title SALE OF LAND, Vol. XXV., pp. 373, 374.

(*i*) *Dakin v. Cope* (1827), 2 Russ. 170, 181; *Leggott v. Metropolitan Rail. Co.* (1870), 5 Ch. App. 716.

(*j*) See *Lawes v. Gibson* (1865), L. R. 1 Eq. 135 (ground rent apportioned up to date of completion); and see, further, title SALE OF LAND, Vol. XXV., p. 335, note (*i*); compare *Williams v. East London Rail. Co.* (1869), 18 W. R. 159; *Carrodus v. Sharp* (1855), 20 Beav. 56.

(*k*) See pp. 91, 92, *ante*, and the text, *supra*.

(*l*) *Ballard v. Shutt* (1880), 15 Ch. D. 122; *Fludyer v. Cocker* (1805), 12 Ves. 25, 27; *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222, 226; *Neath New Gas Co. v. Gwyn*, [1873] W. N. 200. Where a purchaser has been dispossessed after taking possession he is charged with interest during the period of possession (*Johnston v. Johnston* (1869), 3 I. R. Eq. 328). As to contracts exempting a purchaser from paying interest, see *Birch v. Joy* (1852), 3 H. L. Cas. 565, where possession was held for forty years, before completion, and the court refused to give effect to the exemption in the circumstances of the case. Where possession is taken under statutory powers the vendor is generally entitled to interest or compensation as from the date of possession (*Rhys v. Dare Valley Rail. Co.* (1874), L. R. 19 Eq. 93; *Firth v. Midland Rail. Co.* (1875), L. R. 20 Eq. 100; *Re Pigott and Great Western Rail. Co.* (1881), 18 Ch. D. 146); compare *Re Eccleshill Local Board* (1879), 13 Ch. D. 365, doubted in *Re Pigott and Great Western Rail. Co.*, *supra*, per JESSEL, M.R., at p. 154; and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 61; SALE OF LAND, Vol. XXV., p. 375.

(*m*) *Fludyer v. Cocker*, *supra*; *Ballard v. Shutt*, *supra*; *Beresford v. Clarke*, [1908] 2 I. R. 317. In *Cowpe v. Bakewell* (1851), 13 Beav. 421,

SECT. 2.
Relief.

however, where delay has arisen, appropriate the purchase-money for purposes of the contract and give notice to the vendor, who is then only entitled to claim such interest as the money so appropriated produces (*n*).

Deterioration.

165. A vendor, as constructive trustee, is liable for deterioration to the property while he is in possession in the interval before completion, provided such deterioration is due to his wilful default or want of reasonable care (*o*); but he is not liable for deterioration occurring without his fault (*p*), and still less for deterioration due to the purchaser's own fault (*q*).

Payment into
court.

166. In an action for specific performance an order may be made for payment into court by the purchaser of the purchase price; this is done if the purchaser is in possession and a good title has been disclosed by the vendor or admitted by the purchaser (*r*), or the delay in showing a good title is due to no default on the part of the vendor (*s*). The order will, however, be refused if the vendor is in default (*t*), or if the purchaser is in possession under another title than the contract, as, for example, as tenant to the vendor (*a*), or if the contract entitles the purchaser to possession before completion of the title (*b*).

the purchaser was put to his election to pay interest or give up the rents; see also *Herbert v. Salisbury and Yeovil Rail. Co.* (1865), L. R. 2 Eq. 221 (interest at increasing rate); *A.-G. v. Christchurch (Dean and Chapter)* (1842), 13 Sim. 214.

(*n*) *Kershaw v. Kershaw* (1869), L. R. 9 Eq. 56; compare *Winter v. Blades* (1825), 2 Sim. & St. 393; and see title SALE OF LAND, Vol. XXV., p. 376.

(*o*) *Lysaght v. Edwards* (1876), 2 Ch. D. 499, *per* JESSEL, M.R., at p. 507; *Foster v. Deacon* (1818), 3 Madd. 394; *Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83; *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469 (failure to take steps to keep property in cultivation); *Brown v. Dibbs* (1877), 25 W. R. 776, P. C. (vendor of mine held accountable for profits of working); compare *Jegon v. Vivian* (1871), 6 Ch. App. 742; see also *Malone v. Henshaw* (1891), 29 L. R. Ir. 352; *Raffety v. Schofield*, [1897] 1 Ch. 937, 944. In *Dixon v. Fraser* (1866), L. R. 2 Eq. 497, the question was as to deterioration by the vendor's tenants, and he was ordered to give their names. The purchaser's right to claim for deterioration may be enforced by action after conveyance in ignorance of the facts (*Clarke v. Ramuz*, [1891] 2 Q. B. 456, C. A.; *Connolly v. Keating* (No. 2), [1903] 1 I. R. 356), and the claim may be set off against balance of purchase-money (*Ferguson v. Tadman* (1827), 1 Sim. 530), or interest (*Phillips v. Silvester* (1872), 8 Ch. App. 173); and see, further, title SALE OF LAND, Vol. XXV., pp. 368, 370.

(*p*) *Re Sweeney's Estate* (1890), 25 L. R. Ir. 252.

(*q*) *Harford v. Purrier* (1816), 1 Madd. 532.

(*r*) *Crutchley v. Jerningham* (1817), 2 Mer. 502.

(*s*) *Gibson v. Clarke* (1813), 1 Ves. & B. 500. In such cases the purchaser is generally put to his election either to give up possession or to pay the money into court; see *Clarke v. Wilson* (1808), 15 Ves. 317; *Smith v. Lloyd* (1815), 1 Madd. 83; *Wickham v. Evered* (1819), 4 Madd. 53; *Tindal v. Cobham* (1835), 2 My. & K. 385; *Younge v. Duncombe* (1831), You. 275; *King v. King* (1833), 1 My. & K. 442; *Curling v. Austin* (1862), 2 Drew. & Sm. 129; *Greenwood v. Turner*, [1891] 2 Ch. 144.

(*t*) *Fox v. Birch* (1815), 1 Mer. 105.

(*a*) *Freebody v. Parry* (1815), Coop. G. 91; *Faulkner v. Llewellyn* (1862), 31 L. J. (CH.) 549.

(*b*) *Pryse v. Cambrian Rail. Co.* (1867), 2 Ch. App. 444; distinguish

In any case the order is made if the purchaser is not merely in possession, but does acts of ownership (*c*).

Such an order may be made on motion, supported by affidavit (*d*), and in a proper case before delivery of defence (*e*).

SECT. 2.
Relief.

SUB-SECT. 4.—*The Deposit.*

167. In an action for specific performance questions may arise as to the deposit paid by the purchaser on the making of the contract, such deposit being in the nature of part payment if the contract is duly completed, or, if the contract fails owing to the default of the purchaser, serving as earnest or security for the due performance of his contract and therefore liable to forfeiture (*f*).

Questions as to deposit.

A purchaser, in claiming specific performance, may, in the alternative, claim a return of the deposit and damages, and enforcement of his lien on the property for the same (*g*). Similarly, in a vendor's action for specific performance, the purchaser in resisting the claim may counterclaim for return of the deposit, with interest at 4 per cent., and for enforcement of his lien in respect thereof (*h*). It does not, however, necessarily follow that because a vendor is unsuccessful in his claim for specific performance the purchaser is entitled to a return of his deposit (*i*). The right to have the deposit returned depends in some cases upon an express condition of forfeiture (*k*), or, in the absence of such a condition, upon the intention to be collected from the whole contract (*l*).

Purchaser's claim.

Purchaser's counterclaim.

Cooper v. London, Chatham and Dover Rail. Co. (1866), 14 W. R. 985, where the contract also provided that the vendors should retain their lien and all rights incident thereto; see also *Tomlinson v. Manchester and Birmingham Rail. Co.* (1840), 2 Ry. & Can. Cas. 104; *Pell v. Northampton and Banbury Junction Rail. Co.* (1866), 2 Ch. App. 100; *Capps v. Norwich and Spalding Rail. Co.* (1863), 2 New Rep. 51.

(*c*) *Pope v. Great Eastern Rail. Co.* (1866), L. R. 3 Eq. 171; *Bonner v. Johnston* (1816), 1 Mer. 366; *Dixon v. Astley* (1816), 19 Ves. 564; *Cutler v. Simons* (1816), 2 Mer. 103, 106; *Bramley v. Teal* (1818), 3 Madd. 219; *Osborne v. Harvey* (1841), 1 Y. & C. Ch. Cas. 116; *Burroughs v. Oakley* (1815), 1 Mer. 52, 376, n.

(*d*) See R. S. C., Ord. 32, r. 6; *Crutchley v. Jerningham* (1817), 2 Mer. 502; *Tindal v. Cobham* (1835), 2 My. & K. 385; *Wickham v. Evered* (1819), 4 Madd. 53; *Greenwood v. Turner*, [1891] 2 Ch. 144.

(*e*) See, for instance, *Bonner v. Johnston*, *supra*; *Dixon v. Astley*, *supra*; *Cutler v. Simons*, *supra*.

(*f*) See the cases cited in titles SALE OF GOODS, Vol. XXV., p. 133, note (*d*); SALE OF LAND, Vol. XXV., p. 398, note (*c*).

(*g*) *Tacon v. National Standard Land Mortgage and Investment Co.* (1887), 56 L. J. (CH.) 529; compare *Cornwall v. Henson*, [1900] 2 Ch. 298, C. A., where the purchaser, though he had lost his equitable claim to insist on specific performance, was held entitled to recover damages.

(*h*) As to such lien, see *Rose v. Watson* (1864), 10 H. L. Cas. 672; *Whitbread & Co., Ltd. v. Watt*, [1904] 1 Ch. 911; affirmed, [1902] 1 Ch. 835, C. A. (purchaser's lien where contract rescinded under a condition of the contract); and see also title LIEN, Vol. XIX., pp. 16, 17.

(*i*) *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, C. A.; compare *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, 602, C. A.

(*k*) See title SALE OF LAND, Vol. XXV., p. 398.

(*l*) See titles SALE OF GOODS, Vol. XXV., pp. 237, 238; SALE OF LAND, Vol. XXV., pp. 398, 402.

SECT. 2.

Relief.

Application
for relief.

SUB-SECT. 5.—*Ancillary Relief.*

168. Ancillary relief may be obtained after judgment in an action for specific performance where such further relief becomes necessary (*m*). The nature of the relief varies according to the subject-matter of the contract and the position occupied by the parties. The application for the relief must be made to the court by which the judgment was pronounced (*n*).

Nature of
relief.

169. Thus, either party may by motion in the action obtain an order fixing a time and place for completion of the contract, payment of the unpaid purchase-money, and delivery of the executed conveyance and title deeds (*o*), or an order fixing the period within which the judgment is to be obeyed.

Enforcement
of order
granting
relief.

170. Where the defendant fails to obey such an order within the time limited, the plaintiff may without further order issue a writ of sequestration against his estate and effects (*p*). Where the default is in payment of money, the plaintiff may proceed by writ of *fiery facias* (*q*). An order requiring the defendant to perform some act other than or besides the payment of money may be enforced by writ of attachment or committal (*r*). The court may also in case of default, besides or instead of proceedings against the defaulting party for contempt, order the party who has obtained judgment, or some other person appointed by the court, to do the act required to be done, at the cost of the party in default (*s*).

Vesting order
or convey-
ance.

171. A purchaser who has obtained judgment for specific performance of a contract concerning land may also, if the vendor refuses to convey the land, apply to the court for an order vesting it in him, or appointing someone to convey it to him, with a release where necessary of contingent rights (*t*).

(*m*) After judgment for specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the court (*Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, *per* PARKER, J., at p. 601); see title SALE OF LAND, Vol. XXV., p. 403.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17; see title EQUITY, Vol. XIII., pp. 61, 62.

(*o*) *Morley v. Clavering* (1861), 30 Beav. 108; *Morgan v. Brisco* (1885), 31 Ch. D. 216; for form of order made in this case on further consideration, see S. C. (1886), 32 Ch. D. 192; 3 Seton, Judgments and Orders, 7th ed., pp. 2175, 2215 *et seq.* For forms of orders made against defaulting purchasers, see *Bell v. Denver* (1886), 54 L. T. 729; *Jessop v. Smyth*, [1895] 1 I. R. 508).

(*p*) R. S. C., Ord. 43, r. 6; see title EXECUTION, Vol. XIV., p. 82.

(*q*) R. S. C., Ord. 42, r. 17; see title EXECUTION, Vol. XIV., p. 38; or by writ of *elegit* (R. S. C., Ord. 42, r. 17; see title EXECUTION, Vol. XIV., p. 71).

(*r*) R. S. C., Ord. 42, r. 7; see titles CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 309 *et seq.*; EXECUTION, Vol. XIV., p. 73.

(*s*) R. S. C., Ord. 42, r. 31; see *Mortimer v. Wilson* (1885), 33 W. R. 927.

(*t*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 31, 33; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14; *Wellesley v. Wellesley, Mornington v. Mornington, Ex parte Mornington (Countess)* (1853), 4 De G. M. & G. 537, C. A. (agreement for jointure); *Hall v. Hale* (1884), 51 L. T. 226

When judgment has been given for specific performance and there are any parties to the action who are necessary parties to the conveyance, but who are not *sui juris*, the court may declare such persons to be trustees, and make a vesting order as to or appoint some person to convey their interests (a). Similar orders may be made with regard to the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was a party to the contract (b).

SECT. 2.
Relief.

Vesting order
as to interests
of persons
not *sui juris*.

172. Either party may also obtain an order rescinding the contract in default of completion within a fixed time (c). A vendor is not debarred from moving for such an order by the fact that the judgment at the trial contained a declaration of his lien for unpaid purchase-money and gave him liberty to apply for the purpose of enforcing it (d).

Order
rescinding
contract.

An order may be made on the motion for payment of the plaintiff's costs by the defendant, and for a stay of further proceedings in the action, except such as are necessary for the recovery of the costs of the action and motion (e).

Costs.
Stay.

173. Where a contract for sale of land contains a clause forfeiting the deposit and giving the vendor power to proceed to a resale of the

Order on
motion
forfeiting
deposit, with
liberty to
resell.

(agreement for lease); see titles SALE OF LAND, Vol. XXV., p. 433; TRUSTS AND TRUSTEES; 2 Seton, Judgments and Orders, 7th ed., p. 1227; 3 Seton, Judgments and Orders, 7th ed., p. 2217. As to the procedure under the Lands Clauses Acts where the vendor refuses to convey, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 107.

(a) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 31, 33; see *Wellesley v. Wellesley*, *Mornington v. Mornington*, *Ex parte Mornington* (Countess) (1853), 4 De G. M. & G. 537, C. A. (power to jointure); *Grace v. Baynton*, [1877] W. N. 79; *Hall v. Hale* (1884), 51 L. T. 226; *Re Ruthven's Trusts*, [1906] 1 I. R. 236, C. A. For forms of orders, see 2 Seton, Judgments and Orders, 7th ed., pp. 1226, 1227.

(b) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 31, 33.

(c) *Foligno v. Martin* (1853), 16 Beav. 586; *Simpson v. Terry* (1865), 23 Beav. 423; *Clark v. Wallis* (1866), 35 Beav. 460; *Henty v. Schröder* (1879), 12 Ch. D. 666. Where the applicant proves to the satisfaction of the court that the party in default has positively refused to complete, it is conceived that an order for immediate rescission may be made; see title SALE OF LAND, Vol. XXV., p. 397. An admission in his pleading by a defendant who does not appear at the trial does not entitle a plaintiff to an immediate order for rescission at the trial (*Stone v. Smith* (1887), 35 Ch. D. 188).

(d) *Baker v. Williams* (1893), 3 R. 305.

(e) *Olde v. Olde*, [1904] 1 Ch. 35. In the following cases the order excepted from the stay of proceedings any application to the court to award and assess damages arising from the breach of the contract:—*Sweet v. Meredith* (1863), 4 Giff. 207; *Watson v. Cox* (1873), L. R. 15 Eq. 219; see *Hythe Corporation v. East* (1866), L. R. 1 Eq. 620; compare *Henty v. Schröder*, *supra*, where JESSEL, M.R., declined to make this exception, considering that the plaintiff could not at the same time obtain an order for rescission of the contract and claim damages for the breach of it (see title SALE OF LAND, Vol. XXV., p. 398); and see *Hutchings v. Humphrey* (1885), 33 W. R. 563; *Jeffrey v. Stewart* (1899), 80 L. T. 17; *Jackson v. de Kadich*, [1904] W. N. 168, not followed in *Hall v. Burnell*, [1911] 2 Ch. 551, 556. As to an order rescinding the contract and forfeiting the deposit, see title SALE OF LAND, Vol. XXV., p. 400, note (m); as to forfeiture of deposit generally, see *ibid.*, pp. 398 *et seq.*; and see p. 95, *ante*.

SECT. 2.

Relief.

property on default by the purchaser, and further provides that, in the event of such resale, any deficiency in price shall be paid by the purchaser, the vendor may, if the purchaser fails to obey a judgment for specific performance of the contract, apply by motion for an order declaring that the deposit has been forfeited to him and that he is at liberty to proceed to a resale, and ordering the purchaser to pay to the vendor the amount of any deficiency on the resale; but, in ascertaining such deficiency, the vendor must give credit for the amount of the deposit (*f*).

Declaration
as to lien.

174. Where, on the sale of hereditaments of any tenure, the vendor has a lien (*g*) for unpaid purchase-money on the property sold, and obtains judgment for specific performance of the contract of sale, a declaration of the lien may be embodied in the judgment with liberty to apply to enforce the lien, if the vendor so desires (*h*).

Enforcement
of lien.

If the purchaser fails to comply with the judgment, the vendor may obtain further relief by an order for the sale of the property (*i*), or by an order appointing a receiver pending sale (*k*), or by an injunction operating to restore to him possession of the property (*l*).

(*f*) *Shuttleworth v. Clews*, [1910] 1 Ch. 176; see *Griffiths v. Vesey*, [1906] 1 Ch. 796; *Howe v. Smith* (1884), 27 Ch. D. 89, C. A., *per* FRY, L.J., at p. 105.

(*g*) As to the lien of an unpaid vendor on a sale of land, see title LIEN, Vol. XIX., pp. 15, 16.

(*h*) *Walker v. Ware, Hadham and Buntingford Rail. Co.* (1865), L. R. 1 Eq. 195; *Vyner v. Hoylake Rail. Co.* (1868), 17 W. R. 92; *Wing v. Tottenham and Hampstead Junction Rail. Co.* (1868), 3 Ch. App. 740; *Munns v. Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414; *Bee v. Stafford and Uttoxeter Rail. Co.* (1875), 23 W. R. 868; *Keane v. Athenry and Ennis Junction Rail. Co.* (1870), 19 W. R. 43; *Sedgwick v. Watford and Rickmansworth Rail. Co.* (1867), 36 L. J. (CH.) 379 (where an immediate sale was ordered).

(*i*) *Munns v. Isle of Wight Rail. Co.*, *supra*; *Williams v. Aylesbury and Buckingham Rail. Co.* (1873), 28 L. T. 547; *Lycett v. Stafford and Uttoxeter Rail. Co.* (1872), L. R. 13 Eq. 261. The proceeds of sale will be directed to be paid into court and leave reserved for the vendor to apply in chambers for payment (*Vyner v. Hoylake Rail. Co.* (1868), cited in 3 Seton, Judgments and Orders, 7th ed., p. 2223). The vendor may have liberty to bid (*Lycett v. Stafford and Uttoxeter Rail. Co.*, *supra*; *Ware v. Aylesbury and Buckingham Rail. Co.* (1873), 28 L. T. 893; see also *Wing v. Tottenham and Hampstead Junction Rail. Co.*, *supra*; *Keane v. Athenry and Ennis Junction Rail. Co.*, *supra*; *Jersey (Earl) v. South Wales Mineral Rail. Co.* (1868), 19 L. T. 446 (where the contract of sale is made with a railway company the vendor is entitled to an order for sale of the land, although the line has been actually completed). As to enforcement of lien, see, further, title LIEN, Vol. XIX., pp. 27, 28.

(*k*) Where profit is capable of being made out of the property pending the sale, that profit ought to be made (*Munns v. Isle of Wight Rail. Co.*, *supra*, *per* GIFFARD, L.J., at p. 419; see also *Ware v. Aylesbury and Buckingham Rail. Co.*, *supra*; and distinguish *Latimer v. Aylesbury and Buckingham Rail. Co.* (1878), 9 Ch. D. 385, C. A.; and see title RECEIVERS, Vol. XXIV., p. 351.

(*l*) *Williams v. Aylesbury and Buckingham Rail. Co.*, *supra*; *Allgood v. Merrybent and Darlington Rail. Co.* (1886), 33 Ch. D. 571; see title INJUNCTION, Vol. XVII., p. 249.

SUB-SECT. 6.—*Specific Performance with Compensation.*SECT. 2.
Relief.(i) *Where there is No Condition as to Compensation (m).*

175. A vendor may obtain specific performance with compensation against a purchaser under a contract of sale even where the vendor is unable to fulfil the exact terms of the bargain, provided—

(1) that the purchaser will on completion obtain substantially what he bargained for, and

(2) that the difference in value between the thing contracted for and the thing sold can be fairly computed.

Thus, specific performance with compensation may be granted at the instance of the vendor where an estate is described as freehold and in fact a very small portion is held only from year to year (*a*); where, in the case of a large estate, there is an objection to the title of a very small part not material to the enjoyment of the rest (*b*); where a small portion of a property is wrongly described (*c*); where, on a purchase by a tenant in possession, the measurements are given inaccurately (*d*); where, on the sale of a house, the vendor fails to disclose a deed acknowledging that he is not entitled to light to certain windows (*e*); where, on the sale of a colliery, the profits are overstated (*f*); where tithes contracted to be sold are subject to small annual charges (*g*); where the estate sold is subject to quit-rents (*h*); where an estate is described as subject to tithe

Where vendor entitled to specific performance with compensation.

(*m*) As to compensation under an open contract, see, further, title SALE OF LAND, Vol. XXV., pp. 406 *et seq.* As to conditions providing for the case of errors in description of land and allowing or excluding compensation, see title SALE OF LAND, Vol. XXV., pp. 328 *et seq.*

(*a*) *Calcraft v. Roebuck* (1790), 1 Ves. 221 (two acres out of 186 acres).

(*b*) *M'Queen v. Farquhar* (1805), 11 Ves. 467.

(*c*) *Scott v. Hanson* (1829), 1 Russ. & M. 128 (two acres out of fourteen wrongly described as "meadow").

(*d*) *King v. Wilson* (1843), 6 Beav. 124 (property described as 46 feet in depth, instead of 33 feet). In *English v. Murray* (1883), 49 L. T. 35, a purchaser of seventeen shares was ordered to perform the contract by accepting eleven shares with compensation for the loss of the remaining six shares, as the vendors had acted under a *bonâ fide* mistake. The decision appears doubtful as to their title to sell.

(*e*) *Greenhalgh v. Brindley*, [1901] 2 Ch. 324 (the order being made without costs).

(*f*) *Powell v. Elliott* (1875), 10 Ch. App. 424 (vendor allowed to enforce the contract on making compensation to the purchaser by submitting to an abatement from the purchase-money bearing the same proportion to the excess as the total purchase-money bore to capitalised value of profits as stated by vendor).

(*g*) *Halsey v. Grant* (1806), 13 Ves. 73 (inquiry directed as to whether there ought to be any and what indemnity in respect of the charge); *Horniblow v. Shirley* (1806), 13 Ves. 81; compare *Drewe v. Hanson* (1802), 6 Ves. 675; see also *Re Somerville's Estate*, [1895] 1 I. R. 460, 465 (no compensation in respect of tithe rentcharge); *Hamilton v. Bates*, [1894] 1 I. R. 1 (compensation for tithe rentcharge granted).

(*h*) *Esdaile v. Stephenson* (1822), 1 Sim. & St. 122, 124; compare *Barraud v. Archer* (1829), 2 Sim. 433; affirmed (1831), 9 L. J. (O. S.) (CH.) 173 (estate sold as fen land subject under a local public Act to embanking and draining charges not mentioned in particulars of sale: specific performance decreed without compensation).

SECT. 2.

Relief.

Where purchaser not entitled to compensation.

with the exception of a certain part and it is not proved that that part is so exempt (*i*).

The court does not grant compensation to the purchaser where the defect in the subject-matter of the contract is immaterial (*k*), or was visible to everybody at the time of the purchase (*l*); and where a purchaser, after knowing of a defect, acts in a manner implying a waiver of his right to compensation for such defect, the vendor may insist on completion of the purchase without compensation (*m*).

Where vendor not entitled to specific performance with compensation.

176. Where a material part of the subject-matter of a contract is wanting, and the vendor cannot substantially give to the purchaser that which he agreed to buy, the court does not grant specific performance with compensation at the instance of the vendor. Thus, specific performance with compensation may be refused where third parties have prejudicial rights over the property sold (*n*); where there is a defect in title in respect of a substantial portion of the property (*o*); where, on the sale of a house with land adjoining, the vendor has no title to a strip of land between the house and a road (*p*); where the vendor cannot show a title to a substantial part of the property which is material to the enjoyment of the property (*q*); where the measurements of the property are substantially less in a material particular than those by which it is described (*r*); where the tenure of an estate contracted to be sold is different from that which the vendor represented himself to be

(*i*) *Binks v. Rokeby* (Lord) (1818), 2 Swan. 222; compare *Ker v. Clobury* (1814), Sugden, Vendors and Purchasers, p. 321. As a general rule, where an estate is sold as tithe free, a purchaser is not compelled to complete if the land is subject to tithe and the right to such tithe is so material to the enjoyment of the land as to have formed an inducement to an intending purchaser; see also *Smith v. Toleher* (1828), 4 Russ. 302.

(*k*) *Corless v. Sparling* (1875), 9 I. R. Eq. 595 (deficiency of nearly half an acre in property described in the contract as "about 200 acres of mountain land," the land being a waste of heath of trifling value).

(*l*) *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505 (misdescription of a farm described as lying within a ring fence which did not in fact so lie); compare *Grant v. Munt* (1815), Coop. G. 173 (compensation given for dry rot); *King v. Wilson* (1843), 6 Beav. 124 (purchase of property by tenant in possession, property described as 46 feet in depth, but in fact 33 feet; purchaser awarded compensation).

(*m*) *Burnell v. Brown* (1820), 1 Jac. & W. 168; distinguish *Hughes v. Jones* (1861), 3 De G. F. & J. 307, C. A.; see *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320; *Knatchbull v. Grueber* (1817), 3 Mer. 124; and compare *Re Perriam*, *Perriam v. Perriam* (1883), 49 L. T. 710.

(*n*) *Peers v. Lambert* (1844), 7 Beav. 546 (right to remove a jetty); *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609 (right of way).

(*o*) *Osbaldiston v. Askew* (1821), 2 Jac. & W. 539 (11 out of 70 acres); compare *Portman v. Mill* (1826), 2 Russ. 570, 574.

(*p*) *Perkins v. Ede* (1852), 16 Beav. 193; see *Knatchbull v. Grueber* (1815), 1 Madd. 153, *per PLUMER, V.-C.*, at p. 167, affirmed (1817), 3 Mer. 124 (a part of an estate may be material if in the hands of some person other than the purchaser it could be turned to some purpose prejudicial to the enjoyment of the estate).

(*q*) *Jacobs v. Revell*, [1900] 2 Ch. 858 (one-fifth); *Re Arnold*, *Arnold v. Arnold* (1880), 14 Ch. D. 270, C. A. (material part of frontage).

(*r*) *Re Deptford Creek Bridge Co. and Bevan* (1884), 28 Sol. Jo. 327 (wharf 11 feet less than description, which affected use).

selling (*s*); where an estate is sold as tithe free and is not in fact so (*t*); where an estate is sold free from incumbrances and is in fact subject to an incumbrance amounting to a substantial part of the purchase-money (*a*); where the particulars of sale omit to state that the property sold is subject to a ground rent (*b*); where there are restrictive covenants rendering the title to the land sold not marketable (*c*).

Specific performance with compensation is also refused where the amount to be awarded as compensation cannot be fairly ascertained (*d*), or where the vendor has acted in a manner inconsistent with the contract (*e*).

Where the defect or loss is not certain but contingent, the purchaser is not compelled to take an indemnity from the vendor, unless such indemnity was part of the contract between the parties (*f*).

177. A purchaser may obtain specific performance with compensation against a vendor under a contract of sale where the vendor is unable to fulfil the exact terms of the bargain, but the difference in value between the actual subject-matter and that stated in the contract can be measured by the court and form the subject of abatement in the amount of the purchase-money (*g*).

SECT. 2.
Relief.
—

Indemnity.

Where purchaser entitled to specific performance with compensation.

(*s*) *Ayles v. Cox* (1852), 16 Beav. 23 (freehold for copyhold); *Madeley v. Booth* (1848), 2 De G. & Sm. 718; *Re Lloyds Bank, Ltd. and Lillingston's Contract*, [1912] 1 Ch. 601 (underlease for lease); *Fordyce v. Ford* (1794), 4 Bro. C. C. 495 (property described as a "freehold estate with a leasehold adjoining," and out of 70 acres of which the property consisted, 62 were leasehold and remainder freehold); compare *Cox v. Coventon* (1862), 31 Beav. 378; and see *Waring v. Scotland* (1888), 57 L. J. (CH.) 1016; *Hughes v. Jones* (1861), 3 De G. F. & J. 307, C. A.

(*t*) *Ker v. Clobury* (1814), Sugden, Vendors and Purchasers, p. 321; *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222; *Stanhope's (Lord) Case* (undated), cited 6 Ves. 678.

(*a*) *Wood v. Bernal* (1812), 19 Ves. 220, per Lord ELDON, L.C., at p. 221; compare the cases cited in note (*t*), *supra*.

(*b*) *Jones v. Rimmer* (1880), 14 Ch. D. 588, C. A.; compare *Waring v. Scotland*, *supra*, where the vendor sold "all his interest" in a lease; *Camberwell and South London Building Society v. Holloway* (1879), 13 Ch. D. 754, C. A., where the purchaser had notice that the property was held under a derivative lease.

(*c*) *Cato v. Thompson* (1882), 9 Q. B. D. 616, C. A.; and see the cases cited in note (*p*), p. 102, *post*.

(*d*) *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare, 298 (where the amount of timber to be included in the sale was not defined by the contract).

(*e*) *Knatchbull v. Grueber* (1817), 3 Mer. 124, 144, 147.

(*f*) *Balmanno v. Lumley* (1813), 1 Ves. & B. 224, per Lord ELDON, L.C., at p. 225; see *Wood v. Bernal*, *supra*, at p. 221; *Fildes v. Hooker* (1818), 3 Madd. 193; *Ridgway v. Gray* (1849), 1 Mac. & G. 109 (misdescription); *Nouaille v. Flight* (1844), 7 Beav. 521 (ambiguous covenant); *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244 (small contingent incumbrance).

(*g*) As to the grounds of the jurisdiction of the court to grant this relief, see *Mortlock v. Buller* (1804), 10 Ves. 292, per Lord ELDON, L.C., at p. 315; *Rudd v. Lascelles*, [1900] 1 Ch. 815, 818; as to the origin of the jurisdiction, see *Cato v. Thompson*, *supra*, per JESSEL, M.R., at p. 618. The court will not hear the objection by the vendor that the purchaser cannot have the whole (*Mortlock v. Buller*, *supra*, per Lord ELDON, L.C., at p. 315); see *A.-G. v. Day* (1849), 1 Ves. Sen. 218, 224; *Milligan v. Cooke* (1808), 16 Ves. 1; *Dale v. Lister*

SECT. 2.
Relief.

Where purchaser not entitled to specific performance with compensation.

Thus, specific performance with compensation may be granted where the vendor, who has agreed to sell the fee, has only a partial interest (*h*), where the vendor is only entitled to a moiety of the land he has agreed to sell (*i*); where there is a deficiency in the acreage of the property sold (*k*); where there is a misrepresentation as to the state of the roads on the property sold (*l*).

178. This principle, however, is not applied where the vendor has reserved a right to determine the contract rather than complete with compensation (*m*); nor where the alienation of the partial interest of the vendor might prejudice the rights of third parties (*n*); nor where the purchaser has from the first been aware of the vendor's incapacity to convey the whole of the property sold (*o*); nor where the amount of compensation is incapable of computation (*p*); nor where the enforcement of the contract with compensation would be inequitable (*q*), or disappoint the reasonable expectations of the parties (*r*).

Indemnity.

Where the contract contains no agreement by the vendor to give

(undated), cited 16 Ves. 7; *Western v. Russell* (1814), 3 Ves. & B. 187; *Neale v. Mackenzie* (1837), 1 Keen, 474; *Bennett v. Fowler* (1840), 2 Beav. 302; *Sutherland v. Briggs* (1841), 1 Hare, 26, 34; and compare *Dyas v. Cruise* (1845), 2 Jo. & Lat. 460, 487.

(*h*) *Mortlock v. Buller* (1804), 10 Ves. 292, 315; *Wilson v. Williams* (1857), 3 Jur. (N. S.) 810 (vendor entitled only to a reversion); and see the cases cited in title SALE OF LAND, Vol. XXV., p. 407, note (*o*).

(*i*) *Horrocks v. Rigby* (1878), 9 Ch. D. 180; see *Jones v. Evans* (1848), 12 Jur. 664; *Leslie v. Crommelin* (1867), 2 I. R. Eq. 134; and see the cases cited in title SALE OF LAND, Vol. XXV., p. 407, note (*o*).

(*k*) *Hill v. Buckley* (1811), 17 Ves. 394; *McKenzie v. Hesketh* (1877), 7 Ch. D. 675; *Connor v. Potts*, [1897] 1 I. R. 534, 539; see *Wheatley v. Slade* (1830), 4 Sim. 126.

(*l*) *Re Chifferiel, Chifferiel v. Watson* (1888), 40 Ch. D. 45 (which see as to method of estimating compensation in such a case).

(*m*) *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A.

(*n*) *Thomas v. Dering* (1837), 1 Keen, 729.

(*o*) *Castle v. Wilkinson* (1870), 5 Ch. App. 534, 536; compare *Hooper v. Smart, Bailey v. Piper* (1874), L. R. 18 Eq. 683; *Barker v. Cox* (1876), 4 Ch. D. 464; see *Carroll v. Keayes* (1873), 8 I. R. Eq. 97; *Fairhead v. Southee* (1863), 11 W. R. 739; *O'Rourke v. Percival* (1811), 2 Ball & B. 58; *Re Edwards to Sykes (Daniel) & Co.* (1890), 62 L. T. 445; *Hopcraft v. Hopcraft* (1897), 76 L. T. 341; *Maw v. Topham* (1854), 19 Beav. 576; *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329, C. A.; affirmed (1860), 7 H. L. Cas. 806.

(*p*) *Westmacott v. Robins* (1862), 4 De G. F. & J. 390, C. A. (defect arising from conditions in Crown grant); *Cato v. Thompson* (1882), 9 Q. B. D. 616, 618, C. A. (defect arising from existence of restrictive covenants); compare *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, 593 (compensation given for restrictive covenants as to small part); see *Collier v. Jenkins* (1831), You. 295 (outstanding lease); compare *Thomas v. Dering* (1837), 1 Keen, 729; *Graham v. Oliver* (1840), 3 Beav. 124; see *Ramsden v. Hirst* (1858), 4 Jur. (N. S.) 200 (compensation given for the existence in a third party of a right to dig coals in the land sold); compare *Powell v. Elliot* (1875), 10 Ch. App. 424.

(*q*) *Durham (Earl) v. Legard* (1865), 34 Beav. 611; compare *Price v. North* (1837), 2 Y. & C. (EX.) 620, per Lord ABINGER, C.B., at p. 626; *Colyer v. Clay* (1843), 7 Beav. 188; and distinguish *Hill v. Buckley* (1811), 17 Ves. 394; *McKenzie v. Hesketh* (1877), 7 Ch. D. 675; *Rudd v. Lascelles*, [1900] 1 Ch. 815, 819.

(*r*) *Rudd v. Lascelles*, *supra*.

indemnity against defects in the property sold, a purchaser cannot compel specific performance by the vendor with an indemnity by him against such defects (s).

SECT. 2.
Relief.

179. Where on a sale of land the transaction has not been completed by conveyance of the property sold and payment of the purchase-money, the court may award compensation to the purchaser in respect of defects in the property sold which have arisen after the conclusion of the contract (t).

Defects
arising after
contract.

180. When a purchaser fails to establish his right to specific performance with compensation, specific performance without compensation may be ordered (u), or, if this course is under the circumstances inequitable, he may be given the option of completing without compensation or having the contract rescinded (a).

Alternative
relief to pur-
chaser.

(ii.) *Where there is a Condition as to Compensation.*

181. Conditions of sale are construed strictly against a vendor (b). Where, therefore, it is sought to enforce specific performance of a contract of sale against a purchaser at the instance of the vendor, a condition in the contract providing for compensation in the event of any error or misstatement in the particulars applies only when the purchaser will on completion get substantially what he contracted for (c).

Where vendor
entitled to
specific per-
formance.

If, however, there are material misdescriptions (d), so that the

Where vendor
not entitled
to relief.

(s) *Balmanno v. Lumley* (1813), 1 Ves. & B. 224; *Paton v. Brebner* (1819), 1 Bl. 42, H. L., per Lord ELDON, L.C., at p. 66; *Aylett v. Ashton* (1835), 1 My. & Cr. 105; *Bainbridge v. Kinnaid* (1863), 32 Beav. 346.

(t) *Binks v. Rokeby* (Lord) (1818), 2 Swan. 222 (compensation given to purchaser for deterioration in value of property sold, which had occurred between date when contract ought to have been completed by vendor and date when vendor actually made out the title); *Foster v. Deacon* (1818), 3 Madd. 394; distinguish *Re Sweeny's Estate* (1890), 25 L. R. Ir. 252 (deterioration not due to default of vendor); and see title SALE OF LAND, Vol. XXV., p. 406. As to compensation after conveyance, see title SALE OF LAND, Vol. XXV., p. 331.

(u) *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329, C. A.; affirmed (1860), 7 H. L. Cas. 806.

(a) See *Durham (Earl) v. Legard* (1865), 34 Beav. 611; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93, 96.

(b) See titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 441; SALE OF LAND, Vol. XXV., p. 318. As to construction and effect of conditions of sale, see title SALE OF LAND, Vol. XXV., pp. 319 *et seq.*; as to compensation after conveyance, see *ibid.*, p. 331.

(c) *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A. (house and yard described as measuring 1,372 square yards, being really 1,033 yards). As to whether such a condition refers only to trifling errors, see *ibid.*, per Lord ESHER, M.R., at p. 156; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., per LINDLEY, L.J., at p. 28; *Ashburner v. Sewell*, [1891] 3 Ch. 405, per CHITTY, J., at p. 409.

(d) As to what are material, see *Dykes v. Blake* (1838), 4 Bing. (N. C.) 463 (where the fact that there was a right of way over land sold was held not to be within condition for compensation); *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609 (right to fetch water and cut drains); *Nouaille v. Flight* (1844), 7 Beav. 521; *Ayles v. Cox* (1852), 16 Beav. 23; *Heywood v. Mallalieu* (1883), 25 Ch. D. 357; *Brewer v. Brown* (1884), 28 Ch. D. 309; *Jacobs v. Revell*, [1900] 2 Ch. 858, 869 (where the cases are reviewed); *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; distinguish *Re*

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Relief.

purchaser will only get something substantially different from that which he agreed to buy, specific performance is not ordered against him (e). Thus, such an order is refused where property described as copyhold is partly freehold (f), or an underlease is described as a lease (g), or there is serious misrepresentation as to the rent at which the property has been let (h). A mere puffing description of the property sold, however, does not of necessity entitle a purchaser to resist specific performance on the ground of misrepresentation (i).

Substantial error in condition excluding compensation.

A condition which provides that errors and misstatements are not to annul a sale and that no compensation is to be allowed, does not enable a vendor to enforce specific performance without compensation if the error or misstatement is a substantial one (j).

The court will not order specific performance with compensation unless the amount of such compensation can be reasonably estimated (k).

Where purchaser entitled to specific performance.

182. Similar principles apply where a purchaser seeks to enforce against a vendor specific performance with compensation of a contract of sale which contains a condition for compensation, except that in such case the rule as to strict construction does not

Brewer and Hawkins' Contract (1899), 80 L. T. 127; and the cases cited in note (k), *infra*.

(e) *Flight v. Booth* (1834), 1 Bing. (N. C.) 370 (only two of many prohibited businesses mentioned); *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270, 279, C. A.; see *Norfolk (Duke) v. Worthy* (1808), 1 Camp. 337, 340; *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355; *Powell v. Doubble* (1832), Sugden, Vendors and Purchasers, p. 29; and see title SALE OF LAND, Vol. XXV., p. 329.

(f) *Ayles v. Cox* (1852), 16 Beav. 23; see *Stewart v. Alliston* (1815), 1 Mer. 26 (rack-rent described as a ground-rent); compare *Price v. Macaulay* (1852), 2 De G. M. & G. 339, C. A., where specific performance with compensation was granted; *Hudson v. Cook* (1872), L. R. 13 Eq. 417, 420; *Evans v. Robins* (1862), 8 Jur. (N. S.) 846.

(g) *Madeley v. Booth* (1848), 2 De G. & Sm. 718; followed in *Re Beyfus and Masters's Contract* (1888), 39 Ch. D. 110, C. A., and *Broom v. Phillips* (1896), 74 L. T. 459, though disapproved in *Camberwell and South London Building Society v. Holloway* (1879), 13 Ch. D. 754, C. A., by JESSEL, M.R., at p. 760 (in which case, however, the conditions in effect gave notice that the lease sold was an underlease); compare *Turner v. Turner*, [1881] W. N. 70; and see *Re Lloyds Bank, Ltd. and Lillington's Contract*, [1912] 1 Ch. 601.

(h) *Dimmock v. Hallett* (1866), 2 Ch. App. 21; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., per LINDLEY, L.J., at p. 26.

(i) *Johnson v. Smart* (1859), 2 Giff. 151; *Dimmock v. Hallett* (1866), 2 Ch. App. 21, 27).

(j) *Whittemore v. Whittemore* (1869), L. R. 8 Eq. 603; *Jacobs v. Revell*, [1900] 2 Ch. 858; see *Portman v. Mill* (1826), 2 Russ. 570; *Hayford v. Criddle* (1855), 22 Beav. 477; *Henderson v. Hudson* (1867), 15 W. R. 860; *Flood v. Prichard* (1879), 40 L. T. 873; *Turner v. Turner*, [1881] W. N. 70; *Re Scott and Eave's Contract* (1902), 86 L. T. 617, 618; and see titles MISREPRESENTATION AND FRAUD, Vol. XX., p. 747; SALE OF LAND, Vol. XXV., p. 332.

(k) See the cases cited in note (d), p. 103, *ante*; *Magennis v. Fallon* (1829), 2 Mol. 561, 584; compare *Cox v. Coventon* (1862), 31 Beav. 378; see also *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare, 298; *Ridgway v. Gray* (1849), 1 Mac. & G. 109; and distinguish *Farebrother v. Gibson* (1857), 1 De G. & J. 602, C. A.

apply, but the condition is interpreted according to the ordinary rules of construction (l).

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Specific performance with compensation is accordingly granted where there is a misstatement in the particulars (m); even, in some cases, where the purchaser knew of the inaccuracy of the statement (n).

Compensation may, however, be refused on the ground that the misstatement or omission does not affect the value of the property (o), or that the misdescription was verbally corrected by the auctioneer even though the purchaser did not hear the correction (p).

Where compensation refused.

A purchaser's right to compensation may be abrogated by the operation of another term of the contract, as, for example, a condition giving the vendor the right to rescind (q), or by the impossibility of estimating the amount of the compensation to be paid (r).

183. A clause which provides that no misdescription shall annul the sale and that no compensation shall be allowed in respect of any misdescription prevents a purchaser obtaining specific performance with compensation (s).

Condition excluding compensation.

SUB-SECT. 7.—*Damages With or Instead of Specific Performance.*

184. Where the plaintiff establishes a title to relief in equity (t),

Damages as additional or substituted relief.

(l) *Cordingley v. Cheeseborough* (1862), 4 De G. F. & J. 379, per Lord WESTBURY, L.C., at p. 384; see *White v. Cuddon* (1841), 8 Cl. & Fin. 766, H. L.; *Debenham v. Sawbridge*, [1901] 2 Ch. 98 (a defect of title is not "an error or misstatement in the particulars of sale"); *Re Jackson and Haden's Contract*, [1905] 1 Ch. 603; affirmed, [1906] 1 Ch. 412, C. A.

(m) *Painter v. Newby* (1853), 11 Hare, 26; *Aspinalls to Powell and Scholefield* (1889), 60 L. T. 595 (mistake); *Cordingley v. Cheeseborough*, *supra*; *Durham (Earl) v. Legard* (1865), 34 Beav. 611 (mistake); *Re Hurlbalt and Chaytor's Contract* (1888), 57 L. J. (CH.) 421; see *White v. Cuddon*, *supra* (no substantial misrepresentations if particulars read as a whole).

(n) *Lett v. Randall* (1883), 49 L. T. 71; compare *Cobbett v. Locke-King* (1900), 16 T. L. R. 379.

(o) *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A.; compare *Re Ward and Jordan's Contract*, [1902] 1 L. R. 73; *Carlsh v. Salt*, [1906] 1 Ch. 335, per JOYCE, J., at p. 340.

(p) *Re Hare and O'More's Contract*, [1901] 1 Ch. 93.

(q) *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; affirmed (1871), 6 Ch. App. 91; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A.; compare *Painter v. Newby*, *supra*; *Ashburner v. Sewell*, [1891] 3 Ch. 405; and see *Williams v. Edwards* (1827), 2 Sim. 78 (contract avoided if good title not shown); *Hudson v. Buck* (1877), 7 Ch. D. 683, 687.

(r) *White v. Cuddon*, *supra*.

(s) *Re Terry and White's Contract*, *supra*; *Cordingley v. Cheeseborough*, *supra*; see title SALE OF LAND, Vol. XXV., p. 332.

(t) That is, to a judgment for specific performance (Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2 (as to this Act, see note (c), p. 106, *post*)). Title to such relief is a condition precedent to the exercise of the jurisdiction under this Act (*Proctor v. Bayley* (1889), 42 Ch. D. 390, C. A.; *Ferguson v. Wilson* (1866), 2 Ch. App. 77; *Lavery v. Pursell*, (1888), 39 Ch. D. 508, 519; compare *Howe v. Hunt* (1862), 31 Beav. 420; *Hilton v. Tipper* (1868), 16 W. R. 888; *Franklinski v. Ball* (1864), 33 Beav. 560; see *Lewers v. Shaftesbury (Earl)* (1866), L. R. 2 Eq. 270; *Scott v. Rayment* (1868), L. R. 7 Eq. 112; *Rogers v. Challis* (1859), 27 Beav. 175;

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Damages
under general
jurisdiction.

Damages
where specific
performance
refused.

Nature of
damages.

damages may be awarded in addition to (a), or in substitution for (b), a judgment for specific performance (c).

Damages may also be awarded, under the general jurisdiction of the court, for breach of an agreement where the court will not order specific performance (d).

Damages may also be given where specific performance is refused on the ground of mistake by the defendant (e).

185. Where, in the absence of fraud on his part, a vendor is unable to make a good title to property sold, the purchaser is only entitled by way of damages to such expenses as he may have incurred in investigating the title (f), unless the sale is under the

Middleton v. Magnay (1864), 2 Hem. & M. 233, 236; *White v. Boby* (1877), 26 W. R. 133, C. A.; *Hipgrave v. Case* (1885), 28 Ch. D. 356, C. A.

(a) *Jaques v. Millar* (1877), 6 Ch. D. 153; *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390; *Wesley v. Walker* (1878), 26 W. R. 368; compare *Jones v. Gardiner*, [1902] 1 Ch. 191 (where damages were awarded to a purchaser for delay in completing contract for sale of real estate where the delay was due to the vendor not troubling to perform the contract and not to want of or defect in title or conveyancing difficulties); *Cory v. Thames Iron Works and Shipbuilding Co.* (1863), 11 W. R. 589 (where the plaintiff, having filed a bill for specific performance and damages for delay, was held entitled to damages though the defendant had performed the contract after bill filed and before trial); *Chinnock v. Ely (Marchioness)* (1864), 2 Hem. & M. 220 (no special injury arising from delay); *Johnston v. Johnston* (1869), 17 W. R. 278.

(b) *Wilson v. Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279. Where the vendor has no title, and this fact is unknown to the purchaser at the time when he enters into the contract, damages are the only relief open to the purchaser (*Pearl Life Assurance Co. v. Batten-shaw*, [1893] W. N. 123; *Bowman v. Hyland* (1878), 8 Ch. D. 588, 590; compare *Oakeley v. Ramsay* (1872), 27 L. T. 745; and see pp. 61 *et seq.*, ante). The measure of damages in such a case is the same as in an action at common law for breach of the contract (*Rock Portland Cement Co. v. Wilson* (1882), 31 W. R. 193); see also *Middleton v. Magnay* (1864), 2 Hem. & M. 233, 237; and compare *Hythe Corporation v. East* (1866), L. R. 1 Eq. 620; and the cases as to damages subsequent to decree for specific performance cited in note (e), p. 97, ante. As to the general principles of the law of damages, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(c) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2. This Act has been repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but the repeal has not affected the jurisdiction given thereby (*Sayers v. Collyer* (1884), 28 Ch. D. 103, C. A.; *Chapman, Morsons & Co. v. Auckland Union Guardians* (1889), 23 Q. B. D. 294, 300, C. A.; *White v. Boby* (1877), 26 W. R. 133, C. A.; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.). As to the jurisdiction to award damages in equity before the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), see *Todd v. Gee* (1810), 17 Ves. 273, 278; *Prothero v. Phelps* (1855), 7 Jur. (N. S.) 173; *M'Nulty v. Hamill* (1815), Beat. 544.

(d) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); see note (m), p. 50, note (t), p. 77, ante; and see *Elmore v. Pirrie* (1887), 57 L. T. 333; *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd. and National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (damages awarded where no case for specific performance established); *Worthing Corporation v. Heather*, [1906] 2 Ch. 532 (contract unenforceable; damages given for breach); titles INJUNCTION, Vol. XVII., p. 212; LANDLORD AND TENANT, Vol. XVIII., p. 380.

(e) *Tamplin v. James* (1880), 15 Ch. D. 215, C. A.

(f) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; see *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; *Re Wilsons and Stevens' Contract*, [1894] 3 Ch.

direction of the court, in which case he is also entitled to the costs occasioned by his bidding for and becoming purchaser of the property (*g*).

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The amount of the damages may be assessed by the court (*h*), or ascertained by an inquiry in chambers (*i*). Assessment.

186. The court may enforce specific performance of one part of the contract and award damages for breach of the remainder (*k*). Damages as to breach of part of contract.

546, 553; *Morgan v. Russell & Sons*, [1909] 1 K. B. 357, 367; *Bayley v. Birch* (1894), 8 R. 647; and title SALE OF LAND, Vol. XXV., pp. 409, 410.

(*g*) *Holliwell v. Seacombe*, [1906] 1 Ch. 426, 430; compare *Day v. Singleton*, [1899] 2 Ch. 320, C. A. (where the purchaser was held entitled to recover damages for the vendor's wilful omission to procure licence to assign leasehold property contained in the contract of sale); *Jones v. Gardiner*, [1902] 1 Ch. 191, 195.

(*h*) *Cornwall v. Henson*, [1900] 2 Ch. 298, 305, C. A.; *Jaques v. Millar* (1877), 6 Ch. D. 153.

(*i*) *Hilton v. Tipper* (1868), 16 W. R. 888. As to the costs of such inquiry, see *Slack v. Midland Rail Co.* (1880), 16 Ch. D. 81.

(*k*) *Soames v. Edge* (1860), John. 669, followed in *London Corporation v. Southgate* (1868), 17 W. R. 197; distinguish *Norris v. Jackson* (1860), 1 John. & H. 319; and see *Samuda v. Lawford* (1862), 4 Giff. 42.

[NOTE.—In addition to undertaking the responsibility of the title SPECIFIC PERFORMANCE in conjunction with Mr. R. A. Wright, Sir Edward Fry very kindly gave permission for his standard Work on the subject to be made use of in the preparation of the text and to be cited in various places throughout the title.—EDS.]

SPECIFICATION.

See BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; PATENTS AND INVENTIONS; WORK AND LABOUR.

SPIRITUOUS LIQUORS.

See FOOD AND DRUGS; INTOXICATING LIQUORS; REVENUE.

SPOLIATION.

See ECCLESIASTICAL LAW.

SPORTING RIGHTS.

See AGRICULTURE ; GAME ; LANDLORD AND TENANT ; TRESPASS.

SPRING GUNS.

See CRIMINAL LAW AND PROCEDURE ; GAME ; NUISANCE.

SQUARES.

See HIGHWAYS, STREETS, AND BRIDGES ; LAND IMPROVEMENT ; OPEN SPACES AND RECREATION GROUNDS.

STAGE COACHES.

See CARRIERS ; STREET AND AERIAL TRAFFIC.

STAGE PLAYS.

See COPYRIGHT AND LITERARY PROPERTY; THEATRES AND OTHER
PLACES OF ENTERTAINMENT.

STAKEHOLDER.

See AUCTION AND AUCTIONEERS; GAMING AND WAGERING;
INTERPLEADER.

STALLAGE.

See MARKETS AND FAIRS.

STAMPS.

See REVENUE.

STANDING ORDERS.

See PARLIAMENT.

STANNARIES.

See CONSTITUTIONAL LAW; COUNTY COURTS; COURTS; MINES,
MINERALS, AND QUARRIES.

STATEMENT OF CLAIM.

See PLEADING ; PRACTICE AND PROCEDURE.

STATIONS.

See RAILWAYS AND CANALS.

STATUTE OF DISTRIBUTION.

See DESCENT AND DISTRIBUTION.

STATUTE OF FRAUDS.

See CONTRACT ; EQUITY ; GUARANTEE ; SALE OF GOODS ; SALE OF LAND ; SETTLEMENTS ; SPECIFIC PERFORMANCE ; TRUSTS AND TRUSTEES.

STATUTE OF USES.

See EQUITY ; REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES.

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Part I.—In General.

PART I.
In General.

187. A statute (*a*) is a declaration of the law as it exists (*b*), or as it shall be from the time at which such statute is to take effect, made by the Sovereign in Parliament, as the supreme legislative authority (*c*), in the manner prescribed by existing statutes (*d*) and by the rules of each House (*e*). Definition of statute.

188. Subject to the statutory provisions referred to below, a statute must have been embodied in a Bill which has passed through all its stages in both Houses of Parliament in one session (*f*), and has then received the assent of the Sovereign. On receiving the assent the Bill acquires statutory force as from the day on which it is appointed to come into operation, or, if no time is appointed, then on the day of receiving such assent (*g*). Bill.

189. Every Money Bill sent up to the House of Lords at least one month before the end of a session, indorsed with the certificate of the Speaker of the House of Commons that it is a Money Bill, if not passed by the first-mentioned House without amendment within one month after being so sent up, becomes an Act of Parliament, or Statute, after presentation to the Sovereign, and the signification of the Royal Assent (*h*). Money Bill.

190. If any Public Bill, other than a Money Bill, or a Bill providing for the extension of the duration of Parliament beyond five years, has been passed by the House of Commons in three successive sessions, whether of the same Parliament or not, and having been sent up to the House of Lords at least one month before the end of each session is not passed either without amendment or with agreed amendments, it will, on presentation to the Sovereign and receiving the Royal Assent, become law, notwithstanding that the House of Lords has not consented to it, provided Effect of Parliament Act.

(*a*) "Statute" was defined by Coke as "an act of parliament made by the king, the lords, and the commons" (Co. Litt. 126 a). As to the distinctions between statutes and ordinances, see *Willes Claim of Peerage* (1869), L. R. 4 H. L. 126. "Statute" has had more than one meaning. It has been applied to a code, such as the Statute of Westminster I., or to all the Acts passed in one session, which was the original meaning of the word (*R. v. Bakewell* (1857), 7 E. & B. 848, *per* Lord CAMPBELL, C.J., at p. 851).

(*b*) A "declaratory" Act properly so called, as distinguished from the various kinds of Acts mentioned below (see pp. 114 *et seq.*, *post*), which are *primâ facie* prospective (see p. 159, *post*).

(*c*) A statute is the only instrument which can command the obedience of the whole people (*Middleton v. Crofts* (1736), 2 Atk. 650, *per* Lord HARDWICKE, L.C., at p. 652).

(*d*) As by the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13).

(*e*) See title PARLIAMENT, Vol. XXI., p. 702.

(*f*) The Standing Orders are sometimes suspended in the case of private Bills so as to carry them over to the next session; see title PARLIAMENT, Vol. XXI., p. 701. For the exceptions created by the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), see the text, *infra*.

(*g*) See pp. 117, 155 *et seq.*, *post*.

(*h*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (1), (3). For the definition of a Money Bill, see title PARLIAMENT, Vol. XXI., p. 776.

PART I. that two years have elapsed between its first second reading and
In General. its last third reading in the House of Commons (i).

Statutory
authority.

191. As the expression of the will of a Sovereign Parliament, the authority of a statute is supreme. It may define or override the common law, and in like manner a more recent statute may define or override an earlier, so far as the provisions of the latter limit or are repugnant to the former (j). It follows that no statute can provide for its own non-repeal or control future legislation (k).

*Ignorantia
juris non
excusat.*

192. All the King's subjects must be taken to know the statute law (l), including the provisions of special statutes under which bodies have been incorporated with which the public have dealings, and the rights of which may limit the rights of the public (m).

Part II.—Classification and Framework.

SECT. 1.—Classification.

Classifica-
tion.

193. Statutes are generally classified as follows, namely :—

- (1) Public General Acts ;
- (2) Local and Personal Acts (including public Acts of a local character) ; and
- (3) Private Acts (n).

(i) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 2 (1), (3) ; by *ibid.*, s. 5, a Bill for confirming a provisional order is also excluded. See, further, title PARLIAMENT, Vol. XXI., pp. 722, 723.

(j) *Leges posteriores priores contrarias abrogant* (*Foster's Case* (1614), 11 Co. Rep. 56 b, 59 a, 61 a, 63 a, 64 b ; 1 Bl. Com. 89). For a modern statement of the principle, see *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573, 578 ; *Macmillan & Co. v. Dent*, [1907] 1 Ch. 107, 124, C. A. As to the effect of statutory enactments on custom, see title CUSTOM AND USAGES, Vol. X., p. 247.

(k) 1 Bl. Com. 90 ; *Boden v. Smith* (1849), 13 Jur. 428, 430 ; *Associated Newspapers, Ltd. v. City of London Corporation*, [1913] 2 K. B. 281 ; see p. 157, *post*.

(l) Certain statutes, in virtue of provisions contained in them, require to be promulgated, as, for instance, the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), s. 3, in British possessions outside the United Kingdom. Apart from such statutory provision, promulgation is unnecessary. For the general principle of "*ignorantia juris non excusat*," see *Carter v. McLaren* (1871), L. R. 2 Sc. & Div. 120, 125. English statutes do not apply to the Channel Islands unless especially directed to apply to all the King's dominions or to those islands by name (see title DEPENDENCIES AND COLONIES, Vol. X., p. 573), and in such cases they must be registered by the Royal Courts ; see p. 162, *post*.

(m) *Cahill v. London and North Western Rail. Co.* (1861), 10 C. B. (N. S.) 154, 172 ; *Davis & Sons v. Taff Vale Rail. Co.*, [1895] A. C. 542, 560.

(n) See the statutes as published with the Law Reports by the Incorporated Council of Law Reporting. The nomenclature of statutes has altered very much. A distinction between public and private Acts was first drawn in the thirty-first year (1541) of Henry VIII. (Statutes of the Realm, 1810, Introduction, p. xxxiii.). There then came a time when public and general Acts were distinguished from private and special Acts, with the latter being classed local and personal Acts of a public character. As early as 1797 the House of Lords directed a classification of statutes by the King's

SECT. 1.
Classification.

Public
general Acts.
Local and
personal Acts.

194. Public general Acts(*o*) are those in which the whole community is interested, or which carry out some public purpose, and which originate on the motion of some member of the House in which the Bill is introduced (*p*).

195. Local and personal, or simply local (*q*), Acts are Acts procured by local authorities or persons for the purposes of limited areas (*r*), or by trading companies (*s*) which desire and require wider powers than can be secured by incorporation under the Companies (Consolidation) Act, 1908 (*t*). They originate in either House by petition (*u*), and their passage through Parliament is subject to particular rules and procedure (*w*).

There is, however, no reason why an Act should not be partly local and partly general, and one which originates either as one or the other may become so in the course of its passage through Parliament (*x*). It is usual for local and personal Acts to adopt

Printer, and in 1801 the House of Commons resolved that he should class general statutes and public local and personal statutes in each session in separate volumes (*Richards v. Easto* (1846), 15 M. & W. 244, 251; *Shepherd v. Sharp* (1856), 1 H. & N. 115, 122, Ex. Ch.; *R. v. London County Council*, [1893] 2 Q. B. 454, C. A., *per* BOWEN, L.J., at pp. 462, 463). "Local and personal" came to be a term of art; see *Cock v. Gent* (1843), 12 M. & W. 234; *Carr v. Royal Exchange Insurance Co.* (1862), 1 B. & S. 956; and, since 1868, local Acts, dropping the *addendum* "personal," have been printed in separate volumes from public and private Acts, numbered in Roman numerals, and the letter P prefixed to such as are public Acts of a local character. The three classes of statutes mentioned in the text, *supra*, have been printed in three series since 1849. As to local, personal, and private statutes, see, further, pp. 182 *et seq.*, *post*. As to the classification of Bills, see title PARLIAMENT, Vol. XXI., pp. 702 *et seq.*

(*o*) See note (*a*), p. 203, *post*. In *R. v. London County Council*, *supra*, BOWEN, L.J., at p. 462, pointed out that the logical division was into "general" and "local and personal," and the term "general" is as far as possible used throughout this title in speaking of "public general" Acts.

(*p*) See title PARLIAMENT, Vol. XXI., pp. 702 *et seq.*

(*q*) There is an official index of these from 1801 to 1899.

(*r*) For example, Town Improvement Acts (see title LOCAL GOVERNMENT, Vol. XIX., p. 292), and Inclosure Acts (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 540, 541). Such Acts must be judicially noticed, and have all the operation of public Acts (*Aiton v. Stephen* (1876), 1 App. Cas. 456, *per* Lord CAIRNS, L.C., at p. 457). Metropolitan Police Acts have been held not to be local and personal Acts, on the ground that they affect the administration of justice, which touches the whole community (*Barnett v. Cox* (1846), 9 Q. B. 617; doubted in *R. v. London County Council*, *supra*, *per* BOWEN, L.J., at p. 464).

(*s*) As, for instance, railway companies and gas and water companies.

(*t*) 8 Edw. 7, c. 69. As to such companies, see title COMPANIES, Vol. V., pp. 674 *et seq.*

(*u*) At one time all legislation originated by petition to the Crown. The formula of the Royal Assent to these petitions, "*Le Roy le veult*," continues to the present day as the form of assent to Bills; see title PARLIAMENT, Vol. XXI., p. 725.

(*w*) See *ibid.*, pp. 727 *et seq.*

(*x*) As, for instance, the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), referred to in *Re Barker, Ex parte Gorely* (1864), 4 De J. & Sm. 477; followed in *Sinnott v. Bowden*, [1912] 2 Ch. 414; see title INSURANCE, Vol. XVII., p. 542, note (*d*); see, also, *Ingram v. Foote* (1701), 1 Ld. Raym. 708; *R. v. London County Council*, [1893] 2 Q. B. 454, C. A., *per* Lord ESHER, M.R., at p. 459.

SECT. 1.
Classifica-
tion.

Private
personal Acts.

Other
denominative
terms.

and incorporate general statutes which experience has shown may be properly made part of them (*a*).

196. Private personal Acts (*b*) relate to the affairs of individuals, and more especially to names, estates, and divorces. As to these Acts also the procedure pursued is distinctive (*c*), and the Acts when passed need not necessarily be printed (*d*).

197. Statutes are also distinguished as follows, namely:—

(1) Ancient and Modern, the latter comprising those enacted since the first year of Edward III. (*e*);

(2) Declaratory and Enacting, the former generally including what are known as codifying and consolidating Acts (*f*);

(3) Penal and Remedial (*g*);

(*a*) See p. 186, *post*; titles COMPANIES, Vol. V., pp. 674 *et seq.*; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12; GAS, Vol. XV., pp. 310 *et seq.*

(*b*) "Private Act" is also used comprehensively to include local and personal Acts; see p. 182, *post*; title PARLIAMENT, Vol. XXI., pp. 727, 728.

(*c*) See title PARLIAMENT, Vol. XXI., pp. 728 *et seq.*

(*d*) Those dissolving the marriages of individuals domiciled in Ireland are not; but most other private personal Acts have been printed since 1813; see, further, p. 201, *post*.

(*e*) The distinction is recognised in Vol. I. of the Statutes Revised. The dividing line at the year 1327 is purely arbitrary. It is commonly said that ancient statutes, being short and tersely expressed, must be liberally interpreted (*R. v. Gardner* (1837), 6 Ad. & El. 112, *per* COLERIDGE, J., at p. 118; compare *Wilson v. Knubley* (1806), 7 East, 128, *per* Lord ELLENBOROUGH, C.J., at p. 134, speaking of a statute of Edward III. as a very ancient statute when no great precision of language prevailed). If, however, it becomes necessary in the future to construe "ancient" statutes, the ordinary rules of interpretation will probably be applied to them. Wilberforce, *Statute Law*, p. 215, gives examples of particular persons or species mentioned in ancient statutes being held to represent the classes or *genera* in which they were included.

(*f*) For examples of declaratory statutes, see the Merchant Shipping (Seamen's Allotment) Act, 1911 (1 & 2 Geo. 5, c. 8), passed to resolve doubts which had arisen as to the true interpretation of sections of the Merchant Shipping Acts, 1894 (57 & 58 Vict. c. 60) and 1906 (6 Edw. 7, c. 48), and the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), overruling *R. v. Keyn* (1876), 2 Ex. D. 63, C.C.R. As to the distinction between codifying and consolidating statutes, see p. 199, *post*. *Primâ facie* an "enacting" statute modifies the operation of the common law or a previous statute, but it is obvious that even a declaratory statute is for some purposes enactive. See also p. 170, *post*.

(*g*) As to penal statutes, see p. 177, *post*. The broad distinction between penal and remedial statutes is that the former are to be strictly, the latter liberally, construed (*Huntingtower (Lord) v. Gardiner* (1823), 1 B. & C. 297, 299; see p. 153, *post*). Thus, in a remedial statute—the Dogs Act, 1865 (28 & 29 Vict. c. 60) (now repealed; see Dogs Act, 1906 (6 Edw. 7, c. 32))—"cattle" was held to include horses and mares (*Wright v. Pearson* (1869), L. R. 4 Q. B. 582), whereas under the Black Act, stat. (1722) 9 Geo. I, c. 22, it had been doubted if this could be so (*R. v. Paty* (1770), 2 Wm. Bl. 721). The distinction between the two is not so sharply drawn now as formerly (compare *Stephenson v. Higginson* (1852), 3 H. L. Cas. 638, 686; *Nicholson v. Fields* (1862), 7 H. & N. 810, *per* MARTIN, B., at p. 817; *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1, 7); and many statutes partake of the nature of both (*Bones v. Booth* (1778), 2 Wm. Bl. 1226 (Gaming Act, 1710 (9 Anne, c. 19)); *Gorton v. Champneys* (1823), 1 Bing. 287, 301 (an annuity Act, now repealed)).

SECT. 1.
Classification.
tion.

- (4) Enabling and Restraining (*h*);
- (5) Obligatory and Permissive (*i*);
- (6) Mandatory and Directory (*k*);
- (7) Affirmative and Negative (*l*);
- (8) Temporary and Perpetual (*m*).

Such divisions are not, however, mutually exclusive, and statutes so termed are not distinguished in form or by particular treatment in their consideration by Parliament. The terms are rather such as have commended themselves to judicial interpreters as aptly describing the predominating objects or methods of particular statutes, which objects are proper to be considered in their construction (*n*).

198. A proposed legislative enactment before its presentation to Parliament is known as a "Draft Bill." After its introduction into either House and during its passage through Parliament it is known as a "Bill," and its sub-divisions are known as "Clauses." When it receives the Royal Assent it is called an "Act" or "Statute," and its clauses become "Sections" (*o*). "Draft Bill."
"Bill."
"Clauses."
"Sections."

SECT. 2.—*Framework.*

SUB-SECT. 1.—*Heading or Title.*

199. Every statute commences with a heading (*p*) which consists of the introductory phrase, "An Act to," followed by words briefly Heading.

(*h*) See pp. 153, 196, *post*.

(*i*) See pp. 170 *et seq.*, *post*.

(*k*) See pp. 170 *et seq.*, *post*.

(*l*) See pp. 167, 172, *post*.

(*m*) See pp. 157, 158, *post*. Reference may also be made to adoptive Acts, such as the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89) (see title POLICE, Vol. XXII., p. 488), and the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364), which only operate when brought into force by an executive order.

(*n*) It has not been thought necessary here to deal with Money Acts, as to which see title PARLIAMENT, Vol. XXI., pp. 722, 723, 776.

(*o*) Lord Brougham's Act, stat. (1850) 13 & 14 Vict. c. 21, s. 2 (repealed by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), but re-enacted in substance by *ibid.*, s. 8), provided that all Acts should be divided into sections if there were more enactments than one. Previously each separate enactment in a statute had been preceded by the words "Be it enacted," which were thereby rendered unnecessary. The terms "clause" and "section" are, however, somewhat loosely and interchangeably used in forensic arguments and judgments. As to Hybrid Bills and the passage of legislation through Parliament generally, see title PARLIAMENT, Vol. XXI., pp. 703, 704, 729, 744. For forms of Bills and various clauses, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 169 *et seq.*; Ilbert's Legislative Methods and Forms, ch. xii.

(*p*) Originally there were no titles to the Acts, but only a petition and the King's answer; and the judges thereupon drew up the Act into form and then added the title (*A.-G. v. Weymouth (Lord)* (1743), Amb. 20, *per* Lord HARDWICKE, L.C., at pp. 22, 23). A title was first used about the eleventh year (1496) of Henry VII. (*Chance v. Adams* (1696), 1 Ld. Raym. 77). As to the short title of an Act and the Short Titles Act, 1896 (59 & 60 Vict. c. 14), see pp. 202, 203, *post*. For forms of short title, see Encyclopædia of Forms and Precedents, Vol. IX., p. 242.

SECT. 2.
Framework.

describing its object. It now forms part of the enacting statute (*q*), and may be considered in determining the scope of the enactment (*r*), provided that nothing contained in it may be taken to contradict clear and unambiguous language in the enactment itself (*s*).

Date of
Royal Assent.

200. Appended to the heading is the date on which the statute received the Royal Assent, which is the date of its commencement (*t*) unless otherwise provided.

SUB-SECT. 2. — *Preamble.*

Preamble.

201. Following upon the heading or title comes the preamble (if any), which gives the reasons why the passing of the statute has become desirable (*u*). The preamble may now be regarded, like

(*q*) "In old days it used not to be so, but now the title is an important part of the Act, and is so treated in both Houses of Parliament" (*Fielden v. Morley Corporation*, [1899] 1 Ch. 1, C. A., *per* LINDLEY, M.R., at p. 4; *Dartford Rural Council v. Bexley Heath Rail. Co.*, [1898] A. C. 210, *per* Lord HALSBURY, L.C., at p. 213; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord MOULTON, at pp. 128, 129). This statement must be taken as superseding what has been said by Sir E. COKE in *Poulter's Case* (1610), 11 Co. Rep. 29 a, 33 b; by HOLT, C.J., in *Mills v. Wilkins* (1703), 6 Mod. Rep. 62; by Lord MANSFIELD, C.J., in *R. v. Williams* (1757), 1 Wm. Bl. 93; and in recent times in *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, 929, H. L.; *Salkeld v. Johnson* (1848), 2 Exch. 256, 283; *Shrewsbury (Earl) v. Scott* (1859), 6 C. B. (N. S.) 1, 215; *Claydon v. Green* (1868), L. R. 3 C. P. 511, 522; *Allkins v. Jupe* (1876), 2 C. P. D. 375, *per* GROVE, J., at p. 385; and a title is no longer to be classed with marginal notes and punctuation (see p. 121, *post*) as mere *contemporanea expositio*. As to the interpretation of statutes, see pp. 126 *et seq.*, *post*.

(*r*) *Coomber v. Berks Justices* (1882), 9 Q. B. D. 17, 33; *Re a Debtor, Ex parte the Debtor*, [1903] 1 K. B. 705, 708, C. A. (Money-lenders Act, 1900 (63 & 64 Vict. c. 51)). This, however, does not apply to a short title, which is merely for facility of reference (*Vacher & Sons, Ltd. v. London Society of Compositors*, *supra*, at p. 128). The view expressed in *Hunter v. Nockolds* (1850), 1 Mac. & G. 640, *per* Lord COTTENHAM, L.C., at p. 651, would hardly now be followed. See, further, *Brett v. Brett* (1826), 3 Add. 210, 218; *Blake v. Midland Rail. Co.* (1852), 18 Q. B. 93, 109; *Shaw v. Ruddin* (1858), 9 I. C. L. R. 214; *R. v. Mallow Union Guardians* (1860), 12 I. C. L. R. 35; *East and West India Dock Co. v. Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 524, 531; *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q. B. D. 99, 104; *A.-G. v. Margate Pier and Harbour Co.*, [1900] 1 Ch. 749, 754; compare *Fenton v. Thorley*, [1903] A. C. 443, *per* Lord MACNAGHTEN, at p. 447. The Inclosure etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), after mentioning certain Acts in the title, and the usual enacting clause, commences in *ibid.*, s. 1, by the words: "That, notwithstanding any provisions in the said Acts contained" (*Wilberforce, Statute Law*, p. 276).

(*s*) *Wilmut v. Rose* (1854), 3 E. & B. 563, 569; *In the Estate of Groos*, [1904] P. 269, 273.

(*t*) Pursuant to the Acts of Parliament (Commencement) Act, 1793 (33 Geo. 3, c. 13), under which the Clerk of the Parliaments indorses on every Act the time at which it receives the Royal Assent, which indorsement is taken to be part of the Act; see title PARLIAMENT, Vol. XXI., pp. 723, 725. As to short titles, see pp. 202, 203, *post*.

(*u*) For instances, see Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23); Parliament Act, 1911 (1 & 2 Geo. 5, c. 13). For forms of preambles, see *Encyclopædia of Forms and Precedents*, Vol. IX., pp. 241, 242.

the title, as part of the statute (*w*) for the purpose of explaining (*a*),
restraining (*b*), or even extending (*c*) enacting words, but not for
the purpose of limiting express provisions couched in clear and
unambiguous terms (*d*). SECT. 2.
Framework.
—

202. Particular sections or groups of sections are sometimes
preceded by a preamble, which, to distinguish it from a general
preamble, is usually called a “recital” (*e*). Recitals.

203. As a general rule, modern public general Acts dispense
with preambles (*f*), but private Bills—the term being used in the
widest sense (*g*), as opposed to public general Bills—by the rules of
both Houses must have preambles, which must be proved (*h*). When
preamble
necessary.

204. The repeal of a preamble by a Statute Law Revision Act or Repeal of
preamble.

(*w*) In 1848, though the title was not regarded as part of the law, the preamble had come to be so regarded (*Salkeld v. Johnson* (1848), 2 Exch. 256, 283).

(*a*) “The rehearsal or preamble is a good mean to find out the meaning of the statute, and as it were a key to open the understanding thereof” (Co. Litt. 79 a). “A key to open the meaning of the makers of the Act, and the mischiefs it was intended to remedy” (4 Co. Inst. 330). See also *Stowel v. Zouch* (Lord) (1569), 1 Plowd. 353, 369; *Copeman v. Gallant* (1716), 1 P. Wms. 314, 317; *Mason v. Armitage* (1806), 13 Ves. 25, 36; *Emanuel v. Constable* (1827), 3 Russ. 436; *The Sussex Peerage* (1844), 11 Cl. & Fin. 143; *A.-G. v. Powis* (Earl) (1853), Kay, 186, 207; *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114, 124; *Crowder v. Stewart* (1880), 16 Ch. D. 368, 370; *West Ham Overseers v. Iles* (1883), 8 App. Cas. 386, 388; *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, 543; *Crouch v. Crouch*, [1912] 1 K. B. 378.

(*b*) *York (Dean and Chapter) v. Middleburgh* (1828), 2 Y. & J. 196, 215; *Salkeld v. Johnston* (1842), 1 Hare, 196, 207; *Winn v. Mossman* (1869), L. R. 4 Exch. 292, 300. “The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention” (Maxwell, *On the Interpretation of Statutes*, 4th ed., p. 75, approved in *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, C. A., *per FARWELL*, L.J., at p. 218).

(*c*) *Walker v. Richardson* (1837), 2 M. & W. 882, 889; *Kearns v. Cordwainers' Co.* (1859), 6 C. B. (N. S.) 388, 408; see note (*b*), *supra*.

(*d*) *Mace v. Cammel* (1773), Lofft, 782, 783; *Crespigny v. Wittenoom* (1792), 4 Term Rep. 790, 793; *Lees v. Summersgill* (1811), 17 Ves. 508; *Trueman v. Lambert* (1815), 4 M. & S. 234; *Doe d. Bywater v. Brandling* (1828), 7 B. & C. 643, 660; *Hughes v. Chester and Holyhead Rail. Co.* (1861), 1 Drew. & Sm. 524, 536; *Copland v. Davies* (1872), L. R. 5 H. L. 358; *Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395, 404; *Bentley v. Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588, 592; *Sutton v. Sutton* (1882), 22 Ch. D. 511, 520, C. A.; *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, 215, 218, C. A.; *A.-G. v. City of London Corporation*, [1913] 1 K. B. 201, 218.

(*e*) As in *Bryan v. Child* (1850), 5 Exch. 368, where POLLOCK, C.B., at p. 374, held that the introductory recital to a set of clauses in the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106) (now repealed), must be read as incorporated with each; and see *Bristol Corporation v. Canning* (1906), 95 L. T. 183, where the section of a local Act was held to be explained and limited by a recital immediately preceding it.

(*f*) One reason being that a preamble appearing on a draft Bill might by alterations in the Bill during its passage through Parliament become inapt in the subsequent Act.

(*g*) See note (*b*), p. 116, *ante*.

(*h*) See title PARLIAMENT, Vol. XXI., p. 755.

SECT. 2. similar statute will in no way affect the future construction of the Framework. Act (i).

SUB-SECT. 3.—*Enacting Formula.*

Acts other
than Finance
Acts.

205. The enacting formula in Acts other than Finance Acts generally runs in the following words: "Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows" (j).

Acts con-
taining a
preamble.

Where there is a preamble the word "therefore" is introduced before the word "enacted." In every Bill presented to the Sovereign under the provisions of the Parliament Act, 1911 (k), the words "Lords Spiritual and Temporal" are to be omitted, and the words "in accordance with the provisions of the Parliament Act, 1911," introduced after the words "in this present Parliament assembled" (l).

Finance or
Money Bills.

206. In Finance or Money Bills (m) the enacting formula commences with the words "Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament, have resolved to grant unto Your Majesty the sums hereinafter mentioned, and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted" (n).

Not required
for every
section.

207. It is no longer necessary that each section of a statute commence with the words "And be it enacted," or "And be it further enacted." Every section is a substantive enactment in itself (o).

(i) As, for instance, the repeal of the preamble to the Betting Act, 1853 (16 & 17 Vict. c. 119), by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1, and the Short Titles Act, 1892 (55 & 56 Vict. c. 10) (the latter Act having since been repealed and replaced by the Short Titles Act, 1896 (59 & 60 Vict. c. 14) (*Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, C. A., *per* A. L. SMITH, L.J., at p. 269).

(j) See *Encyclopædia of Forms and Precedents*, Vol. IX., p. 243.

(k) 1 & 2 Geo. 5, c. 13.

(l) *Ibid.*, s. 4 (1). The words "by authority of Parliament" in an Act or charter were formerly held sufficient to make it an Act of Parliament (*The Prince's Case* (1606), 8 Co. Rep. 1 a, 20 a).

(m) For the definition of a "Money Bill," see title PARLIAMENT, Vol. XXI., p. 776. These Bills must be initiated by a resolution moved by a member of the Government in committee of the whole House; see *ibid.*, pp. 766, 771; May's *Parliamentary Practice* (11th ed.), pp. 587, 614; and compare *Provisional Collection of Taxes Act, 1913* (3 Geo. 5, c. 3), s. 1 (1).

(n) The remainder of the formula follows that of Acts other than Finance Acts.

(o) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 8, re-enacting in substance Lord Brougham's Act (stat. (1850) 13 & 14 Vict. c. 21), s. 2. The effect of this provision is that the enacting formula at the commencement of an Act covers the whole Act.

SUB-SECT. 4.—*Heading of Parts.*

SECT. 2.

Framework.

Headings of parts.

208. Headings (which are first found in the Clauses Consolidation Acts of 1845) frequently precede clauses of enactments, or *fasciculi* of clauses (*p*), applicable to special objects. They govern, and may generally be read before, each of the sections which are ranged under them (*q*). They are to be regarded as parts of the statute itself, and may be read not only as explaining the sections which immediately follow, but as affording an even better key to the general construction than a mere preamble (*r*). Further, as being found and sometimes referred to in the enacting parts (*s*), they are deserving of greater consideration than marginal notes (*t*). The clear meaning and natural operation of words found in the various sections under headings must, however, according to the general rule, not be restrained or confined by them (*u*).

SUB-SECT. 5.—*Sections.*

209. Notwithstanding that every section of a statute is a substantive enactment in itself (*a*), the statute must be read and construed as a whole, though one section may bear a wider, another a more limited, meaning (*b*). One section may contain more than one enactment (*c*). Sections of statutes.

SUB-SECT. 6.—*Marginal Notes, Punctuation, and Brackets.*

210. Marginal notes have been referred to as part of a statute when they have been found on the Parliament roll (*d*); and, as they are now printed with the draft Bill, it cannot be said that the eye of Parliament has never rested on them. The disposition of the courts is, however, to disregard them (*e*). Marginal notes.

(*p*) *Hammersmith etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171, *per* Lord CAIRNS, at p. 216.

(*q*) *Eastern Counties and London and Blackwall Rail. Cos. v. Marriage* (1860), 9 H. L. Cas. 32, *per* BRAMWELL, B., at p. 46; compare *Bryan v. Child* (1850), 5 Exch. 368; but see *Union S.S. Co. of New Zealand v. Melbourne Harbour Commissioners* (1884), 9 App. Cas. 365, 369, P. C.

(*r*) *Eastern Counties and London and Blackwall Rail. Cos. v. Marriage*, *supra*, *per* CHANNELL, B., at p. 41. As to the preamble, see pp. 118 *et seq.*, *ante*.

(*s*) See the Merchant Shipping Acts, 1854 (17 & 18 Vict. c. 104) and 1894 (57 & 58 Vict. c. 60); London Building Act, 1894 (57 & 58 Vict. c. cxxiii.).

(*t*) *Lang v. Kerr, Anderson & Co.* (1878), 3 App. Cas. 529, 539; *R. v. Local Government Board* (1882), 10 Q. B. D. 309, 321, C. A.; *Inglis v. Robertson*, [1898] A. C. 616, 624, 630. As to marginal notes, see the text, *infra*.

(*u*) *Hammersmith etc. Rail. Co. v. Brand*, *supra*, *per* Lord CAIRNS, at p. 216; *Latham v. Lafone* (1867), L. R. 2 Exch. 115, 119; *Union S.S. Co. of New Zealand v. Melbourne Harbour Commissioners*, *supra*; *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, 215, C. A.

(*a*) See p. 120, *ante*.

(*b*) *Short v. Hubbard* (1824), 2 Bing. 349, 355; *Pretty v. Solly* (1859), 26 Beav. 606, 610; and see p. 135, *post*.

(*c*) *R. v. Newark-upon-Trent (Inhabitants)* (1824), 3 B. & C. 59, 71.

(*d*) *R. v. Milverton (Inhabitants)* (1836), 5 Ad. & El. 841, 854; *Re Venour's Settled Estates, Venour v. Sellon* (1876), 2 Ch. D. 522, 525.

(*e*) *A.-G. v. Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, C. A., *per* BAGGALLAY, L.J., at p. 461 ("I never knew one considered by the House of Commons"); *Lang v. Kerr, Anderson & Co.* (1878), 3 App. Cas.

SECT. 2.

Framework.

Punctuation
and brackets.

211. Punctuation and brackets do not form parts of a statute, and if found on the Parliament roll, or a statute as printed by the King's Printer (*f*), can only at the most be regarded as *contemporanea expositio* (*g*).

SUB-SECT. 7.—Schedules.

Purpose and
construction.

212. Schedules (*h*) which usually contain a list of any statutes repealed, and which for purposes of drafting often contain other matter which may conveniently be separated from the enacting sections, such as treaties or forms, agreements and plans, or machinery, are to be regarded as constituent parts of the statute (*i*). If there is discrepancy between an enacting part and a schedule, the former prevails (*j*), and the operation of an enactment is never restrained by reference to a schedule when such restriction is unfavourable to the liberty of a subject (*k*).

Forms
appended in
schedule.

213. Forms appended in a schedule to a statute may be referred to for the purpose of throwing light on the construction of the statute (*l*). If such forms are merely given as models, and by way of example, or for departmental purposes, their bearing on the construction of enacting sections is less (*m*) than if they form an essential element in the operation of the statute (*n*).

Imperative
effect.

If a form included in a schedule to a statute is made imperative

529, *per* Lord CAIRNS, L.C., at p. 536 ("inserted perhaps by the printer only"); *Sutton v. Sutton* (1882), 22 Ch. D. 511, C. A., *per* JESSEL, M.R., at p. 513 ("The practice is so uncertain that it cannot be laid down that they are always on the roll"); thus retracting what had previously been said in *Re Venour's Settled Estates*, *Venour v. Sellon* (1876), 2 Ch. D. 522, *per* JESSEL, M.R., at p. 525; see also *Claydon v. Green* (1868), L. R. 3 C. P. 511, 519, 522; *Sheffield Waterworks Co. v. Bennett* (1872), L. R. 7 Exch. 409, 421.

(*f*) As to the King's Printer, see titles CONSTITUTIONAL LAW, Vol. VI., pp. 497, 498; PRESS AND PRINTING, Vol. XXIII., p. 226.

(*g*) *Claydon v. Green*, *supra* (punctuation); *Devonshire (Duke) v. O'Connor* (1890), 24 Q. B. D. 468, *per* Lord ESHER, M.R., at p. 478 ("To my mind it is perfectly clear that in an Act of Parliament there are no such things as brackets, any more than there are such things as stops").

(*h*) A schedule is first found in the Isle of Man Purchase Act, 1765 (5 Geo. 3, c. 26).

(*i*) *A.-G. v. Lamplugh* (1878), L. R. 3 Ex. D. 214, 229, C. A.

(*j*) *Allen v. Flicker* (1839), 10 Ad. & El. 640; *R. v. Baines* (1840), 12 Ad. & El. 210, 227; *Re Baines* (1840), Cr. & Ph. 31; *R. v. Russell* (1849), 13 Q. B. 237; *Jacobs v. Hart* (1900), 2 Fraser (Justiciary Cases), 33, 38.

(*k*) *Dean v. Green* (1882), 8 P. D. 79, 89.

(*l*) *Thomas v. Kelly* (1888), 13 App. Cas. 506, 511. As to whether forms prescribed under a statute, but not included in it, may be referred to, see *Re Norman, Ex parte Board of Trade*, [1893] 2 Q. B. 369, 376, C. A.

(*m*) See *Re Norman, Ex parte Board of Trade*, *supra* (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25); *Bartlett v. Gibbs* (1843), 5 Man. & G. 81, 96 (schedule of a Franchise Act); *Simpson v. South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679, 688 (plan annexed in a schedule); *Dean v. Green*, *supra* (schedule to Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127)).

(*n*) See *Re Townsend, Ex parte Parsons* (1886), 16 Q. B. D. 532, 545, C. A.; *Saunders v. White*, [1902] 1 K. B. 472, C. A. (Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43)); *Liverpool Borough Bank v. Turner* (1860), 1 John. & H. 159 (Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104)); *Davison v. Gill* (1800), 1 East, 64 (a justices' order for stopping up footpath under stat. (1773) 13 Geo. 3, c. 78, s. 19); *Ex parte*

by the statute, or is in terms which indicate that it is intended to be imperative, it must be strictly followed (*o*).

SECT. 2.
Framework.

214. An agreement scheduled to a statute has statutory validity, and no objection can be taken to it on the ground of remoteness or uncertainty (*p*).

Agreement scheduled to statute.

215. A plan annexed by way of schedule to a statute may be regarded as illustrating the scope and meaning of an enacting clause (*q*), but the statute may confer a greater right than that which is indicated by the plan (*r*).

Plan annexed by way of schedule.

SUB-SECT. 8.—*Statutory Rules and Orders.*

216. The tendency of modern legislation is to lay down general principles, and to avoid going into administrative details (*s*). It is within the competence of Parliament to delegate its authority, as may be seen in the statutes by which constitutions have been granted to the great colonies and dominions (*t*), and in the powers given in administrative Acts for the making of rules (*a*), regulations (*b*), and bye-laws (*c*), and for the suspensory or operative action of proclamations (*d*), of Orders in Council (*e*), and of departmental orders (*f*).

Delegation of statutory authority.

Greenwood (1855), 1 Jur. (N. S.) 522 (certificate under a Lunacy Act (stat. (1853) 16 & 17 Vict. c. 96), s. 4).

(*o*) *Wing v. Epsom Urban Council*, [1904] 1 K. B. 798 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96).

(*p*) *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37, C. A.

(*q*) See p. 122, *ante*.

(*r*) *Simpson v. South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679, *per* Lord WESTBURY, L.C., at p. 688.

(*s*) *R. v. Walker* (1875), L. R. 10 Q. B. 355, *per* LUSH, J., at p. 358; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186, 203. The Privy Council has termed it "legislating conditionally" (*R. v. Burah* (1878), 3 App. Cas. 889, 906, P. C.).

(*t*) See the British North America Act, 1867 (30 & 31 Vict. c. 3); Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12); South Africa Act, 1909 (9 Edw. 7, c. 9); title DEPENDENCIES AND COLONIES, Vol. X., p. 535.

(*a*) See the Rules of the Supreme Court (Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 17); Summary Jurisdiction Rules, 1886 (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 29); County Court Rules, 1903 (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 164).

(*b*) See, for instance, the regulations made by the Secretary of State under the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 445.

(*c*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16; and the various Building and Public Health Acts and Railway and other local and personal Acts; for examples, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 728 *et seq.*, 787.

(*d*) Thus, the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), only becomes effective in places outside the United Kingdom upon being proclaimed (*ibid.*, s. 3). As to proclamations generally, see title CONSTITUTIONAL LAW, Vol. VII., pp. 15, 16. As to the coming into operation of statutory rules, see, further, p. 125, *post*.

(*e*) Thus, rules are made by Order in Council for the prevention of

(*f*) For note (*f*), see p. 124, *post*.

SECT. 2.

Framework.

Exercise of
delegated
authority.

Control of
judiciary.

217. Delegated authority of the kind above referred to must be exercised strictly in accordance with the powers creating it (*g*), and in the spirit of the enabling statute (*h*). Statutes of a subordinate legislature, and also rules, ordinances, orders, and bye-laws, which have fulfilled all the conditions precedent to their validity, have the force of statutes, and must be construed as such (*i*).

218. Statutory rules, orders, and bye-laws differ from statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with conditions precedent (*j*), and in the case of bye-laws to consider if they are reasonable (*k*). If they fail to comply with such conditions, the court may quash them or treat them as unenforceable (*l*).

collisions at sea; see, generally, title SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.; and by the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 34, the Privy Council might authorise a local authority to make regulations, *inter alia*, for prescribing and regulating the lighting, ventilation etc. of cowsheds—a double delegation of authority; but see title ANIMALS, Vol. I., p. 433, note (*b*). As to the nature of Orders in Council, see title CONSTITUTIONAL LAW, Vol. VII., p. 8.

(*f*) Thus, the Board of Trade may by provisional order constitute pilotage authorities; see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 599.

(*g*) *Hacking v. Lee* (1860), 2 E. & E. 906; *Re Davis, Ex parte Davis* (1872), 7 Ch. App. 526, 529; *Irving v. Askew* (1870), L. R. 5 Q. B. 208, 211; *Hartmont v. Foster* (1881), 8 Q. B. D. 82, 85, 86, C. A.; *Slattery v. Naylor* (1888), 13 App. Cas. 446, 450, P. C.; *Wilmot v. Grace*, [1892] 1 Q. B. 812, 816; *Mantle v. Jordan*, [1897] 1 Q. B. 248.

(*h*) *Rickards v. A.-G. of Jamaica* (1848), 6 Moo. P. C. C. 381, 398; *Schneider v. Butt* (1881), 8 Q. B. D. 701, 705, C. A.

(*i*) *Garnett v. Bradley* (1878), 3 App. Cas. 944, 964; *Danford v. McAnulty* (1883), 8 App. Cas. 456, 460; *Gebruder Naf v. Ploton* (1890), 25 Q. B. D. 13, 15, C. A. (Rules of the Supreme Court); *Re Langlois and Biden*, [1891] 1 Q. B. 349, 355, C. A. (County Court Rules); *Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376, 455, C. A. (Rules made under Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85)); *Patent Agents Institute v. Lockwood*, [1894] A. C. 347, 356 (Rules made under Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57) (now repealed)); *National Telephone Co. v. Baker*, [1893] 2 Ch. 186, 203 (act done under provisional order of Board of Trade); *Jones v. Robson*, [1901] 1 K. B. 673 (Rules made under Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43) (now repealed)); *Willingale v. Norris*, [1909] 1 K. B. 57, 64 (Regulations made under London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), by the Commissioners of Police); *Williams v. Weston Urban District Council* (1908), 72 J. P. 54; (1909), 74 J. P. 52; (1910), 74 J. P. 370, C. A. (bye-laws made by a local authority); *R. v. Baggallay, Hurlock v. Shinn, R. v. Hedderwick, Morris v. Ashton*, [1913] 1 K. B. 290 (Rules made under National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55)).

(*j*) Such as publication (*Drew v. Harlow* (1875), 39 J. P. 420; *Timothy v. Fenn* (1910), 74 J. P. 123).

(*k*) As to which a wide diversity of opinion has existed (*Kruse v. Johnson*, [1898] 2 Q. B. 91, 100; *Mitcham Common Conservators v. Cox, Same v. Cole*, [1911] 2 K. B. 854; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 393, 394). Generally speaking, the function of a bye-law is to regulate and not prohibit; see *Rossi v. Edinburgh Corporation*, [1905] A. C. 21; *Sydney Municipal Council v. Australian Freezing Works, Ltd.*, [1905] A. C. 161, P. C.

(*l*) See the cases cited in note (*k*), *supra*; *Toronto (City) Municipal Corporation v. Virgo*, [1896] A. C. 88, P. C.; *Baker v. Williams*, [1898] 1 Q. B. 23, 25; *R. v. Bird, Ex parte Needes*, [1898] 2 Q. B. 340; *Kennaird v. Cory & Son*, [1898] 2 Q. B. 578; *Scott v. Glasgow Corporation*, [1899] A. C. 470.

Where the Act under which rules are made does not come into operation immediately on passing, the rule-making power may be exercised during the interval for the purpose of bringing the Act into operation (*m*). SECT. 2.
Framework.

219. Words and expressions used in subordinate legislation *primâ facie* have the same meaning as in the statute creating the power of legislation (*n*). Meaning of words and expression.

220. The power to make any rules, regulations, or bye-laws is, unless the contrary intention appears, to be construed as including a power exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or bye-laws (*o*). Alteration or rescission.

221. General provision has been made by statute for the printing and publication of statutory rules (*p*), such as, for instance, rules, regulations, or bye-laws, made under any Act of Parliament, which relate to any court in the United Kingdom, or the procedure, practice, costs, or fees therein, or which are made by His Majesty in Council, the Judicial Committee, the Treasury, or any other Government department. The rules must be sent to the King's Printer (*q*), and numbered, and, unless otherwise ordered, must be printed and sold by him. If the rules are required by statute to be gazetted, this requirement is complied with by a notice in the *Gazette* that the rules have been made, and of the place where copies of them can be purchased (*r*). Printing and publication of statutory rules.

222. To meet cases of urgency, provisional rules may be made to come into operation at once, but they are only to continue in force until rules have been made in accordance with the foregoing provisions (*s*). Provisional rules.

(*m*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 37.

(*n*) *Blashill v. Chambers* (1884), 14 Q. B. D. 479, 485; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31.

(*o*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (3). This provision applies to rules, regulations, and bye-laws only, and not to Orders in Council, and the other instruments mentioned on p. 123, *ante*.

(*p*) By the Rules Publication Act, 1893 (56 & 57 Vict. c. 66); as to the Index to the Statutory Rules and Orders, see note (*a*), p. 203, *post*.

(*q*) As to the King's Printer, see titles CONSTITUTIONAL LAW, Vol. VI., pp. 497, 498; PRESS AND PRINTING, Vol. XXIII., p. 226.

(*r*) Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 3. In order to obtain criticisms before rules are finally made, and to prevent people being taken by surprise, provision is made that, at least forty days before making certain statutory rules, notice of the proposal to make the rules, and of the place where copies of the draft rules may be obtained, is to be published in the *London Gazette*. During these forty days any public body may obtain copies of such draft rules on payment of a sum not exceeding threepence per folio, and any representations or suggestions made by a public body interested in the matter must be taken into consideration by the rule-making authority before finally settling the rules. These provisions apply to statutory rules which are required to be laid before Parliament, but not to those required to be laid before Parliament for any period before they come into operation; nor do they apply to rules made by the Local Government Board, the Board of Trade, the revenue departments, the Post Office, or rules made by the Board of Agriculture and Fisheries relating to contagious diseases of animals; nor do they apply to Scotland (*ibid.*, s. 1).

(*s*) *Ibid.*, s. 2. This provision does not give power to make rules, but

SECT. 2.
 Framework.
 Scope of
 meaning of
 statutory rule.

223. Every exercise of a statutory power by a rule-making authority (*t*) which is of a legislative, and not of an executive, character, is to be deemed a statutory rule within the meaning of the provisions relating to the publication of draft rules (*u*).

Part III.—Interpretation.

SECT. 1.—*In General.*

Function
 imposed upon
 courts of
 justice.

224. The function of interpreting the statute as well as the common law lies with the High Court of Justice, and in the last instance with the House of Lords, and, when a court of supreme authority (*v*) has once laid down a rule of construction, such rule can only be amended by Parliament itself, legislating by statute (*a*). For, although a statute may have the effect of undoing that which has been wrought by an earlier statute, no recital in a declaratory statute as to the intention of Parliament in the statute amended can reverse or render void that which has been declared by the courts to have been done rightly under it (*b*).

While it is the duty of the courts to interpret, they are not entitled to canvass the power of Parliament to make any enactment (*c*), nor to

to provide that rules made in accordance with statutory power shall provisionally come into operation immediately (*R. v. Baggallay, Hurlock v. Shinn, R. v. Hedderwick, Morris v. Ashton*, [1913] 1 K. B. 290).

(*t*) As defined by the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 4.

(*u*) Rules made by the Lord Chancellor and the Treasury, dated 9th August, 1894, under the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 3 (4). See, further, the preface to the Index to the Statutory Rules and Orders in force on the 31st December, 1912, and to the annual volumes.

(*v*) The House of Lords is the *commune forum* of Great Britain and Ireland (*Cooper v. Cooper* (1888), 13 App. Cas. 88, *per* Lord WATSON, at p. 104), as the Privy Council is that of the British Dominions beyond the Seas; see *Harding v. Queensland Stamps Commissioners*, [1898] A. C. 769, 774, P. C.; *Trimble v. Hill* (1879), 5 App. Cas. 342, 344, P. C. As to judicial notice of statutes, see title EVIDENCE, Vol. XIII., p. 525.

(*a*) *Inland Revenue Commissioners v. Harrison* (1874), L. R. 7 H. L. 1; see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 210. It is possible, however, to ascertain the interpretation of an earlier Act by reference to a later (*Gaslight and Coke Co. v. Hardy* (1886), 17 Q. B. D. 619, C. A., *per* Lord ESHER, M.R., at p. 621).

(*b*) *Ex parte Lloyd* (1851), 1 Sim. (N. S.) 250; *R. v. Haughton (Inhabitants)* (1853), 1 E. & B. 501, 516; *Shrewsbury (Earl) v. Scott* (1859), 6 C. B. (N. S.) 1, 180; *Mersey Docks and Harbour Board v. Cameron, Jones v. Mersey Docks and Harbour Board* (1865), 11 H. L. Cas. 443, 518; *Mitealfe v. Hanson* (1866), L. R. 1 H. L. 242, 250; *Mollwo, March & Co. v. Court of Wards* (1872), L. R. 4 P. C. 419, 437; *Sewell v. Burdick* (1884), 10 App. Cas. 74, 105.

(*c*) *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, *per* Lord BLACKBURN, at p. 764; *Mortensen v. Peters* (1906), 8 Fraser (Justiciary Cases), 93, 103.

inquire into the circumstances attending its passing (*d*), nor must they interpret it in any but the spirit in which it has been passed (*e*). SECT. 1.
In General.

225. The function of interpretation exercised by the High Court extends not merely to the interpretation of statutes strictly so called, but to correcting errors of interpretation made by inferior courts (*f*), by Government departments in assumed exercise of statutory powers (*g*), or by bodies to which the right of making rules and bye-laws has been delegated (*h*). Function extending to errors of interpretation.

SECT. 2.—Statutory Provisions.

SUB-SECT. 1.—Definitions.

226. The following words and expressions have been defined by the Interpretation Act, 1889 (*i*):— Words and expressions defined by Interpretation Act, 1889.

(1) As found in any Act whenever passed: Admiralty, Bank of England, Bank of Ireland, Board of Trade, Charity Commissioners, Commissioners of Woods and Forests, Commissioners of Works, Consular Officer, Ecclesiastical Commissioners, Education Department (*j*), Lord Chancellor, National Debt Commissioners,

(*d*) *Co. Litt.* 98 b; *The Prince's Case* (1605), 8 Co. Rep. 1 a, 18 a; *Harrison v. Burwell* (1670), 2 Vent. 9, per VAUGHAN, C.J., at p. 10; *Stead v. Carey* (1843), 1 C. B. 496, 516; *Salkeld v. Johnson* (1848), 2 Exch. 256, 273; *Shrewsbury (Earl) v. Scott* (1859), 6 C. B. (N. S.) 1, 160; *Lee v. Bude and Torrington Junction Rail. Co.* (1871), L. R. 6 C. P. 576, 582; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, 113.

(*e*) In other words, they must not begin by assuming what Parliament ought to have done (*R. v. Mansel Jones* (1889), 23 Q. B. D. 29, per Lord COLERIDGE, C.J., at p. 39; compare *Abel v. Lee* (1871), L. R. 6 C. P. 365, 371); and see *Re Holborn Union, R. v. Poor Law Commissioners* (1838), 6 Ad. & El. 56, 69; *Allkins v. Jupe* (1877), 2 C. P. D. 375, per GROVE, J., at p. 385.

(*f*) *Home v. Camden (Earl)* (1795), 2 Hy. Bl. 533, 536, H. L.

(*g*) *Institute of Patent Agents v. Lockwood*, [1894] A. C. 347, 366, P. C.; *A.-G. v. West Riding of Yorkshire County Council*, [1907] A. C. 29; *Wilford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685, 702; *R. v. Board of Education*, [1910] 2 K. B. 165, C. A.; affirmed, *sub nom. Board of Education v. Rice*, [1911] A. C. 179; *Re Hardy's Crown Brewery, Ltd. and St. Philip's Tavern, Manchester*, [1910] 2 K. B. 257, C. A.; *Re Weir Hospital*, [1910] 2 Ch. 124, C. A.; *Dyson v. A.-G.*, [1911] 1 K. B. 410, 423, C. A.

(*h*) See p. 123, ante.

(*i*) 52 & 53 Vict. c. 63. This Act defines some sixty expressions in common use, making them of general application, except where an intention to the contrary appears in the particular statute in which they may be used. Some of these expressions are intended to abbreviate the language of statutes by substituting a convenient short term for a cumbrous legal description, as, for instance, "the Board of Trade" for "the Lords of the Committee for the time being of the Privy Council relating to trade and foreign plantations." Other definitions are intended to secure uniformity in the meaning of certain common terms, and to save their needless repetition in every Act; thus, the definition of "person" in *ibid.*, s. 2 (1), slightly strengthens the common law rule of construction, as to which see *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A. (Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6); and see *Pearks, Gunston and Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairy Co.*, [1902] 2 K. B. 1. The Act does not, however, necessarily alter the common law (*Bebb v. Law Society* (1913), 29 T. L. R. 634).

(*j*) Now the Board of Education; see title EDUCATION, Vol. XII., p. 8.

SECT. 2.
Statutory
Provisions.

Postmaster-General, Privy Council, Queen Anne's Bounty, Secretary of State, Treasury (*k*); Assizes, Court of Appeal, Court of Assize, Court of Summary Jurisdiction, High Court, Petty Sessional Court, Summary Jurisdiction Act, 1848, Summary Jurisdiction (England or English) Acts, Summary Jurisdiction Acts, Supreme Court (*l*); Writing (*m*); Statutory Declaration (*n*); Crown, Sovereign (*o*); Commencement of Act (*p*);

(2) As found in any Act or Order of Council passed or made after 1846: County Court (*q*);

(3) As found in any Act passed after 1850: Affidavit, Land, Month, Oath (*r*); Masculine Words and Plural and Singular Words (*s*);

(4) As found in any Act passed after 1866: Parish (*t*).

(5) As found in any Act passed between 1850 and 1890 (exclusive): County (*u*);

(6) As found in any Act coming into operation after 1889: Board of Guardians, Poor Law Union (*v*); Borough, Municipal Borough and Parliamentary Borough (*w*); British India, British Islands, British Possession, Colonial Legislature, Colony, Governor, India, Legislature (*x*); Local Government Register of Electors, Parliamentary Register of Electors, Parliamentary Election (*y*); Person (*z*); Rules of Court (*a*); Service by Post (*b*); Committed for Trial (*c*); Financial Year (*d*);

(7) As used in the Act itself: "Act" (*e*).

Words and
expressions
defined by
other statutes.

227. A few other definitions of general application are given by other Acts: for example, the expression "England" when used in any Act of Parliament includes Wales and the town of Berwick-upon-Tweed (*f*); and references to "attorneys" before the Solicitors Act, 1877 (*g*), stand as references to solicitors of the Supreme Court (*h*). "Summary Jurisdiction Acts," "Court of Summary

(*k*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12.

(*l*) *Ibid.*, s. 13.

(*m*) *Ibid.*, s. 20.

(*n*) *Ibid.*, s. 21.

(*o*) *Ibid.*, s. 30.

(*p*) *Ibid.*, s. 36 (1); see p. 155, *post*.

(*q*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 6.

(*r*) *Ibid.*, s. 3.

(*s*) *Ibid.*, s. 1 (1); see p. 130, *post*.

(*t*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5.

(*u*) *Ibid.*, s. 4.

(*v*) *Ibid.*, s. 16.

(*w*) *Ibid.*, s. 15.

(*x*) *Ibid.*, s. 18.

(*y*) *Ibid.*, s. 17.

(*z*) *Ibid.*, s. 19.

(*a*) *Ibid.*, s. 14.

(*b*) *Ibid.*, s. 26; see pp. 130, 131, *post*.

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 27.

(*d*) *Ibid.*, s. 22.

(*e*) *Ibid.*, s. 39.

(*f*) Wales and Berwick Act, 1746 (20 Geo. 2, c. 42), s. 3.

(*g*) 40 & 41 Vict. c. 25.

(*h*) Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 21.

Jurisdiction," "Petty Sessional Court," and "Occasional Court-house" are defined in the Summary Jurisdiction Act, 1879 (*i*).

SECT. 2.
Statutory
Provisions.

SUB-SECT. 2.—*Words and Expressions Judicially Interpreted.*

228. The following words and expressions, among others, have received judicial interpretation (*j*):—

Words and
expressions
judicially
interpreted.

(1) "Accident" (*k*); (2) "Assigns" (*l*); (3) "Belonging to and occupied with" (*m*); (4) "Beyond the seas" (*n*); (5) "Charitable uses" (*o*); (6) "Clerk or Servant" (*p*); (7) "Completion" (*q*); (8) "Creditor" (*r*); (9) "Daily" (*s*); (10) "Day next appointed" (*t*); (11) "Deviation" (*u*); (12) "Fabricate" (*v*); (13) "Footpath" (*w*); (14) "Forthwith" (*x*); (15) "House or other building or manufactory" (*y*); (16) "Householder" (*z*); (17) "Immediately" (*a*); (18) "Now" (*b*); (19) "On" (*c*); (20) "Passenger" (*d*); (21) "Pauper" (*e*); (22) "Person" (*f*); (23) "Purchase" (*g*);

(*i*) 42 & 43 Vict. c. 49, s. 50.

(*j*) Though words judicially defined do not properly fall under the heading of "Statutory Provisions," it is thought convenient to refer to them here. For more exhaustive lists, see Craies' Statute Law, 2nd ed.; Stroud's Judicial Dictionary, 2nd ed.

(*k*) *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518, per Lord HALSBURY, L.C., at p. 524; *Fenton v. Thorley & Co., Ltd.*, [1903] A. C. 443, per Lord MACNAGHTEN, at p. 448.

(*l*) *Re Woking Urban District Council (Basingstoke Canal) Act*, 1911 (1913), 77 J. P. 321.

(*m*) *Reith v. Westminster School (Governing Body)*, [1913] 3 K. B. 129, C. A.

(*n*) *Ruckmaboje (H. H.) v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4.

(*o*) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, 587.

(*p*) As used in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (1) (*Re Beeton & Co., Ltd.*, [1913] 2 Ch. 279).

(*q*) *Reigate Rural District Council v. Sutton District Water Co.* (1908), 99 L. T. 168.

(*r*) *Re Perrin* (1842), 2 Dr. & War. 147.

(*s*) *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A.

(*t*) *Richards v. McBride* (1881), 8 Q. B. D. 119.

(*u*) *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, 518.

(*v*) *Aberdare Local Board v. Hammett* (1875), L. R. 10 Q. B. 162, 166.

(*w*) *Scales v. Pickering* (1828), 4 Bing. 448.

(*x*) *R. v. Worcestershire Justices* (1846), 1 Saund. & C. 102; *Hancock v. Somes* (1859), 1 E. & E. 795; *Roberts v. Brett* (1864), 20 C. B. (N. S.) 148, H. L.; *Re Sullivan, Ex parte Sullivan* (1866), 36 L. J. (BCY.) 1; *Re Sillence, Ex parte Sillence* (1877), 7 Ch. D. 238; *R. v. Berkshire Justices* (1878), 4 Q. B. D. 469, 471; *Re Southam, Ex parte Lamb* (1881), 19 Ch. D. 169, 173, C. A.; *Keith, Prowse & Co. v. National Telephone Co.*, [1894] 2 Ch. 147, 155.

(*y*) *Richards v. Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, 434, C. A.; followed in *Regent's Canal and Dock Co. v. London County Council*, [1912] 1 Ch. 583.

(*z*) *R. v. Hall* (1822), 1 B. & C. 123, 126.

(*a*) *Barker v. Lewis and Peat*, [1913] 3 K. B. 34, C. A.

(*b*) *Wagh v. Middleton* (1853), 8 Exch. 352.

(*c*) *Bradley v. Bradley* (1878), 3 P. D. 47, 50; *Robertson v. Robertson* (1883), 8 P. D. 94, 96, C. A.

(*d*) *The "Lion"* (1869), L. R. 2 P. C. 525.

(*e*) *Brighton Guardians v. Strand Union Guardians*, [1891] 2 Q. B. 156, 168, C. A.

(*f*) *Newcastle Corporation v. A.-G.* (1845), 12 Cl. & Fin. 402, H. L.; *O'Shanassy v. Joachim* (1876), 1 App. Cas. 82, P. C.; *Pharmaceutical*

(*g*) For note (*g*), see p. 130, *post*.

- SECT. 2. (24) "Seaman" (*h*); (25) "Shop" (*i*); (26) "Soil" (*k*);
 Statutory (27) "Stationary vessel" (*l*); (28) "Submitted for decision" (*m*);
 Provisions. (29) "Successive weeks" (*n*); (30) "Take" (*o*); (31) Town (*p*).

SUB-SECT. 3.—*Measurement of Distance and Time.*

Measurement
of distance.

229. In the measurement of any distance for the purposes of any statute passed since 1889, that distance, unless the contrary intention appears, must be measured in a straight line on a horizontal plane (*a*).

Measurement
of time.

230. Any expression of time found in a statute must, in the case of Great Britain, be taken to refer to Greenwich time (*b*).

The law does not, in general, regard fractions of a day, but cases may arise where the object of a statute will be defeated unless the precise hour of an occurrence is noted (*c*).

SUB-SECT. 4.—*General Rules.*

Imported
meanings.

231. Words importing the masculine gender *primâ facie* include females, and words in the singular *primâ facie* include the plural and words in the plural the singular (*d*).

Service by
post.

232. Where any statute passed since 1889 authorises or requires any document to be served by post, whether the expression "serve" or any equivalent expression is used, then, unless the contrary intention appears, service is deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at

Society v. London and Provincial Supply Association (1880), 5 App. Cas. 857, 862; *Re Jeffcock's Trusts* (1882), 51 L. J. (CH.) 507; *Enniskillen Guardians v. Hilliard* (1884), 14 L. R. Ir. 214; *St. Helens Tramways Co. v. Wood* (1891), 56 J. P. 71; *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.; *Pearks, Gunston and Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairy Co.*, [1902] 2 K. B. 1; *Wills v. Tozer* (1904), 20 T. L. R. 700; *Chuter v. Freeth and Pocock, Ltd.*, [1911] 2 K. B. 832.

(*g*) *Inland Revenue Commissioners v. Gribble*, [1913] 3 K. B. 212, 215, C. A.

(*h*) *Macbeth & Co. v. Chislett*, [1910] A. C. 220.

(*i*) *Unwin v. Hanson*, [1891] 2 Q. B. 115, C. A.

(*k*) *Pretty v. Solly* (1859), 26 Beav. 606, 610.

(*l*) *The Dunelm* (1884), 9 P. D. 164, 171, C. A.

(*m*) *Ex parte Kent County Council and Dover Council, Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 725, 728, C. A.

(*n*) *Aberdeen City v. Watt* (1901), 3 F. (Ct. of Sess.) 787.

(*o*) *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, C. A.

(*p*) *R v. Cottle* (1851), 16 Q. B. 412; *Milton Commissioners v. Faversham District Highway Board* (1867), 10 B. & S. 548, n.; *Collier v. Worth* (1876), 1 Ex. D. 464.

(*a*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34; see title WEIGHTS AND MEASURES.

(*b*) Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9). But "sunset" in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1) (*a*), as to carriages carrying lights between one hour after sunset and one hour before sunrise, was held by a divisional court not to be an expression of time within the Act (*Gordon v. Cann* (1899), 68 L. J. (Q. B.) 434); and see title TIME, p. 441, *post*.

(*c*) *Combe v. Pitt* (1763), 3 Burr. 1423, 1434; *Chick v. Smith* (1840), 8 Dowl. 337, 340; *Campbell v. Strangeways* (1877), 3 C. P. D. 105 (as to the moment from which a licence under the Dog Licences Act, 1867 (30 & 31 Vict. c. 5), begins to run); as to fractions of a day generally, see title TIME, p. 454, *post*.

(*d*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1); *Connelly v. Steer* (1881), 7 Q. B. D. 520, 522, C. A.

the time at which the letter would be delivered in the ordinary course of post (*e*).

233. Where any statute passed since 1889 confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty performed from time to time as occasion requires (*f*), and, when the power is so conferred or the duty imposed on the holder of an office as such, it may be exercised or performed by the holder for the time being of the office (*g*).

SECT. 2.
Statutory
Provisions.

Performance
of statutory
duty.

SUB-SECT. 5.—*Interpretation Clauses.*

234. Most modern statutes contain an interpretation clause (*h*), wherein is declared the meaning which certain words and expressions are to, or may, bear for the purposes of the statute in question (*i*). As a rule, it should be used for interpreting words which are ambiguous or equivocal only, and not so as to disturb the meaning of such as are plain (*k*).

Purpose.

Interpretation clauses are often inserted *ex abundanti cautela*, and are not necessarily to be construed as positive enactments (*l*).

Construction.

SECT. 3.—*Common Law Rules.*

SUB-SECT. 1.—*To Ascertain the Meaning.*

(i.) *In General.*

235. Broad rules for the construction of statutes have been laid

General
rules of
construction.

(*e*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26; see titles EVIDENCE, Vol. XIII., p. 441; POST OFFICE, Vol. XXII., pp. 658, 659.

(*f*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (1); *Battersea Borough Council v. County of London Electric Supply Co., Ltd.*, [1913] 2 Ch. 248. There was an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise.

(*g*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (2). For offences under two or more laws, as to which a statutory rule is laid down in *ibid.*, s. 33; see p. 179, *post*. As to statutory powers and duties, see, further, pp. 173 *et seq.*, *post*; compare title POWERS, Vol. XXIII., p. 17.

(*h*) See *Lindsay v. Cundy* (1876), 1 Q. B. D. 348, *per* BLACKBURN, J., at p. 358 ("A modern invention which frequently does a great deal of harm"); *Ely (Dean) v. Bliss* (1852), 2 De G. M. & G. 459, *per* Lord St. LEONARDS, L.C., at p. 471 ("They attempt to put a general construction on words which in the different senses in which they are introduced in the various clauses of an Act do not admit of such"); *Wakefield Board of Health v. West Riding and Grimsby Rail. Co.* (1865), 6 B. & S. 794, *per* COCKBURN, C.J., at p. 801 ("I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion").

(*i*) *Ablert v. Pritchard* (1866), L. R. 1 C. P. 210 (the word "cart" might in virtue of the interpretation clause include "threshing machine"); *R. v. Commissioners under Boiler Explosions Act*, 1882, [1891] 1 Q. B. 703, 714, C. A. (a pipe might be a boiler). For forms, see *Encyclopædia of Forms and Precedents*, Vol. IX., p. 244.

(*k*) *R. v. Pearce* (1880), 5 Q. B. D. 386, *per* LUSH, J., at p. 389 (extended meaning of "justice of the peace"); *R. v. Cambridgeshire Justices, R. v. Shropshire Justices, R. v. Gloucestershire Justices* (1838), 7 Ad. & El. 480, 491 ("overseer"); *Midland Rail. Co. v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1853), 10 Hare, 359; *Ex parte Ferguson* (1871), L. R. 6 Q. B. 280, 291 ("ship"); *The Gauntlet* (1871), L. R. 3 A. & E. 381, 388 ("ship"); *Pound v. Plumstead Board of Works* (1871), L. R. 7 Q. B. 183, 194 ("street"); *Nutter v. Accrington Local Board of Health* (1878), 4 Q. B. D. 375, 384, C. A. ("street"); *London School Board v. Jackson* (1881), 7 Q. B. D. 502, 504 ("parent").

(*l*) Thus, where in the Railways Clauses Consolidation Act, 1845 (8 & 9

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down from early times. It has been said that their meaning is primarily to be sought in themselves (*m*), by which it is to be understood that all the constituent parts above dealt with (*n*), so far as they may be regarded as matter which has received the sanction of Parliament, are to be duly weighed. It has been further said that their grammatical and ordinary sense is mainly to be regarded (*o*). If the collocation of enacting words is in itself precise and unambiguous, no difficulty arises (*p*); if the terms employed are ambiguous, then the intention of Parliament must be sought first in the statute itself (*q*), then in other legislation and contemporaneous circumstances (*r*), and finally in the general rules laid down by Sir E. Coke (*s*), and often since approved (*t*), namely, by ascertaining—

(1) What was the common law before the Act;

(2) What was the mischief and effect for which the common law did not provide (*u*);

Vict. c. 20), s. 3, “justice” was defined as “a justice acting for the county who” (*inter alia*) should “not be interested in the matter,” it was held that interest was not an absolute disqualification, but might be waived; see title RAILWAYS AND CANALS, Vol. XXIII., p. 688, note (*d*).

(*m*) *Ex visceribus actus* (Co. Litt. 381 b); and see *Lincoln College's Case* (1595), 3 Co. Rep. 58 b, 59 b; *Logan v. Courtown (Earl)* (1851), 13 Beav. 22, 29; *Barrow v. Wadkin* (No. 2) (1857), 24 Beav. 327, 330; *Hack v. London Provident Building Society* (1883), 23 Ch. D. 103, 108, C. A.; *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch. D. 254, 258, C. A.; *Hobbs v. Winchester Corporation*, [1910] 2 K. B. 46, 471, 479, C. A.; *Inland Revenue Commissioners v. Herbert*, [1913] A. C. 326, 332.

(*n*) See pp. 117 *et seq.*, *ante*.

(*o*) *Copeman v. Gallant* (1716), 1 P. Wms. 314, 320; *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623, 628, Ex. Ch.; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 106; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, 117 *et seq.*

(*p*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, *per* TINDAL, C.J., at p. 143; *Hornsey Local Board v. Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A., *per* Lord Esher, M.R., at p. 5; *Fordyce v. Bridges* (1847), 1 H. L. Cas. 1, 4; *Philpott v. St. George's Hospital (President and Governors)* (1857), 6 H. L. Cas. 338, 349; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, C. A., *per* BOWEN, L.J., at p. 27; *R. v. Titterton*, [1895] 2 Q. B. 61, 67; *Vacher & Sons, Ltd. v. London Society of Compositors*, *supra*, *per* Lord MACNAGHTEN, at pp. 117, 118.

(*q*) See p. 136, *post*.

(*r*) See pp. 138 *et seq.*, *post*.

(*s*) *Heydon's Case* (1584), 3 Co. Rep. 7 a, 7 b.

(*t*) *Salkeld v. Johnson* (1848), 2 Exch. 256, *per* POLLOCK, C.B., at p. 273; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, *per* Lord BLACKBURN, at p. 764.

(*u*) Great pains were taken, according to the reports of older cases, to ascertain the intention of Parliament; see 4 Co. Inst. 324; *Willion v. Berkley* (1561), Plowd. 223, 231; *Stowel v. Zouch (Lord)* (1562), Plowd. 353, 366, Ex. Ch.; *Eyston v. Studd* (1574), Plowd. 459, 464; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 27 b; *Magdalen College Case* (1615), 11 Co. Rep. 66 b, 73 b. The rule is still frequently adverted to in modern judgments; see *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 21, C. A.; *Hughes v. Chester and Holyhead Rail. Co.* (1861), 3 De G. F. & J. 352, 362, C. A.; *Phillips v. Phillips* (1866), L. R. 1 P. & D. 169, 173; *Bell v. Holtby* (1873), L. R. 15 Eq. 178, 189; *River Wear Commissioners v. Adamson*, *supra*, at p. 765; *Freem v. Clement* (1881), 18 Ch. D. 499, 508; *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114, 122; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 372; *Conway v. Wade*, [1908] 2 K. B. 844, 853, C. A.

(3) What remedy the Parliament hath resolved and appointed to cure the disease (*w*);

(4) The true reason of the remedy (*w*).

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236. The great difficulty in all cases is in applying these rules to the particular case (*x*). A reasonable construction should, if possible (*a*), prevail, and it must not be assumed that Parliament foresees every result which may accrue from the use of a particular word (*b*); yet effect must be given to every part of the statute (*c*), even if the consequence be a hardship upon individuals (*d*).

Application
of rules of
construction.

237. The canons of construction to be imposed with regard to statutes do not, in effect, differ from those applicable to all documents (*e*).

Statutes and
documents
construed
alike.

(ii.) *Parts of Statute which may be Considered.*

238. It is convenient to consider for purposes of interpretation the following matters, namely:—

Matters to be
considered.

- (1) The words employed;
- (2) The words as collocated in an enacting section;
- (3) Enacting sections as making up a whole statute;
- (4) The whole statute, including the non-enacting constituent parts, which, according to the rules before laid down (*f*), may be referred to for the purpose of ascertaining the scope and meaning;

(*w*) *Pardo v. Bingham* (1869), 4 Ch. App. 735, 740; *Freme v. Clement* (1881), 18 Ch. D. 499, 508; *Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D. 648, 660, C. A.; *Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, 186, C. A.; *The Dunelm* (1884), 9 P. D. 164, 171, C. A.; *Reigate Rural District Council v. Sutton District Water Co.* (1908), 99 L. T. 168.

(*x*) *Allgood v. Blake* (1872), L. R. 8 Exch. 160, per BLACKBURN, J., at p. 163. A good example of this is seen in *Tuff v. Guild of Drapers of London City*, [1913] 1 K. B. 40, C. A.

(*a*) *Hawes v. Paveley* (1876), 1 C. P. D. 418, C. A., per JESSEL, M. R., at p. 419; *Higham v. Wright* (1877), 2 C. P. D. 397, per GROVE, J., at p. 401; *Ruther v. Harris* (1876), 1 Ex. D. 97, per GROVE, J., at p. 100; *Williams v. Evans* (1876), 1 Ex. D. 277, per GROVE, J., at pp. 281, 282, and per FIELD, J., at p. 284.

(*b*) *Nairn v. St. Andrews University*, [1909] A. C. 147, per Lord LORE-BURN, L. C., at p. 161; see *King v. Burrell* (1840), 12 Ad. & El. 460, 468; *R. v. West Riding of Yorkshire Justices* (1841), 1 Q. B. 325, 329; *R. v. Skeen* (1859), Bell, C. C. 97, 116; *Boon v. Howard* (1874), L. R. 9 C. P. 277, 308; *R. v. Oxford (Bishop)* (1879), 4 Q. B. D. 245, 261; *Gard v. London Sewers Commissioners* (1885), 28 Ch. D. 486, 511, C. A.; *Metropolitan Water Board v. London, Brighton and South Coast Railway*, [1910] 2 K. B. 890, 895, C. A.

(*c*) "Obscurity of expression and difficulty of construction are not sufficient grounds for rejecting provisions in Acts of Parliament" (*Inland Revenue Commissioners v. Joicey* (No. 1), [1913] 1 K. B. 445, C. A., per FARWELL, L. J., at p. 452).

(*d*) *A verbis legis non recedendum* (*Edrich's Case* (1603), 5 Co. Rep. 118 a; *Rorke v. Errington* (1859), 7 H. L. Cas. 617, 630); *Monck v. Hilton* (1877), 2 Ex. D. 268, per CLEASBY, B., at p. 275.

(*e*) *Lamplugh v. Norton* (1889), 22 Q. B. D. 452, C. A., per BOWEN, L. J., at p. 459; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 106; approved in *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114, 131; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 27 b; *Curtis v. Stovin* (1889), 22 Q. B. D. 513, 517, C. A.; *Hawke v. Dunn*, [1897] 1 Q. B. 579, 586.

(*f*) See p. 132, *ante*.

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and, having thus examined a statute as a self-contained entity, to point out what recourse has been had to external matters when interpretation from within has failed.

Words
construed in
popular
sense.

239. Words are primarily to be construed in their popular sense (*g*), and as they would have been understood the day after the statute was passed (*h*), unless such construction would lead to manifest and gross absurdity (*i*).

Terms of art.

Terms of art, however, must be taken in their technical or legal sense (*k*), especially in a penal enactment (*l*), although the result of this may be that, in statutes applying to the whole of the United Kingdom, words used in different senses in different parts of it may have to be construed in a sense peculiar to one part (*m*).

Technical
use.

When a word is capable of being construed either in its popular sense or as a word of art, it is for those who assert that it is used in a technical, and not in a popular, sense to establish the fact (*n*).

(*g*) *R. v. Income Tax Commissioners* (1888), 22 Q. B. D. 296, C. A., *per* FRY, L.J., at p. 309, affirmed, *sub nom. Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, 545; *R. v. Ramsgate (Inhabitants)* (1827), 6 B. & C. 712, 715; *A.-G. v. Bailey* (1847), 1 Exch. 281, 292; *Grenfell v. Inland Revenue Commissioners* (1876), 1 Ex. D. 242, 248; *Cargo ex Schiller* (1877), 2 P. D. 145, 161, C. A.; *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, 862; *Gordon v. Jennings* (1882), 9 Q. B. D. 45, 46; *A.-G. of Ontario v. Mercer* (1883), 8 App. Cas. 767, 778, P. C.; *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904, 920, C. A.

(*h*) *Sharpe v. Wakefield* (1888), 22 Q. B. D. 239, 241, 242, C. A., affirmed, [1891] A. C. 173; *Collins v. Welch* (1879), 5 C. P. D. 27, C. A.; *Glasgow (Lord Provost and Magistrates) v. Farie* (1888), 13 App. Cas. 657; *North British Railway v. Budhill Coal and Sandstone Co.*, [1910] A. C. 116, 127.

(*i*) *Clerical, Medical, and General Life Assurance Society v. Carter* (1889), 22 Q. B. D. 444, 448, C. A.; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 106; *"Fanny M. Carvill" (Owners) v. "Peru" (Owners), The "Fanny M. Carvill"* (1875), 13 App. Cas. 455, n., P. C.; *Wear Commissioners v. Adamson* (1876), 1 Q. B. D. 546, 549, C. A.; *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99, 112, C. A.; *Re Levy, Ex parte Walton* (1881), 17 Ch. D. 746, 756, C. A.; *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878, 887, C. A.; *R. v. Clarence* (1888), 22 Q. B. D. 23, 65, C. C. R.; *Hornsey Local Board v. Monarch Investment Building Society* (1889), 24 Q. B. D. 1, 5, 9, C. A.; *The Duke of Buccleuch* (1889), 15 P. D. 86, C. A.

(*k*) *Income Tax Special Purposes Commissioners v. Pemsel*, *supra*, *per* LORD MACNAGHTEN, at pp. 578, 579; *Burton v. Reeve* (1847), 16 M. & W. 307, 309; *Williams v. Lear* (1872), L. R. 7 Q. B. 285; *Laird v. Briggs* (1881), 19 Ch. D. 22, 34, C. A.; *R. v. Stator* (1881), 8 Q. B. D. 267, 272; *Mason v. Bolton's Library, Ltd.*, [1913] 1 K. B. 83, 90, C. A.

(*l*) *Stephenson v. Higginson* (1852), 3 H. L. Cas. 638.

(*m*) *Income Tax Special Purposes Commissioners v. Pemsel*, *supra*, at p. 580: though, in the absence of reason to the contrary, interpretation in both countries should be the same (*North British Railway v. Budhill Coal and Sandstone Co.*, *supra*, at p. 135); and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 502 *et seq.*

(*n*) *Mansell v. R.* (1857), 8 E. & B. 54, 73, 109; *Sharp v. Dawes* (1876), 2 Q. B. D. 26, 29, C. A.; *Nuth v. Tamplin* (1881), 8 Q. B. D. 247, 253, C. A.; *Western Suburban and Notting Hill Permanent Benefit Building Society v. Martin* (1886), 17 Q. B. D. 609, 614, C. A.; *Inland Revenue Commissioners v. Gribble*, [1913] 3 K. B. 212, C. A.

240. It is generally necessary in determining the sense of a particular word to have regard to the sentence or section in which it is contained (*o*). If the sense can be so determined, then recourse need not be had to its use in other sections of the statute (*p*) or in other statutes (*q*).

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Law Rules.

Collocation
of words.

241. As a general rule a word is to be considered as used throughout a statute in the same sense (*r*). It may happen, however, that the same word is used in different senses in the same section (*s*), and, *a fortiori*, in different sections of the same statute (*t*).

Use in
different
senses.

242. Where in the same statute, and in relation to the same subject-matter, different words are used, *prima facie* the alteration has been made intentionally (*a*).

Use of
different
words.

243. As a word is primarily to be construed in its literal and popular sense, so an enacting section is to be understood according to the ordinary meaning of the words composing it (*b*). The only exceptions to this rule are where some other section in the statute shows that the ordinary meaning is to be enlarged (*c*) or cut

Meaning of
enacting
section.

(*o*) *Rosse (Earl) v. Wainman* (1845), 14 M. & W. 859, 872. It will often be easy to interpret a word by finding out from the context what it does not mean (*A.-G. v. Sillem* (1863), 2 H. & C. 431, *per* POLLOCK, C.B., at p. 515).

(*p*) *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 162, C. A.

(*q*) *Macbeth & Co. v. Chislett*, [1910] A. C. 220, 223. On the whole it is true, however, to say that the meaning of particular words in Acts of Parliament, as in other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained; see *R. v. Hall* (1822), 1 B. & C. 123, *per* ABBOTT, C.J., at p. 136; *Graham v. Ewart* (1856), 1 H. & N. 550, 563, Ex. Ch.; *Rein v. Lane* (1867), L. R. 2 Q. B. 144, 150, 151; *Edinburgh Street Tramways Co. v. Torbain* (1877), 3 App. Cas. 58, 68; *The Dunelm* (1884), 9 P. D. 164, 171, C. A. Thus, "bicycle" has for purposes of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78, been held to be a carriage (*Taylor v. Goodwin* (1879), 4 Q. B. D. 228); see also titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 64, note (*d*); STREET AND AERIAL TRAFFIC, pp. 277, note (*d*), 335, *post*.

(*r*) *Re National Savings Bank Association* (1866), 1 Ch. App. 547, 550; and see *Re Holborn Union, R. v. Poor Law Commissioners* (1838), 6 Ad. & El. 56, 68.

(*s*) *Doe d. Angell v. Angell* (1846), 9 Q. B. 328, 355; *R. v. Allen* (1872), L. R. 1 C. C. R. 367, 373, 374; *Re Smith, Green v. Smith* (1883), 24 Ch. D. 672, 678.

(*t*) Even an interpretation clause (as to which see, further, p. 131, *ante*) does no more than say that the words interpreted shall have a particular meaning, unless there be something repugnant in the context (*Mew v. Jacobs* (1875), L. R. 7 H. L. 481, *per* Lord SELBORNE, at p. 493).

(*a*) *Brighton Guardians v. Strand Union Guardians*, [1891] 2 Q. B. 156, C. A., *per* Lord ESHER, M.R., at p. 167. A similar rule is applicable where two statutes dealing with the same subject-matter use different language (*Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1, 8); but see p. 139, *post*.

(*b*) *Gye v. Fulton* (1813), 4 Taunt. 876; *Turner v. Sheffield and Rotherham Rail. Co.* (1842), 10 M. & W. 425, 430, 434; *Re Gorham v. Exeter (Bishop), Ex parte Exeter (Bishop)* (1850), 10 C. B. 102.

(*c*) *St. Peter's, York (Dean and Chapter) v. Middleburgh* (1827), 2 Y. &

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Law Rules.

Alternative
interpretations.

Statute to
be construed
as a whole.

Inconsistent
sections.

down (*d*), or where its literal construction would be repugnant to the general purview (*e*). For the primary meaning is not always the parliamentary meaning, and any construction which leads to absurd results or produces injustice should if possible be avoided (*f*).

244. When a rule or enactment is capable of more than one interpretation, and no light is to be derived from the rules applicable to the construction of it *a priori*, the consequences of alternative interpretations must be regarded (*g*).

245. Notwithstanding that each section of a statute is to be regarded as a substantive enactment (*h*), the statute must be read and construed as a whole (*i*), though one section may bear a wider, another a more limited, meaning (*k*). Rules made under a statute which are to be observed as if they were enacted in the statute may also be considered for the purpose of construing it (*l*).

246. Where two co-ordinate sections are apparently inconsistent an effort must be made to reconcile them (*m*). If this is impossible the later will generally override the earlier (*n*); but a particular enactment, wherever found, must be construed strictly as against a general provision (*o*).

J. 196; *Re St. Pancras (Parish), R. v. Poor Law Commissioners* (1837), 6 Ad. & El. 1, per COLERIDGE, J., at pp. 7, 8. Interpretation clauses frequently extend the natural meaning; thus, "new street" may include old highways (*Robinson v. Barton-Eccles Local Board* (1883), 8 App. Cas. 798).

(*d*) See *Atkinson v. Fell* (1816), 5 M. & S. 240; *Re St. Pancras (Parish), R. v. Poor Law Commissioners*, *supra*, per COLERIDGE, J., at pp. 7, 8; *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 23, C. A.; *Re Watson, Ex parte Johnston, Johnston v. Watson*, [1893] 1 Q. B. 21, C. A.

(*e*) *Re St. Pancras (Parish), R. v. Poor Law Commissioners*, *supra*, per COLERIDGE, J., at pp. 7, 8; *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114, per Lord SELBORNE, L.C., at p. 122. See, too, 2 Co. Inst. 386; *Doe d. Nethercote v. Bartle* (1822), 5 B. & Ald. 492, 501; *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623, 648, Ex. Ch.; *Giles v. Grover* (1832), 1 Cl. & Fin. 72, 184, H. L.; *Simpson v. Unwin* (1832), 3 B. & Ad. 134; *East and West India Dock Co. v. Hill* (1882), 22 Ch. D. 14, 23, C. A.; affirmed (1884), 9 App. Cas. 448, 453; *Gowan v. Wright* (1886), 18 Q. B. D. 201, C. A.; *Railton v. Wood* (1890), 15 App. Cas. 363, P. C.

(*f*) *Waugh v. Middleton* (1853), 8 Exch. 352, 356; *Hibernian Mine Co. v. Tuke* (1858), 8 I. C. L. R. 321; *Simpson v. Smith* (1870), L. R. 6 C. P. 87; followed in *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878, C. A.; *R. v. Tonbridge Overseers* (1884), 13 Q. B. D. 339, 342, C. A.

(*g*) *The R. L. Alston* (1882), 8 P. D. 5, C. A., per BRETT, L.J., at p. 9; *Brunton v. New South Wales Commissioners of Stamps* (1913), 82 L. J. (P. C.) 139, 146.

(*h*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 8.

(*i*) *Wynne v. Griffith* (1825), 3 Bing. 179, 196; *Doe d. Bywater v. Brandling* (1828), 7 B. & C. 643, 660; *Rein v. Lane* (1867), L. R. 2 Q. B. 140, 151; *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, 506; *Inland Revenue Commissioners v. Herbert*, [1913] A. C. 326, 332.

(*k*) *Short v. Hubbard* (1824), 2 Bing. 349, 355; *Pretty v. Solly* (1859), 26 Beav. 606, 610.

(*l*) *Re Wier, Ex parte Wier* (1871), 6 Ch. App. 875, 879; *Watkins v. Naval Colliery Co. (1897), Ltd.*, [1911] 2 K. B. 162, 185, C. A.

(*m*) *Ebbs v. Boulnois* (1875), 10 Ch. App. 479, 484.

(*n*) *Wood v. Riley* (1867), L. R. 3 C. P. 26.

(*o*) *Churchill v. Crease* (1828), 5 Bing. 177, 180; *De Winton v. Brecon Corporation* (1859), 26 Beav. 533, 543; *Pretty v. Solly*, *supra*.

247. Among the parts of a statute which must be considered in arriving at its true meaning are the sections or parts of sections known as provisos, exceptions, and saving clauses.

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A proviso excepts out of a previous section, or out of the earlier part of the section which contains it, something which but for it would have been within the enacting part (*p*). It is generally something engrafted and dependent on a main enactment (*q*), and when the enactment is repealed the proviso falls with it (*r*).

Provisoes.

An enacting power cannot in general be implied from the language of a proviso (*s*), and provisos are frequently inserted in statutes not to impose liability, but to allay fears (*t*). The substance, and not the form, must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before (*a*).

248. While a proviso follows the enacting part of a section, and is in a way independent of it, an exception is part of it. Hence where there is an exception co-extensive with, and therefore repugnant to, the enactment, it must be ignored for contrariety (*b*). A proviso in similar circumstances might, so far as relates to cases falling within it, repeal a foregoing enactment (*c*).

Exceptions.

249. Exceptions and reservations are strictly construed, and affirmative rights cannot be based upon them unless by necessary implication (*d*).

Construction
of exceptions.

Special provisions as to particular properties following on general

(*p*) *Mullins v. Surrey (Treasurer)* (1880), 5 Q. B. D. 170, 173; *Duncan v. Dixon* (1890), 44 Ch. D. 211, 215; *Local Government Board v. South Stoneham Union*, [1909] A. C. 57, 63.

(*q*) *R. v. Taunton St. James (Inhabitants)* (1829), 9 B. & C. 831, 836; *Ex parte Partington* (1844), 6 Q. B. 649, 653; *R. v. Dibdin*, [1910] P. 57, 125, C. A.; affirmed, *sub nom. Thompson v. Dibdin*, [1912] A. C. 533.

(*r*) *Horsnail v. Bruce* (1873), L. R. 8 C. P. 378, 385. For an instance to the contrary, see Stamp Act (stat. (1853) 16 & 17 Vict. c. 59), s. 19, and the note thereon in Chalmers, *Bills of Exchange*, 7th ed., p. 371. In old statutes the words "provided that," instead of introducing a proviso, were sometimes used as equivalent to "it is hereby provided that."

(*s*) *Arnold v. Gravesend Corporation* (1856), 2 K. & J. 574, 591; *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A. C. 647, 657.

(*t*) "Not to impose liability upon those who were not apprehensive" (*West Derby Union v. Metropolitan Life Assurance Society*, *supra*, per Lord HERSCHELL, at p. 656); and see p. 185, *post*.

(*a*) *Rhondda Urban Council v. Taff Vale Railway*, [1909] A. C. 253, 258.

(*b*) *Clelland v. Ker* (1843), 6 I. Eq. R. 35; affirmed on appeal, Drury, *temp.* Sug. 227.

(*c*) *A.-G. v. Chelsea Waterworks Co.* (1731), Fitz-G. 195; *Wood v. Riley* (1867), L. R. 3 C. P. 26. The distinction was also drawn in pleading that a declaration or information must allege that the particular case was not within an exception, while a proviso was matter for defence (*R. v. Jarvis* (1757), 1 East, 643, n., per Lord MANSFIELD, C.J., at p. 647, n., cited in *R. v. James*, [1902] 1 K. B. 540, 544, C. C. R., and in *R. v. Audley*, [1907] 1 K. B. 383, 385, C. C. R.; *Thibault v. Gibson* (1843), 12 M. & W. 88, 94, 95).

(*d*) *Lord Advocate for Scotland v. Hamilton* (1852), 1 Macq. 46, 52, H. L. (where the Crown, being owner of the bed of a river, was held disentitled to compensation provided for landowners who claimed rights in it); *Sowerby v. Smith* (1874), L. R. 9 C. P. 524, Ex. Ch.; *Devonshire (Duke) v. O'Connor* (1890), 24 Q. B. D. 468, 485, C. A.; *Woolcombers, Ltd. v. Bradford Corporation* (1906), 70 J. P. 434.

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provisions contained in the same or an incorporated statute are to be regarded as exceptions out of the general provisions (e).

An exception out of the provisions of a general statute may be ground whence an intention may be implied to repeal a statutory provision which would, if not repealed, have excepted the particular matter expressly excepted (f).

Saving
clauses.

250. Saving clauses may be inserted where one statute is repealed and re-enacted by another, the scope and purport of both remaining the same. Their effect is that portions of the repealed statute remain in force as if the second statute had not been passed; and, unlike exceptions from an enacting clause, they are liberally construed (g).

A saving clause repugnant to the body of a statute is void (h). It can only preserve things which were *in esse* at the time of its enactment (i), and therefore cannot affect transactions which were complete at the date of the repealing statute (k).

A saving clause in a general statute will cease to operate if it is inconsistent with the operation of a subsequent special statute (l).

The insertion of words in a statute protecting or excepting certain persons does not necessarily by implication exclude others. Many things find their way into saving clauses *ex abundanti cautela* and upon the insistence of particular bodies of persons (m).

(iii.) Other Statutes.

Statutes in
pari materia.

251. All statutes made *in pari materia*, or incorporated by express provision (n), should be regarded as a whole for purposes of

(e) *Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395, *per* JESSEL, M.R., at p. 410; compare *A.-G. v. Freeman* (1818), 5 Price, 425. Where two Acts passed within three weeks of each other contained two inconsistent clauses, the court treated the latter as an exception out of the provisions of the former; see *Hunter v. Nockolds* (1850), 1 Mac. & G. 640.

(f) See *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573, where it was held that the Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 14, giving a bank priority in the distribution of the assets of an insolvent actuary, has been repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, because that expressly reserves and excepts rights arising out of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), and stat. (1865) 28 & 29 Vict. c. 86, commonly called Bovill's Act (both repealed and re-enacted).

(g) *R. v. West Riding of Yorkshire Justices* (1876), 1 Q. B. D. 220; *Barnes v. Eddleston* (1876), 1 Ex. D. 102, C. A. (both decisions affirming the validity of acts done under statutes repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55)). As to savings implied in a repeal section, see p. 198, *post*. As to saving clauses in respect of the Crown in the Metropolis Management Acts (see title METROPOLIS, Vol. XX., p. 459, note (e)), see *ibid.*, p. 463. For forms of saving clauses, see *Encyclopædia of Forms and Precedents*, Vol. IX., pp. 244, 245.

(h) *Alton Woods Case* (1600), 1 Co. Rep. 40 b, 47 a, 52 b.

(i) *Ibid.*; *Arnold v. Gravesend Corporation* (1856), 2 K. & J. 574, 591; *R. v. Pirehill North Justices* (1884), 14 Q. B. D. 13, 19, C. A.

(k) *Butcher v. Henderson* (1868), L. R. 3 Q. B. 335.

(l) *Yarmouth Corporation v. Simmons* (1878), 10 Ch. D. 518.

(m) *McLaughlin v. Westgarth* (1906), 75 L. J. (P. c.) 117, *per* Lord HALSBURY, L.C., at p. 118; *Smyth v. R.*, [1898] A. C. 782, P. C.

(n) Such as the various Factory Acts, Shipping Acts, and Sale of Food and Drugs Acts.

construction (o). It is difficult to define with precision what constitutes being *in pari materiâ* (p), but series of statutes dealing with a particular subject, such as the Bankruptcy Acts, the poor laws, the game laws, and so forth, are naturally regarded as making each so many separate systems; and the Short Titles Act, 1896 (q), has grouped many such systems under collective titles. An explanatory or declaratory Act is naturally confined to the same subject-matter as that which it explains (r).

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Law Rules.

252. It may be presumed that in statutes *in pari materiâ* similar language is to be similarly interpreted (s), though change of language is not conclusive that change of interpretation is intended (t), more particularly having regard to the frequency of slovenly draftsmanship (a). Moreover, a later statute may be intended to enlarge and not merely to explain or consolidate (b).

Principles of
interpretation.

253. The comparison of a statute with those *in pari materiâ* affords a useful aid in resolving doubts in the following cases, namely:—

Comparison
of the statute.

(1) When the question is how far, if at all, an earlier statute has been repealed by a later;

(2) When difficulties arise out of apparently conflicting language in statutes concurrently in operation;

(3) When words are susceptible of divers constructions, one of which may be recommended and others repelled by considerations derived from the policy of the law as declared in other statutes dealing with the same subject (c).

(o) *Canadian Southern Rail. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723, 727; *A.-G. v. Leicester Corporation*, [1910] 2 Ch. 359, 369; see also *R. v. Loxdale* (1758), 1 Burr. 445, 447; *R. v. Palmer* (1784), 1 Leach, 352, 355; *R. v. Mason* (1788), 2 Term Rep. 531, 586; *Re Copeland, Ex parte Copeland* (1852), 2 De G. M. & G. 914, 920, C. A.; *M'William v. Adams* (1852), 1 Macq. 120, 141, H. L. As to the Lands Clauses Acts, and their construction, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12, 14 *et seq.*; and see title RAILWAYS AND CANALS, Vol. XXIII., p. 707.

(p) Such difficulties are apparent in cases like *Davis v. Edmonson* (1803), 3 Bos. & P. 382, Ex. Ch.; *Redpath v. Allan, The "Hibernian"* (1872), L. R. 4 P. C. 511, 518; see *Knill v. Towse* (1889), 24 Q. B. D. 186, *per* MATHEW, J., at p. 195.

(q) 59 & 60 Vict. c. 14; see p. 203, *post*.

(r) *A.-G. v. Morgan*, [1891] 1 Ch. 432, 462, C. A.

(s) *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1, 8; *Re Foster v. Great Western Rail. Co.* (1882), 8 Q. B. D. 515, 522, C. A.; *Barlow v. Teal* (1885), 15 Q. B. D. 403, 405; and see *Catterall v. Sweetman* (1845), 9 Jur. 951, 954.

(t) *R. v. East Teignmouth (Inhabitants)* (1830), 1 B. & Ad. 244, 249; *Hadley v. Perks* (1866), L. R. 1 Q. B. 444, 457; *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70, 78, C. A.; *Lawless v. Sullivan* (1881), 6 App. Cas. 373, 383, P. C.

(a) *R. v. Buttle* (1870), L. R. 1 C. C. R. 248, 251; *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 161, C. A.; *Nottage v. Jackson* (1883), 11 Q. B. D. 627, 630, 631, C. A.

(b) *R. v. Bullock* (1868), L. R. 1 C. C. R. 115, 117; *R. v. Price* (1871), L. R. 6 Q. B. 411, 416; *Reed v. Nutt* (1890), 24 Q. B. D. 669, 672.

(c) *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 358, 373; compare *Re Perrin* (1842), 2 Dr. & War. 147, 156, 161; *R. v. Hopkins*, [1893] 1 Q. B. 621; *Smeed, Dean & Co. v. Port of London Authority*, [1913] 1 K. B. 226, C. A., *per* BUCKLEY, L.J., at p. 232.

SECT. 3.

Common
Law Rules.Earlier
statutes.

254. Apart from a clause of reference, the earlier of two statutes *in pari materiâ* cannot, strictly speaking, be construed by what is enacted in the later one (*d*). Regard may be had, however, to a repealed statute *in pari materiâ* where difficulties of construction arise (*e*); and where a statute incorporates a section of an earlier statute and directs it to apply as if certain words were omitted therefrom, the incorporated section is not to be construed as if the deleted words had never existed therein (*f*).

Express
incorpora-
tion.

255. Sections of an earlier statute may be incorporated into a later one by an express provision contained in the former (*g*).

A statute containing a general clause of reference to statutes *in pari materiâ* incorporates the general powers and provisions of the latter, but not special provisions, such as a right of appeal (*h*); *a fortiori*, the powers conferred by a principal Act are read into an amending Act (*i*). A single section of an earlier statute incorporated with a later statute may lay all the other sections of the earlier statute open as a field of interpretation of that section, although they are not incorporated (*k*).

Repealed
statutes.

256. When a statute repeals earlier statutes upon the same subject, the repealed statutes cannot be resorted to for the purpose of bringing within the purview of the new statute anything omitted therefrom (*l*).

Statutes
excluded.

257. Express reference to a particular statute may by necessary inference exclude from consideration statutes *in pari materiâ* (*m*).

Statutes *in pari materiâ* must generally be carefully distinguished from those *alio intuitu*, to which the foregoing rules do not apply (*n*).

(*d*) *Re Bolton Estates Act* (26 & 27 Vict. c. vi.) (1902), 72 L. J. (CH.) 55 (reversed, without affecting this point, *sub nom. Re Bolton Estates, Russell v. Meyrick*, [1903] 2 Ch. 461, C. A.), following *Macassey v. Thompson, Macassey v. Huston* (1902), 36 I. L. T. 162, H. L.; compare *Casanova v. R., The "Ricardo Schmidt"* (1866), L. R. 1 P. C. 268, 277. It is otherwise where there is a clause of reference (*Charing Cross Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] W. N. 230).

(*e*) *R. v. Loxdale* (1758), 1 Burr. 445, 447; *Re Copeland, Ex parte Copeland* (1852), 2 De G. M. & G. 914, 920, C. A.; *A.-G. v. Lamplough* (1878), 3 Ex. D. 214, 227, C. A.

(*f*) Thus, the meaning of "voluntary" in the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, as amended by Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, must be considered, although for the purposes of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (*c*), it is to be excluded (*A.-G. v. Smyth*, [1905] 2 I. R. 553).

(*g*) Thus, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is incorporated into subsequent statutes which involve the compulsory taking of land (*Re Wood's Estate, Ex parte Works and Buildings Commissioners* (1886), 31 Ch. D. 607, 615, C. A.); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12, 13. As to what is to be considered a later statute for this purpose, see *Re Mills' Estate, Ex parte Works and Public Buildings Commissioners* (1886), 34 Ch. D. 24, 30, 37, C. A.

(*h*) *R. v. Surrey Justices* (1788), 2 Term Rep. 504, 510.

(*i*) *Wigram v. Fryer* (1887), 36 Ch. D. 87.

(*k*) *Portsmouth Corporation v. Smith* (1885), 10 App. Cas. 364, 371; compare *Willingale v. Norris*, [1909] 1 K. B. 57.

(*l*) *Shaw v. Ruddin* (1858), 9 I. C. L. R. 214, 218; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 380.

(*m*) *R. v. Dove* (1820), 3 B. & Ald. 596; *Lane v. Bennett* (1836), 1 M. & W. 70.

(*n*) *Knowles & Sons v. Lancashire and Yorkshire Rail. Co.* (1889), 14

(iv.) *Contemporaneous Circumstances.*

SECT. 3.

**Common
Law Rules.**

258. In construing a statute regard may be had to the exact state of the law, and generally to all circumstances which can be proved by extrinsic evidence to have surrounded Parliament at the time it was passed (o); for ignorance of the circumstances which rendered the passing of a statute necessary cannot be imputed to Parliament (p).

Contem-
poraneous
circum-
stances.

259. In the construction of ancient statutes it is proper also to consider the general state of contemporary public sentiment, and in the construction of remedial statutes to consider the evils they were proposed to redress (q). For this purpose recourse may be had to annals or histories of the period and to antiquarian researches (r).

Contem-
poraneous
sentiment.

260. Light may be thrown on the scope of a statute by looking at what Parliament was doing contemporaneously, and at the history of the statute (s); but even when words in a statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced (t), nor to what has been said in Parliament (a) or elsewhere (b).

Proceedings
in Parliament.

App. Cas. 248, 253; *Inland Revenue Commissioners v. Forrest* (1890), 15 App. Cas. 334, 353; *Re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252, 258, C. A.; *Kydd v. Liverpool Watch Committee*, [1908] A. C. 327, 330. As to codifying and consolidating Acts, see p. 199, *post*.

(o) *A.-G. v. Powis (Earl)* (1853), Kay, 186, 207. On this principle preambles and recitals are resorted to as affording *prima facie* evidence of the facts therein stated; see p. 204, *post*. See, further, *Swanton v. Gould* (1858), 9 I. C. L. R. 234; *Pardo v. Bingham* (1869), 4 Ch. App. 735, 740; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 763; *Hunt v. Wimbledon Local Board* (1878), 4 C. P. D. 48, 58, C. A.; *Young & Co. v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517, 526; *Philipps v. Rees* (1889), 24 Q. B. D. 17, C. A.; *Taff Vale Rail. Co. v. Davis*, [1894] 1 Q. B. 43 (provision inserted in private statute for benefit of a particular party); *Barnacle v. Clark*, [1900] 1 Q. B. 279 (intention of Parliament); *Reigate Rural District Council v. Sutton District Water Co.* (1908), 99 L. T. 168, 170; *Keates v. Lewis Merthyr Consolidated Collieries, Ltd.*, [1911] A. C. 641, 642.

(p) *Beaden v. King* (1852), 9 Hare, 499, 522.

(q) *M^cWilliam v. Adams* (1852), 1 Macq. 120, 137, H. L.; *Montrose Peerage* (1853), 1 Macq. 401, *per* Lord CRANWORTH, L.C., at p. 406.

(r) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, P. C., *per* Lord HALSBURY, L.C., at p. 653.

(s) *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 22, C. A.; *Re Leavesley*, [1891] 2 Ch. 9, C. A.; *Wigram v. Fryer* (1887), 36 Ch. D. 87 (report of select committee so far as recited in the Act may be referred to).

(t) *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, *per* Lord HALSBURY, L.C., at p. 501.

(a) *Millar v. Taylor* (1769), 4 Burr. 2303, 2332; *Shrewsbury (Earl) v. Hope Scott* (1859), 6 C. B. (N. S.) 1, 213; *South Eastern Railway v. Railway Commissioners and Hastings Corporation* (1881), 50 L. J. (Q. B.) 201, C. A., *per* Lord SELBORNE, L.C., at p. 203, stating that the House of Lords regretted that the Court of Appeal in *R. v. Oxford (Bishop)* (1879), 4 Q. B. D. 525, 535, C. A., had allowed the speech of Lord CAIRNS upon the third reading of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), to be read; *Richards v. McBride* (1881), 8 Q. B. D. 119, 123; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676, 700, C. A.; *R. v. Board of Education*, [1909] 2 K. B. 1045, 1057, 1072.

(b) *Martin v. Hemming* (1854), 18 Jur. 1002 (report of commissioners); *Ewart v. Williams* (1854), 3 Drew. 21, 24 (intention expressed by Charity Commissioners before introducing a Bill).

SECT. 3.
Common
Law Rules.

Informalities
in passing
statute.

261. A statute which has received the sanction of Parliament cannot be impeached for informalities preceding its enactment, even if its passing has been procured by fraud (*c*). Parliament alone can provide a remedy (*d*), and it is immaterial that persons whose rights are affected thereby have not received notice of the Bill introducing it, and that the Standing Orders of either or both Houses have not been complied with (*e*).

Public policy.

262. In the construction of a statute the policy which dictated the statute may be taken into account (*f*), but not public policy in general, and the danger of taking account of public policy has been frequently pointed out (*g*).

(*v.*) *Previously Accepted Interpretation.*

Words and
phrases
previously
interpreted.

263. It is to be assumed that Parliament knows the law (*h*), even in technical matters (*i*). Where, therefore, words and expressions in a statute are plainly taken from earlier statutes *in pari materid* which have received judicial interpretation, it must be assumed that Parliament was aware of such interpretation, and intended it to be followed in later enactments (*k*), even, apparently,

(*c*) *Edinburgh Rail. Co. v. Wauchope* (1842), 8 Cl. & Fin. 710, 720, H. L.; *Stead v. Carey* (1845), 1 C. B. 496; *Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Logan* (1850), 14 Q. B. 672, 680; *Lee v. Bude and Torrington Junction Rail. Co.* (1871), L. R. 6 C. P. 576, 582; *Labrador Co. v. R.*, [1893] A. C. 104, 125, P. C.

(*d*) *Lee v. Bude and Torrington Junction Rail. Co.*, *supra*, at p. 582.

(*e*) *Edinburgh Rail. Co. v. Wauchope*, *supra*. This was not always so (*Bonham's Case* (1610), 8 Co. Rep. 114 a, 118 a; *London (City) v. Wood* (1701), 12 Mod. Rep. 669, 687).

(*f*) *Hine v. Reynolds* (1840), 2 Scott (N. R.), 394, 419, by Serjeant STEPHEN *arguendo*; and see *R. v. Hall* (1822), 2 Dow. & Ry. (K. B.) 241, *per* ABBOTT, C.J., at p. 246.

(*g*) *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, *per* PARKE, B., at p. 123; *Municipal Building Society v. Kent* (1884), 9 App. Cas. 260, 273; *Re Mirams*, [1891] 1 Q. B. 594, 595; *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 45; *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 500, 507.

(*h*) *R. v. Watford (Inhabitants)* (1846), 9 Q. B. 626, *per* Lord DENMAN, C.J., at p. 635; *Young & Co. v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517, 526; *Ex parte Kent County Council and Dover Council*, *Ex parte Kent County Council and Sandwich Council*, [1891] 1 Q. B. 725, C. A.

(*i*) Such as the rules and practice in bankruptcy (*Kellock's Case*, *Re Xeres Wine Shipping Co.*, *Ex parte Alliance Bank* (1868), 3 Ch. App. 769, 781), or liquidation of companies (*Re Demerara Rubber Co., Ltd.*, [1913] 1 Ch. 331, *per* SWINFEN EADY, J., at p. 335).

(*k*) *Mansell v. R.* (1857), 8 E. & B. 54, 73; *Cope v. Doherty* (1858), 2 De G. & J. 614, 624, 625, C. A.; *Mersey Docks and Harbour Board v. Cameron*, *Mersey Docks and Harbour Board v. Jones* (1865), 11 H. L. Cas. 443, 480; *Mulcahy v. R.* (1868), L. R. 3 H. L. 306, 319; *Re Cathcart*, *Ex parte Campbell* (1870), 5 Ch. App. 703, 706; *Greaves v. Tofield* (1880), 14 Ch. D. 563, 571, C. A.; *Barlow v. Teal* (1885), 15 Q. B. D. 403, 405; *Ex parte Kent County Council and Dover Council*, *Ex parte Kent County Council and Sandwich Council*, *supra*, at p. 728; *Dyke v. Gower*, [1892] 1 Q. B. 220, 225; *Jay v. Johnstone*, [1893] 1 Q. B. 25, 28; *Harding v. Queensland Stamps Commissioners*, [1898] A. C. 769, 774, P. C.; *North British Railway v. Budhill Coal and Sandstone Co.*, [1910] A. C. 116, 127.

though the court had been forced to do violence to the primary meaning and grammatical construction of words (*l*). This rule is especially applicable in the case of consolidating Acts (*m*).

SECT. 3.
Common
Law Rules.

While knowledge of the law as defined by statute, and as interpreted by the courts, may be attributed to Parliament, it must not be taken to have knowledge of the habitual neglect of duty by those upon whom statutory duties are thrown (*n*).

264. Where legislation, supervening on a practice which has grown up and become generally recognised, repeats words on which the practice was founded, it may be inferred that Parliament intends those words to be understood in their previously accepted meaning (*o*).

Previous
practice.

265. Where expressions of larger meaning are used in an amending statute than in the principal Act, it must be taken that they are used intentionally (*p*). Where, however, a statute of limited operation is repealed by one which re-enacts its provisions in an amended form, it need not be presumed that its operation was to be extended to classes of persons hitherto not subject to them (*q*).

Extension of
meaning.

If the words of a later statute differ from those of an earlier statute, the court, in construing the later statute, is not bound by a decision under the earlier one, even though it relates to the same subject-matter (*r*).

266. An interpretation which has long been acted on will not be disregarded by a court of law (*s*); nor will a construction long acquiesced in be lightly overruled by a court of review (*t*).

Received
construction.

(*l*) *Waterford's (Earl) Claim* (1832), 6 Cl. & Fin. 133, per Lord COTTENHAM, L.C., at p. 172.

(*m*) *Mitchell v. Simpson* (1890), 25 Q. B. D. 183, 190, C. A.; *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557, 561 (statutory rules).

(*n*) *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A., per VAUGHAN WILLIAMS, L.J., at p. 82.

(*o*) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, per Lord MACNAGHTEN, at p. 591, where he also condemns the setting aside of established practices by administrative departments without the interposition of Parliament.

(*p*) *Hurlbatt v. Barnett & Co.*, [1893] 1 Q. B. 77, 79, C. A. (Arbitration Act, 1889 (52 & 53 Vict. c. 49), passed in wider language with full knowledge of decisions upon the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) and the Judicature Act, 1873 (36 & 37 Vict. c. 66)).

(*q*) *Brown v. McLachlan* (1892), L. R. 4 P. C. 543, 550.

(*r*) *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch. D. 254, 258, C. A.

(*s*) *Nicol v. Paul* (1867), L. R. 1 Sc. & Div. 127, 133; *R. v. Outbush* (1867), L. R. 2 Q. B. 379, 382; *Cox v. Leigh* (1874), L. R. 9 Q. B. 333, 339; *Lancashire and Yorkshire Rail. Co. v. Bury Corporation* (1889), 14 App. Cas. 417, 422; *Tancred, Arrol & Co. v. Steel Co. of Scotland* (1890), 15 App. Cas. 125, 141; compare *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C. As to when statutes are judicially noticed, see title EVIDENCE, Vol. XIII., p. 525.

(*t*) *Re Wright, Ex parte Willey* (1883), 23 Ch. D. 118, 127, C. A.; *Philipps v. Rees* (1889), 24 Q. B. D. 17, 21, C. A.; *London County Council v. Erith (Churchwardens) and Dartford Union Assessment Committee, West Ham (Churchwardens) v. London County Council, St. George's Union Assessment Committee v. London County Council*, [1893] A. C. 599 (where

SECT. 3.

Common
Law Rules.

Usage.

*Contem-
poranea
expositio.*When usage
excluded.Scottish
interpretation
followed.

267. Where a statute, speaking on some points, is silent as to others, practice may supply the defect, especially if statutory directions are given and the practice is not inconsistent with them. Where a statute uses language of doubtful import, the action taken under it, if continued for a long course of years, may reduce uncertainty to a fixed rule (*a*).

The court may have regard to the construction put upon a statute when it first came into force (*b*). *Contemporanea expositio*, however, means unanimous consent over a long unbroken period, and can rarely be applied to modern statutes (*c*).

268. Usage cannot prevail if the language of the statute is clear (*d*), and the consideration of practice as a key to interpretation must be distinguished from usage as a proof of right (*e*). Casual admissions of liability under a statute cannot be called in aid (*f*). The court may, however, have regard not only to the precise words of the statute, but also to the practice which existed at the time it was passed (*g*).

269. A court of first instance in this country follows an interpretation unanimously placed upon a statute by the Court of Session in Scotland, where the question is simply one that turns

Lord HERSCHELL, L.C., concurred in the view expressed by BLACKBURN, J., in an earlier case, that until Parliament interfered, *R. v. West Middlesex Waterworks Co.* (1859), 1 E. & E. 716, should not be overruled; *Morgan v. Fear*, [1907] A. C. 425, 429; *Cohen v. Bayley-Worthington*, [1908] A. C. 97, 99.

(*a*) As to the effect of statutory enactments on custom, see title CUSTOM AND USAGES, Vol. X., pp. 247, 248; *Dunbar (Magistrates) v. Roxburghe (Duchess)* (1835), 3 Cl. & Fin. 335, H. L., per Lord BROUGHAM, at p. 354, referring to the old maxim *optimus legis interpretis consuetudo*. The principle had been laid down in *Sheppard v. Gosnold* (1672), Vaugh. 159, per VAUGHAN, C.J., at p. 169.

(*b*) *Fermoy's (Lord) Claim to Vote* (1856), 5 H. L. Cas. 715, 747; *Morgan v. Crawshaw* (1871), L. R. 5 H. L. 304, 315; *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 652, P. C.

(*c*) *M'William v. Adams* (1852), 1 Macq. 120, 146, H. L.; *Clyde Navigation Trustees v. Laird* (1883), 8 App. Cas. 658, 673; *Danford v. McNulty* (1883), 8 App. Cas. 456, 463 (practice growing up under statutory rules); *A.-G. and Settle Rural District Council v. Lundesdale Rural District Council* (1902), 86 L. T. 822, 825; *Assheton Smith v. Owen*, [1906] 1 Ch. 179, 213, C. A.; *Goldsmiths' Co. v. Wyatt*, [1907] 1 K. B. 95, 107, C. A.

(*d*) *R. v. Hogg* (1787), 1 Term Rep. 721, 728; *Dunbar (Magistrates) v. Roxburghe (Duchess)*, *supra*, at p. 354; *Northam Bridge Co. v. R.* (1886), 55 L. T. 759 (where the fact of toll not having been paid for over eighty years was held to be of no avail against the express provision of a private Act); *Hamilton v. Baker*, *The "Sara"* (1889), 14 App. Cas. 209, 221; *West Ham Union v. Edmonton Union*, [1908] A. C. 1, 4; *Lord Advocate v. Walker Trustees*, [1912] A. C. 95; and see title CUSTOM AND USAGES, Vol. X., p. 247.

(*e*) *Clyde Navigation Trustees v. Laird*, *supra*, at p. 670; *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92, 98, P. C.

(*f*) *Northam Bridge Co. v. R.*, *supra*.

(*g*) *Yewens v. Noakes* (1880), 6 Q. B. D. 530, 535, C. A.; *Gowan v. Wright* (1886), 18 Q. B. D. 201, 208, C. A.; *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667, C. A. (where evidence of the practice observed in the taking of an oath in the House of Commons was received for the purpose of explaining the statutes affecting it).

upon the construction of a statute which extends to Scotland as well as to England (*h*). Unless there is some controlling reason to the contrary, the interpretation in both countries should be the same (*i*).

SECT. 3.
Common
Law Rules.

(vi.) *General Words after Particular Words.*

270. As a rule, general words following specific words are limited to things *ejusdem generis* with those before enumerated (*k*), although this, as a rule of construction, must be controlled by another equally general rule, that statutes ought, like wills or other documents, to be construed so as to carry out the objects sought to be accomplished by them (*l*). Hence the same general words would receive a wider interpretation in a remedial than in a penal enactment (*m*).

*Ejusdem
generis* rule.

271. Where difficulty arises in deciding what further particular objects may fall within the same *genus* as the particular ones preceding the general words, the intendment of the statute and the non-applicability of the general words to particular species of the *genus* must be considered (*n*).

Intention of
statute.

(*h*) *Re Hartland, Banks v. Hartland*, [1911] 1 Ch. 459; and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 212.

(*i*) *North British Railway v. Budhill Coal and Sandstone Co.*, [1910] A. C. 116, 135.

(*k*) *Hawke v. Dunn*, [1897] 1 Q. B. 579, 586; *North British Railway v. Budhill Coal and Sandstone Co.*, *supra*, at p. 132. Thus, when the statute (1740) 14 Geo. 2, c. 6, made it felony to steal sheep or other cattle, it was thought necessary to specify in a declaratory Act (stat. (1741) 15 Geo. 2, c. 34) what cattle were intended (*R. v. Paly* (1770), 2 Wm. Bl. 721; *Fletcher v. Sondes* (Lord) (1826), 3 Bing. 501, 580, H. L.). See also *Scales v. Pickering* (1828), 4 Bing. 448, 453; *Casher v. Holmes* (1831), 2 B. & Ad. 592; *R. v. Edmundson* (1859), 2 E. & E. 77, 83; *Webb v. Bird* (1861), 10 C. B. (N. S.) 268, 286; affirmed (1863), 13 C. B. (N. S.) 839, Ex. Ch.; *Fenwick v. Schmalz* (1868), L. R. 3 C. P. 313; *R. v. Portugal* (1885), 16 Q. B. D. 487; *R. v. Kane*, [1901] 1 K. B. 472, C. C. R. (both cases dealing with the limitation of "or other agent" (Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 75)); *Re Stockport Ragged, Industrial and Reformatory Schools*, [1898] 2 Ch. 687, 696, C. A. ("or other schools" (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62)); *Tillmanns & Co. v. S.S. Knutsford, Ltd.*, [1908] 2 K. B. 385, C. A.; affirmed, [1908] A. C. 407; *A.-G. v. Leicester Corporation*, [1910] 2 Ch. 359; *A.-G. v. Seacombe*, [1911] 2 K. B. 688, 698 ("by contract or otherwise" (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c))); *Re Samuel*, [1913] A. C. 514, 519, P. C.

(*l*) *Hawke v. Dunn*, *supra*; *R. v. Payne* (1866), L. R. 1 C. C. R. 27; *Anderson v. Anderson*, [1895] 1 Q. B. 749, 753, C. A.; *Glasgow Corporation v. Glasgow Tramway and Omnibus Co.*, [1898] A. C. 631, 634; *Smeed, Dean & Co. v. Port of London Authority*, [1913] 1 K. B. 226, 230, C. A.; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 469.

(*m*) Thus, "cattle" was held to include horses and mares in the Dogs Act, 1865 (28 & 29 Vict. c. 60), s. 1 (*Wright v. Pearson* (1869), L. R. 4 Q. B. 582), but not, apparently, in stat. (1740) 14 Geo. 2, c. 6 (*R. v. Paly*, *supra*). See also *Myers v. Veitch* (1869), L. R. 4 Q. B. 649, where, in a statute rendering liable to a penalty officers detaining bankrupts who had procured orders of protection, it was held that "any officer" must be limited to the officer who had actually effected the arrest; *Killin v. Swatton* (1896), 76 L. T. 55 ("any statute, law, ordinance, custom, or provision, to the contrary in anywise, notwithstanding").

(*n*) *Bedford Infirmary (Governors) v. Bedford Improvement Commissioners*

SECT. 3.

Common
Law Rules.Other general
words.Comparison
of terms.Mistakes and
omissions.*Ut res magis
valeat quam
pereat.*

272. Where several words are followed by a general expression, which is as much applicable to the first and other words as to the last, that expression is not, as a matter of ordinary construction, limited to the last, but applies to all (o).

273. It is often possible to arrive at the meaning of sweeping general words, which it is difficult to apply in their literal sense, by comparing them with words of like import in the same statute (p).

(vii.) *Mistakes in Statutes.*

274. It is not competent to any court to proceed upon the assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes (q); and, as a rule, it is not permissible to supply omissions, even though they are evidently unintentional (r).

If it is possible, the words of a statute must be construed so as to give a sensible meaning to them, *ut res magis valeat quam pereat* (s). Where the main object and intention of a statute are clear from the title, preamble, or otherwise, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman, unless such language is intractable (t).

Thus, it may be possible in certain circumstances :—

(1) To treat as rectified obvious misprints (a);

(1852), 7 Exch. 768, 774. It has been laid down that the general words of a statute beginning with inferior persons do not extend to superior persons. Thus, in stat. (1571) 13 Eliz. c. 10, “colleges, deans and chapters, parsons, vicars, and others having spiritual promotions” do not include bishops; and when stat. (1539) 31 Hen. 8, c. 13, speaks of property coming to the Crown by dissolution, renouncing, forfeiture etc., “or by any other means,” an Act of Parliament, which is the highest form of conveyance, not having been specified, cannot be intended (*Canterbury’s Archbishop Case* (1596), 2 Co. Rep. 46 a).

(o) See *Great Western Rail. Co. v. Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, where “lands” in a definition clause being declared to extend to messuages, lands, tenements, and hereditaments, of any tenure, the words “of any tenure” were held to define the four preceding substantives; and Lord BRAMWELL added, at p. 808, that in “horses, oxen, pigs, and sheep, from whatever country they may come,” the latter words would apply to horses as much as to sheep; see also *R. v. Cambridgeshire Justices* (1835), 4 Ad. & El. 111, 119.

(p) *Blackwood v. R.* (1882), 8 App. Cas. 82, 94, P. C.

(q) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, 549; *Green v. Wood* (1845), 7 Q. B. 178; *Richards v. McBride* (1881), 8 Q. B. D. 119, 122; *Cowper Essex v. Acton Local Board* (1889), 14 App. Cas. 153, 169.

(r) *Logan v. Burslem, The “Guiana”* (1842), 4 Moo. P. C. C. 284, 297; *Crawford v. Spooner* (1846), 6 Moo. P. C. C. 1, 9; *Underhill v. Longridge* (1859), 29 L. J. (M. C.) 65; *R. v. Denton (Inhabitants)* (1864), 5 B. & S. 821, 828.

(s) *Curtis v. Stovin* (1889), 22 Q. B. D. 513, C. A., per BOWEN, L.J., at p. 517; *Huxham v. Wheeler* (1864), 3 H. & C. 75, 80.

(t) *Salmon v. Duncombe* (1886), 11 App. Cas. 627, 634, P. C.; *R. v. Buttle* (1870), L. R. 1 C. C. R. 248, 251.

(a) Thus, an intention to repeal part of the Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), was implied from stat. (1818) 58 Geo. 3, c. 51, although the latter statute, in setting out the title of the former, stated it

- (2) To reject words or phrases as surplusage (*b*);
- (3) To supply omitted words or expressions (*c*);
- (4) To substitute one word for another (*d*);
- (5) To read negative words as affirmative, or affirmative as negative (*e*); disjunctive as conjunctive (*f*), and *vice versa* (*g*);
- (6) To put upon words a sense possible but not usually attributable to them (*h*);
- (7) To expand their literal meaning (*i*).

SUB-SECT. 2.—*To Determine the Scope.*(i.) *Following the Plain Meaning.*

275. If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning (*j*). Ordinary meaning.

to be 13 Geo. 3, etc. (*R. v. Wilcock* (1845), 7 Q. B. 317; *Re Boothroyd* (1846), 15 M. & W. 1).

(*b*) *R. v. Everdon (Inhabitants)* (1807), 9 East, 101; *R. v. East Ardsley (Inhabitants)* (1850), 14 Q. B. 793; *Hall v. Knox* (1863), 4 B. & S. 515; *R. v. Strachan* (1872), L. R. 7 Q. B. 463, 465; *Fisher v. Val de Travers Asphalte Co.* (1875), 1 C. P. D. 592, C. A.; *Stone v. Yeovil Corporation* (1876), 1 C. P. D. 691, 701; *R. v. Vasey*, [1905] 2 K. B. 748, C. C. R.

(*c*) *Re Wainewright* (1843), 1 Ph. 258; *Jubb v. Hull Dock Co.* (1846), 9 Q. B. 443, 455; *Wigton (Overseers) v. Snaith* (1851), 16 Q. B. 496; *Quin v. O'Keeffe* (1859), 10 I. R. C. L. 393, 416; *R. v. Ettridge*, [1909] 2 K. B. 24, 28, C. C. A.

(*d*) *Laird v. Briggs* (1880), 16 Ch. D. 440 (where FRY, J., read "ease-ment" for "convenient"; S. C. (1881), 19 Ch. D. 22, C. A., *per* JESSEL, M.R., at p. 33, doubting if the former could be substituted, although he agreed that "convenient" could be ignored as being in the context absurd); *Green v. Wood* (1845), 7 Q. B. 178 (where, upon the construction of the Warrants of Attorney Act, 1822 (3 Geo. 4, c. 39), s. 2, "unless judgment shall have been signed or execution issued," the court refused to alter "or" into "and," or "issued" into "levied," although it thought that was what Parliament meant, and stated that it might have done the former if that would have supplied a meaning, but would not do the latter, or both).

(*e*) *Metropolitan Board of Works v. Stead* (1881), 8 Q. B. D. 445; compare *Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co.* (1906), 8 F. (Ct. of Sess.) 915.

(*f*) *Fowler v. Padget* (1798), 7 Term Rep. 509; *Green v. Wood*, *supra*, *per* WILLIAMS, J., at p. 186; *Mersey Docks and Harbour Board v. Henderson Brothers* (1888), 13 App. Cas. 595, 603.

(*g*) *Golden Horseshoe Estates Co., Ltd. v. The Crown*, [1911] A. C. 480, P. C.

(*h*) Thus, Southampton Water (across which there is a public ferry) was held to be a thoroughfare within the meaning of the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 10 (*Coulbert v. Troke* (1875), 1 Q. B. D. 1); see also *Lyde v. Barnard* (1836), 1 M. & W. 101, 113; *Wood v. De Mattos* (1865), L. R. 1 Exch. 91, 100, Ex. Ch.

(*i*) Thus, "so condemned" has been read as "so liable to be condemned" (*Hewett v. Hattersley*, [1912] 3 K. B. 35).

(*j*) "Index animi sermo; a verbis legis non recedendum" (*Edrick's Case* (1603), 5 Co. Rep. 118 a, 118 b); see also *St. John, Hampstead (Vestry) v. Cotton* (1886), 12 App. Cas. 1, 6; *Warburton v. Loveland* (1828), 1 Hud. & B. 623, 648, Ex. Ch.; *Gwynne v. Burnell* (1840), 7 Cl. & Fin. 572, 607, H. L.; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 755; *Hornsey Local Board v. Monarch Investment Building Society* (1889), 24 Q. B. D. 1, 5, C. A.; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 27, C. A.; *Salomon v. Salomon & Co.*, *Salomon & Co. v. Salomon*,

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Common
Law Rules.

Where the words of an enactment are clear, inquiry into its history and any supposed defect in former legislation on the subject is to be deprecated (*k*).

Duty of
judges.

276. It is the duty of judges to give fair and full effect to statutes without regard to the particular consequence in the special case (*l*), and not to indulge in conjecture as to what Parliament would have done if a particular case had been presented to its notice (*m*); for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence (*n*).

Conditions
precedent.

277. A condition precedent clearly imposed must be performed before a statutory power can take effect, and that though the power has been treated as operative for many years, and even recognised as existing by subsequent statutes (*o*).

(ii.) *What may be Implied.*

Presumptions.

278. In determining what is intended to be the scope of a statute it may be presumed—

(1) That what is within the purview of the statute, and is not expressly provided for by that or some earlier statute, may be sought in pre-existing common law principles (*p*);

[1897] A. C. 22, 29, 38; *Vacher v. London Society of Compositors*, [1913] A. C. 107, 117 *et seq.*

(*k*) *R. v. London (Bishop)* (1889), 24 Q. B. D. 213, C. A., *per* Lord ESHER, M.R., at p. 224; *R. v. Most* (1881), 7 Q. B. D. 244, 251, C. C. R. As to codifying and consolidating Acts, compare p. 199, *post*.

(*l*) *Dixon v. Harrison* (1670), Vaugh. 36, 37; *Re Hall* (1888), 21 Q. B. D. 137, 141. Even though the consequence may be a public nuisance (*Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Lea Conservancy Board v. Hertford Corporation* (1884), Cab. & El. 299; *London and Brighton Rail. Co. v. Truman* (1885), 11 App. Cas. 45, 59; *Goldberg & Son, Ltd. v. Liverpool Corporation* (1900), 82 L. T. 362, C. A.; *Smeed, Dean & Co. v. Port of London Authority*, [1913] 1 K. B. 226, 232, 239, C. A.).

(*m*) *A.-G. v. Noyes* (1881), 8 Q. B. D. 125, 138, C. A.; see also *Bole v. Horton* (1673), Vaugh. 360, 373; *Atcheson v. Everitt* (1776), 1 Cowp. 382, 391; *Woodward v. Watts* (1853), 2 E. & B. 452, 458; *A.-G. v. Great Eastern Rail. Co.* (1873), L. R. 6 H. L. 367, 374; *Municipal Building Society v. Kent* (1884), 9 App. Cas. 260, 273; *Clark v. Wallond* (1883), 52 L. J. (Q. B.) 321; *Cox v. Hakes* (1890), 15 App. Cas. 506, 528; *McCowan v. Baine, The "Niobe,"* [1891] A. C. 401, 409.

(*n*) 2 Co. Inst. 137; *Bole v. Horton*, *supra*; *Hyde v. Johnson* (1836), 2 Bing. (N. C.) 776, 780 (where it was held that the fact of some people being unable to write could not make the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1, mean that an acknowledgment to revive a statute-barred debt might be signed by an agent); *Re St. James's Club* (1852), 16 Jur. 1075 (ambiguous words not to be extended).

(*o*) See *Kent Coast Rail. Co. v. London, Chatham and Dover Rail. Co* (1868), 3 Ch. App. 656, where a lease which two companies had been empowered to enter into upon obtaining a certificate of the Board of Trade had been acted upon for several years, and had been referred to in subsequent local and personal Acts.

(*p*) "If any case be doubtful it is good to construe it according to the reason of the common law" (*Chudleigh's Case* (1595), 1 Co. Rep. 113 b, 134 a); see also *Dalmerie v. Barnard* (1567), Plowd. 346, 352; *Harbert's Case* (1584), 3 Co. Rep. 11 b, 13 b; *Fermor's Case* (1602), 3 Co. Rep. 77 a, 78 a; Bac. Abr. tit. Stat. (B).

(2) That in the absence of express language Parliament did not intend to abrogate ordinary rules of law (*q*);

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(3) That Parliament did not intend to do a palpable injustice (*r*);

(4) That it was not intended that a man should benefit from his own wrong (*s*); or benefit where he has been in fault (*t*).

279. When it is clear from the nature of a provision that some restriction must be put upon the literal signification of the words used, and it is uncertain from anything to be found in the statute itself what the exact character and extent of the restriction should be, no greater restrictions should be imposed than are rendered necessary by the nature of the statute and its subject-matter (*a*).

Restrictions.

280. *Ubi aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potest.* A duty imposed or a power granted by Parliament carries with it the power necessary for its performance or execution (*b*). Similarly, an authority given by statute to do certain work authorises the doing not only of all things absolutely necessary for its execution, but of all things reasonably necessary (*c*). This is especially the case with enabling Acts (*d*).

Powers
implied.

281. It may be presumed:

(1) That words are not used in a statute without a meaning (*e*);

Language
of statutes.

(2) Nor omitted, when they have been used in a corresponding clause in an earlier statute, without a reason (*f*).

(*q*) This perhaps follows from the preceding statement in the text; but see *Wear Commissioners v. Adamson* (1876), 1 Q. B. D. 546, C. A., *per* MELLISH, L.J., at p. 554; *Rendall v. Blair* (1890), 45 Ch. D. 139, C. A., *per* BOWEN, L.J., at p. 152; *Re Barker* (1881), 17 Ch. D. 241, C. A.

(*r*) *Re Shand, Ex parte Corbett* (1880), 14 Ch. D. 122, 129, C. A.; *Re Brockelbank, Ex parte Dunn and Raeburn* (1889), 23 Q. B. D. 461, 463, C. A.; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 28, C. A.

(*s*) *Gowan v. Wright* (1886), 18 Q. B. D. 201, 204, C. A.

(*t*) *Cory & Son, Ltd. v. France, Fenwick & Co., Ltd.*, [1911] 1 K. B. 114, 135, C. A.

(*a*) *Sullivan v. Mitcalfe* (1880), 5 C. P. D. 455, 459, C. A.; compare *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623, 648, Ex. Ch.

(*b*) *Oath before Justices* (1611), 12 Co. Rep. 130 (where justices empowered to require persons to take an oath were held entitled to issue a warrant for their bringing up); *Bane v. Methuen* (1824), 2 Bing. 63; *Clarence Rail. Co. v. Great North of England, Clarence and Hartlepool Junction Rail. Co.* (1845), 13 M. & W. 706, 721; *Smeeton v. Collier* (1847), 1 Exch. 457; *Cookson v. Lee* (1854), 23 L. J. (CH.) 473 (where a power to invest in land for the express purpose of selling it as building land was held to carry with it the power to develop by setting out and making roads).

(*c*) *Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, 414; *London and North Western Rail. Co. v. Evans, supra*; compare *Ecclesiastical Commissioners for England v. North Eastern Rail. Co.* (1877), 4 Ch. D. 845. As to when statutes are judicially noticed, see title EVIDENCE, Vol. XIII., p. 525.

(*d*) *Yarmouth Corporation v. Simmons* (1878), 10 Ch. D. 518, 527 (public right of way held to be extinguished by necessary implication); *Re Dudley Corporation* (1881), 8 Q. B. D. 86, 93, C. A.

(*e*) *Auchterarder Presbytery v. Kinnoul (Earl)* (1839), 6 Cl. & Fin. 646, 686, H. L.; *R. v. St. John, Westgate, Burial Board* (1862), 2 B. & S. 703, 706, Ex. Ch.; *East London Rail. Co. (Directors etc.) v. Whitechurch* (1874), L. R. 7 H. L. 81, 91; *Green v. R.* (1876), 1 App. Cas. 513, 537, 552; *Yorkshire Insurance Co. v. Clayton* (1881), 8 Q. B. D. 421, 424, C. A.

(*f*) *A.-G. v. Sillem* (1863), 2 H. & C. 431, 515; *Mullins v. Collins*

SECT. 3.

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Law Rules.

Statutory
creation of
right.

Derogation
from common
law rights.

282. It has been said that in order to give effect to a right claimed by a party who by himself or his predecessor has long been in enjoyment of it, the existence of a statute creating such right may in some cases be presumed (*g*).

(iii.) *What must be Expressed.*

283. Statutes which limit or extend common law rights must be expressed in clear unambiguous language (*h*). Such are:—

- (1) Those which detract from rights of ownership (*i*);
- (2) Those which impose a new obligation (*k*);
- (3) Fiscal or rating enactments (*l*);
- (4) Those which interfere with existing contracts (*m*);
- (5) Those which affect status (*n*), or personal privileges (*o*);
- (6) Those which prejudice a man who has had no opportunity of being heard (*p*);

(1874), L. R. 9 Q. B. 292 (where the omission of words requiring a guilty knowledge rendered an employer liable under a penal statute for the act of his servant); *Union Bank of London v. Ingram* (1882), 20 Ch. D. 463, 465, C. A.

(*g*) *Lopez v. Andrew* (1826), 3 Man. & Ry. (K. B.) 329, n.; *A.-G. v. Evelme Hospital* (1853), 17 Beav. 366, 390.

(*h*) *Ash v. Abdy* (1678), 3 Swan. 664; *Re Cuno, Mansfield v. Mansfield* (1889), 43 Ch. D. 12, 17, C. A.

(*i*) *Scales v. Pickering* (1828), 4 Bing. 448, 452; *Webb v. Manchester and Leeds Rail. Co.* (1839), 4 My. & Cr. 116, 120; *Arnold v. Gravesend Corporation* (1856), 2 K. & J. 574, 591; *R. v. Mallow Union Guardians* (1860), 12 I. C. L. R. 35; *Wells v. London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126, 130; *Lang v. Kerr, Anderson & Co.* (1878), 3 App. Cas. 529, 535; *Wake v. Redfearn* (1880), 43 L. T. 123, 126; *Hough v. Windus* (1884), 12 Q. B. D. 224, 237, C. A.; *Westminster Corporation v. London and North Western Railway*, [1905] A. C. 426, 439.

(*k*) *Finch v. Bannister*, [1908] 1 K. B. 485, 489; affirmed, [1908] 2 K. B. 441, C. A. (Land Drainage Act throwing obligation to scour and cleanse upon an owner).

(*l*) *Re Micklethwait* (1855), 11 Exch. 452, 456; *Shaw v. Ruddin* (1858), 9 I. C. L. R. 214; *Partington v. A.-G.* (1869), L. R. 4 H. L. 100, 122; *Oriental Bank Corporation v. Wright* (1880), 5 App. Cas. 842, 856, P. C.; *A.-G. v. Selborne (Earl)*, [1902] 1 K. B. 388, 396, C. A.; *Whiteley v. Burns*, [1908] 1 K. B. 705, 709; *Inland Revenue Commissioners v. Gribble*, [1913] 3 K. B. 212, C. A., *per* BUCKLEY, L.J., at p. 219. As to fiscal and revenue statutes, see pp. 180 *et seq.*, *post*.

(*m*) *Morris v. Mellin* (1827), 6 B. & C. 446, 449; *Bryan v. Child* (1850), 5 Exch. 368; *Walsh v. Secretary of State for India* (1863), 10 H. L. Cas. 367, 386; *Gardner v. Lucas* (1878), 3 App. Cas. 582, 603; *Western Counties Rail. Co. v. Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, 189, P. C.; *Barlow v. Teal* (1885), 15 Q. B. D. 403, 501; and see title CONTRACT, Vol. VII., p. 431.

(*n*) *R. v. Harrauld* (1872), L. R. 7 Q. B. 361 (right of married women to vote in municipal elections).

(*o*) *Randolph v. Milman* (1868), L. R. 4 C. P. 107, Ex. Ch. (rights of persons to vote as members of a cathedral chapter); *Newcastle (Duke) v. Morris* (1870), L. R. 4 H. L. 661 (where it was held that the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 69 (1), rendering all persons subject to the bankruptcy law, did not deprive debtors of the privilege of Parliament); *Walsall Overseers v. London and North Western Rail. Co.* (1879), 4 App. Cas. 467, 478; *Re Vexatious Actions Act*, 1896, *Re Boaler (Bernard)* (1913), 29 T. L. R. 767.

(*p*) *Cooper v. Wandsworth District Board of Works* (1863), 14 C. B. (N. S.) 180, 187; *Brockwell v. Bullock* (1889), 22 Q. B. D. 567, 575, C. A.

- (7) Those which cut down the right of peremptory challenge (*q*);
- (8) Those which work a forfeiture (*r*).
- (9) Those which affect the prerogative of the Crown (*s*);
- (10) Those which take away the jurisdiction of the High Court of Justice (*t*);
- (11) Those which modify the rules of public meetings (*u*);
- (12) Those which give a right of appeal (*a*);
- (13) Those which introduce new principles into any branch of the law (*b*);

The fact that a statute may restrict common law rights is, however, no reason why, when the language is clear, it should be construed differently from other statutes (*c*).

(iv.) *Construction of General Provisions.*

284. General words must receive a general construction, unless there is in the statute itself some ground for restricting their meaning (*d*). The fact that general words are used in a statute is not in itself, however, a conclusive reason why every case falling literally within them should be governed by it (*e*). General words

(*q*) *Gray v. R.* (1844), 11 Cl. & Fin. 427, H. L.; *Levinger v. R.* (1870), L. R. 3 P. C. 282, 289. As to the right of peremptory challenge, see title JURIES, Vol. XVIII., p. 249.

(*r*) *Blennerhassett v. Day* (1812), 2 Ball & B. 104, 128.

(*s*) *Magdalen College Case* (1615), 11 Co. Rep. 66 b, 68 b; *Sheffield (Lord) v. Ratcliffe* (1615), Hob. 334, 347; see, further, pp. 164 *et seq.*, *post*.

(*t*) *R. v. Moreley* (1760), 2 Burr. 1040, 1042; *Shipman v. Henbest* (1790), 4 Term Rep. 109; *R. v. London Corporation* (1829), 9 B. & C. 1, 27; *Balfour v. Malcolm* (1842), 8 Cl. & Fin. 485, 500, H. L.; *Smith v. Brown* (1871), L. R. 6 Q. B. 729, 733; *Oram v. Brearey* (1877), 2 Ex. D. 346, 348; *Seward v. "Vera Cruz"* (1884), 10 App. Cas. 59; *A.-G. v. Boden*, [1912] 1 K. B. 539, 561. As to the jurisdiction of the High Court, see titles COURTS, Vol. IX., pp. 52 *et seq.*; PRACTICE AND PROCEDURE, Vol. XXIII., pp. 89 *et seq.*

(*u*) *R. v. Wimbledon Local Board* (1882), 8 Q. B. D. 459, C. A. (right to demand a poll). As to the right to hold public meetings, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 470.

(*a*) *R. v. Stock* (1838), 8 Ad. & El. 405; *A.-G. v. Sillem* (1864), 10 H. L. Cas. 704; *Cousins v. Lombard Bank* (1876), 1 Ex. D. 404, 406; *Edwards v. Roberts*, [1891] 1 Q. B. 302. It is a rule of law that an appeal does not lie unless expressly given by statute (*R. v. Hanson* (1821), 4 B. & Ald. 519, 521); see also *National Telephone Co. v. H.M. Postmaster-General*, [1913] 2 K. B. 614, C. A.

(*b*) *Nothard v. Pepper* (1864), 17 C. B. (N. S.) 39, 50 (altering the laws of evidence); *Rolfé and Bank of Australasia v. Flower, Salting & Co.* (1865), L. R. 1 P. C. 27, 48 (affecting existing principles of insolvency law); *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507, C. A. (powers of the court under the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41).

(*c*) *The Warkworth* (1883), 9 P. D. 20, 21; *East Fremantle Corporation v. Annois*, [1902] A. C. 213, P. C.; *Canadian Pacific Railway v. Roy*, [1902] A. C. 213, P. C.

(*d*) *Copeman v. Gallant* (1716), 1 P. Wms. 314; *Beckford v. Wade* (1805), 17 Ves. 87, 91, 92, P. C.; *Phillips v. Poland* (1866), L. R. 1 C. P. 204, *per* WILLES, J., at p. 207; *R. v. Liverpool Justices* (1883), 11 Q. B. D. 638, 649, C. A.

(*e*) *Cope v. Doherty* (1858), 2 De G. & J. 614, C. A., *per* TURNER, L.J., at p. 623; *Phillips v. Poland*, *supra*, *per* WILLES, J., at p. 207; *Washer v. Elliott* (1876), 1 C. P. D. 169, *per* ARCHIBALD, J., at p. 174.

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capable of extending in their application to the whole of a statute do not necessarily so extend (*f*).

General words are not to be so construed as to alter the common law, or the previous policy of the law, if a sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched (*g*).

Prohibitions.

285. Where a statute enacts a prohibition in general terms, more extensive than a recital, its words must have their full and natural effect; if, however, the case under consideration is not plainly within the mischief intended to be prevented, it is permissible to restrain the effect of the enactment by a previous recital (*h*).

*Expressio
unius.*

286. The method of construction summarised in the maxim *expressio unius exclusio alterius* cannot be applied without limitation (*i*), for a failure to make an *expressio* complete may easily arise from the accidents of parliamentary procedure, and it is common to put provisions into statutes, particularly private statutes, *ex abundanti cautela*, and at the instance of parties interested (*j*).

Statutes
applying to
England and
Scotland.

287. A general statute applying to both England and Scotland, using terms of art which have different meanings in the two countries, may *prima facie* be treated differently in the courts of each (*k*); hence in respect of certain terms statutory provision has been made as to their respective meanings when used in relation to England, Scotland, or Ireland (*l*). The meaning of legal expressions in the law of the country to which they properly belong may show what Parliament intended to be the meaning in the sister country (*m*).

(*f*) *Re Cambrian Railways Co.'s Scheme* (1868), 3 Ch. App. 278 (where the words "nothing hereinbefore contained" were held to be limited to the preceding part of the same section); *Stracey v. Nelson* (1844), 12 M. & W. 535 (where a limitation was found *reddendo singula singulis*).

(*g*) *Minet v. Leman* (1855), 20 Beav. 269, 278; *Henderson v. Bise* (1822), 3 Stark. 158; *Wells v. Porter* (1836), 2 Bing. (N. C.) 722; *Elsworth v. Cole* (1836), 2 M. & W. 31 (construction of stock-jobbing Acts); *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 19, C. A.; *R. v. Harrold* (1872), L. R. 7 Q. B. 361 (right of married women to vote in municipal elections); *R. v. Wimbledon Local Board* (1881), 8 Q. B. D. 459, C. A.; *R. v. Salisbury (Bishop)*, [1901] 1 K. B. 573, 579; affirmed, [1901] 2 K. B. 225, C. A.; *Nairn v. St. Andrews University*, [1909] A. C. 147.

(*h*) *York (Dean and Chapter) v. Middleburgh* (1828), 2 Y. & J. 196, 215; *Hughes v. Chester and Holyhead Rail. Co.* (1861), 1 Drew. & Sm. 524, 536; *Winn v. Mossman* (1869), L. R. 4 Exch. 292, 300; *R. v. Percy* (1873), L. R. 9 Q. B. 64, 65; *Bristol Corporation v. Canning* (1906), 95 L. T. 183, 186.

(*i*) *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400, *per* WILLS, J., at p. 406, whose dissentient judgment was in accordance with the decision in the House of Lords (S. C. (1889), 14 App. Cas. 493); *Stevenson v. Hunter* (1903), 5 F. (Ct. of Sess.) 761.

(*j*) *Newcastle (Duke) v. Morris* (1870), L. R. 4 H. L. 661, 671; *McLaughlin v. Westgarth* (1906), 75 L. J. (P. C.) 117.

(*k*) *R. v. Slaton* (1881), 8 Q. B. D. 267, 272 ("indictment"); *Re Wanzer, Ltd.*, [1891] 1 Ch. 305, 311 ("sequestration"). As to judicial notice of statutes, see title EVIDENCE, Vol. XIII., p. 525.

(*l*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), ss. 23—25, 28, 29.

(*m*) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C.

(v.) *Benevolent Interpretation.*

SECT. 3.
Common
Law Rules.
—
Liberal
construction.

288. Judicial interpretation should be directed to avoiding consequences which are inconvenient and unjust, if this can be done without violence to the spirit or the language of a statute (*n*). In advancement of a remedial statute everything is to be done that can be done consistently with a proper construction of it (*o*), even though it may be necessary to extend enacting words beyond their natural import and effect (*p*). This principle is applied where the intention of Parliament is not clear (*q*), or its language is capable of two constructions (*r*).

It has been laid down that a liberal construction is to be given to general statutes which provide for the maintenance of religion, the advancement of learning, and the relief of the poor (*a*), and to saving clauses introduced into repealing statutes for the purpose of protecting persons from the consequences of acts done under the statutes repealed (*b*).

289. The principle that "an Act of late time shall be taken within the equity of an Act made long time before" (*c*) is still unimpaired, and a power of jointuring created before the Statute of Devises, 1540 (*d*), may be properly exercised by will (*e*).

*Vernon's
Case.*

531, *per* Lord MACNAGHTEN, at p. 580, citing with approval remarks of Lord HARDWICKE.

(*n*) *Middlesex Justices v. R.* (1884), 9 App. Cas. 757, 770; *R. v. Great Driffield (Inhabitants)* (1828), 8 B. & C. 684, 690; *Pollock v. Lands Improvement Co.* (1888), 37 Ch. D. 661; *Barlow v. Ross* (1890), 24 Q. B. D. 381, 389, C. A. Construction by the equity, or the extension of decisions beyond the enacting words, so long as they were within the mischief or cause of making (*Co. Litt.* 24 b), was common with regard to earlier statutes (*Hay v. Perth (Lord Provost and Magistrates)* (1863), 4 Macq. 535, 544, H. L.); but the courts always required to be satisfied that plain words did not stand in the way, and such construction or extension is now generally out of use (*Atcheson v. Everitt* (1776), 1 Cowp. 382, 391, H. L.; *Brandling v. Barrington* (1827), 6 B. & C. 467, 475; *Shuttleworth v. Le Fleming* (1865), 19 C. B. (N. S.) 687, 703). As to the effect of a series of decisions as to the true meaning of an Act in justifying a particular construction of it, compare *Re Bethlem Hospital* (1875), L. R. 19 Eq. 457, *per* JESSEL, M.R., at p. 460. As to judicial notice of statutes, see title EVIDENCE, Vol. XIII., p. 525.

(*o*) *Johnes v. Johnes* (1814), 3 Dow, 1, H. L., *per* Lord ELDON, at p. 15; *Turtle v. Hartwell* (1795), 6 Term Rep. 426, 429; *Lyde v. Barnard* (1836), 1 M. & W. 101, 113, 114; *R. v. Milner* (1845), 14 L. J. (M. C.) 157; *R. v. Cheshire Justices* (1845), 3 Dow. & L. 337 (both cases in which orders made under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), were cured by following the form given in the schedule to the Bastardy Act, 1845 (8 & 9 Vict. c. 10)); *Dapueto (Giovanni) v. Wyllie (James) & Co.* (1874), L. R. 5 P. C. 482; *Stainland Industrial Corn and Provision Society v. Stainland Urban Council*, [1906] 1 K. B. 233.

(*p*) *York (Dean and Chapter) v. Middleburgh* (1828), 2 Y. & J. 196, 215.

(*q*) *Dixon v. Harrison* (1670), Vaugh. 36, 38.

(*r*) See *Chelsea Vestry v. King* (1864), 17 C. B. (N. S.) 625, *per* ERLE, C.J., at p. 629; *R. v. Monck* (1877), 2 Q. B. D. 544, 555, C. A.

(*a*) *Magdalen College Case* (1615), 11 Co. Rep. 66 b, 70 b, 71 a.

(*b*) *Foster v. Pritchard* (1857), 2 H. & N. 151.

(*c*) *Vernon's Case* (1572), 4 Co. Rep. 1 a, 4 a.

(*d*) 32 Hen. 8, c. 1.

(*e*) *Re Bolton Estates, Russell v. Meyrick*, [1903] 2 Ch. 461, C. A.,

SECT. 3.

Common
Law Rules.Substitution
or addition.(vi.) *Provisions Affecting Jurisdiction.*

290. It is a question of construction whether a statute directly, or by necessary implication, takes away a right of procedure by substituting another, or leaves the former right co-existing with the latter (*f*). This question may be tested by inquiring whether the substituted procedure is a complete one, and whether it gives the parties interested in invoking it the same rights of being heard as they formerly possessed (*g*).

Lex fori.

291. Where power is given by statute to take proceedings in different courts, the remedy is subject to the *lex fori* of the court in which it is taken, as, for instance, the limit of time within which the remedy must be sought (*h*).

Inferior
courts.

292. Statutory provisions giving jurisdiction to inferior courts, to Government departments, or to bodies created *ad hoc*, must be strictly construed (*i*), and the procedure prescribed must be exactly followed (*k*).

(vii.) *Consistency with International Law.*Extra-terri-
torial juris-
diction.

293. There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations. On the principles already stated (*l*), however, this presumption must give way before an intention clearly expressed (*m*).

Comity of
nations.

294. Statutes are to be interpreted, provided that their language admits, so as not to be inconsistent with the comity of nations (*n*).

approving *Vernon's Case* (1572), 4 Co. Rep. 1 a, 4 a. The leading characteristic of this extension of statutes by inference to include cases not originally contemplated is that the earlier statute deals with a genus within which a new species is brought by a subsequent Act (*R. v. Smith* (1870), L. R. 1 C. C. R. 266, *per Bovill*, C.J., at p. 270). As to powers of jointturing, see title POWERS, Vol. XXIII., pp. 80 *et seq.*

(*f*) *Sharp v. Warren* (1818), 6 Price, 131; *Brockwell v. Bullock* (1889), 22 Q. B. D. 567, C. A.; *Great Western Rail. Co. v. Sharman* (1892), 61 L. J. (Q. B.) 600.

(*g*) *Brockwell v. Bullock*, *supra*, *per* FRY, L.J., at p. 575.

(*h*) Thus, where a local Act enacted that paving expenses should be recoverable from frontagers either in a court of summary jurisdiction, or by action in the High Court, it was held that in the latter case the action need not be brought within six months (*Blackburn Corporation v. Sanderson*, [1902] 1 K. B. 794, C. A., followed in *Metropolitan Water Board v. Bunn*, [1913] 1 K. B. 134); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 223 *et seq.*

(*i*) *R. v. Bird*, *Ex parte Needes*, [1898] 2 Q. B. 340 (rules made by court of quarter sessions); *R. v. Board of Education*, [1910] 2 K. B. 165, C. A., affirmed, [1911] A. C. 179 (exercise of powers by public office); *Brown v. Holyhead Local Board of Health* (1862), 1 H. & C. 601; *Scott v. Pilliner*, [1904] 2 K. B. 855 (local bye-laws).

(*k*) *R. v. Essex County Court Judge* (1887), 18 Q. B. D. 704, 708, C. A.

(*l*) See p. 147, *ante*.

(*m*) *Mortensen v. Peters* (1906), 8 Fraser (Justiciary Cases), 93, 103 (question whether a foreigner could be convicted under certain Fishery Acts of offences outside the three-mile limit).

(*n*) *Bloxam v. Favre* (1883), 8 P. D. 101, 104, affirmed (1884), 9 P. D. 130, C. A.; *Re Martin*, *Loustalan v. Loustalan*, [1900] P. 211, 233, C. A.; see title CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*

International law, however, being mainly conventional, can, it seems, only be administered by the courts when it forms part of the law of this country (*o*). If, therefore, statutory enactments are clearly inconsistent with international law, they must be so construed, whatever the effect upon the rights of aliens not within the jurisdiction may be (*p*).

SECT. 3.
Common
Law Rules.

295. The statute law of a foreign country, when relevant and not repugnant to the law of this country or to natural justice, may be proved and given effect to by the courts of this country (*q*), excepting in the case of statutes imposing penalties (*r*) or liabilities or disqualifications in the nature of penalties (*s*), and fiscal laws (*t*). On the same principle the wills of foreigners executed in accordance with the law of the country in which they are domiciled are admitted to probate (*u*), and foreigners sojourning in British dominions may avail themselves generally of British statutes (*w*).

Foreign
statutes.

Part IV.—Operation.

SECT. 1.—Commencement and Duration.

296. The expression “commencement” used with reference to a statute means the time at which the statute comes into operation (*x*), which, where no other time is provided, is the commencement of the day upon which it receives the Royal Assent (*a*). Any statute passed after 1889, or any Order in Council, order, warrant,

Commence-
ment.

(*o*) *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, C. A., per LINDLEY, L.J., at p. 229.

(*p*) *Cail v. Papayanni*, “*The Amalia*” (1863), 1 Moo. P. C. C. (N.S.) 471, 474; *R. v. Anderson* (1868), L. R. 1 C. C. R. 161 (alien convicted of murder in a British ship within foreign territory, pursuant to Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 267); *R. v. Keyn* (1876), 2 Ex. D. 63, 160; *Niboyet v. Niboyet* (1878), 4 P. D. 1, 20, C. A.

(*q*) *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; see titles EVIDENCE, Vol. XIII., p. 490; CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*; CONTRACT, Vol. VII., pp. 493, 494; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 163 *et seq.*

(*r*) *Huntington v. Attrill*, [1893] A. C. 150, 157, P. C. As to extradition, see title EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., pp. 403 *et seq.*

(*s*) *Re Selot's Trust*, [1902] 1 Ch. 488; *Sydney Municipal Council v. Bull*, [1909] 1 K. B. 7.

(*t*) *Wynne v. Jackson* (1826), 2 Russ. 351; see Chalmers, Bills of Exchange, 7th ed., p. 264, and the cases there cited; title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 562.

(*u*) *Doglion v. Crispin* (1866), L. R. 1 H. L. 301; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; see title CONFLICT OF LAWS, Vol. VI., pp. 224 *et seq.*

(*w*) *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815; *Routledge v. Low* (1868), L. R. 3 H. L. 100 (copyright cases); *Davidsson v. Hill*, [1901] 2 K. B. 606 (Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93)); see title ALIENS, Vol. I., p. 308.

(*x*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 36 (1).

(*a*) Acts of Parliament (Commencement) Act, 1793 (33 Geo. 3, c. 13); *Tomlinson v. Bullock* (1879), 4 Q. B. D. 230; *R. v. Smith, R. v. Weston*, [1910] 1 K. B. 17, 24, C. C. A. As to the procedure relating to the signifying of the Royal Assent, see title PARLIAMENT, Vol. XXI., pp. 723 *et seq.*

SECT. 1.
Commence-
ment and
Duration.

Passing of
Act.

Earlier
exercise of
powers.

scheme, letters patent, rules, regulations, or bye-laws made, granted, or issued under a power conferred by statute, if expressed to come into operation on a particular day, must be construed as coming into operation immediately on the expiration of the previous day (*b*).

The expression "passing of the Act" refers to the date at which the Royal Assent is given, and not necessarily to the commencement of its operation (*c*).

The commencement of a statute may vary as regards different places or as regards its various provisions (*d*).

297. A statute passed since 1889, which is not to come into operation immediately on its passing (*e*), may, nevertheless, confer powers to be exercised for the purpose of bringing it into operation at the appointed time (*f*). Such powers may, unless a contrary

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 36 (2). The result is that an Act of Parliament, or Order in Council, which is expressed to come into operation on the 1st January, takes effect immediately after the clock has struck midnight on the 31st December. Before 1793, Acts of Parliament, in which the contrary was not expressed, came into operation as from the first day in the session in which they were passed, because by a legal fiction a session, like an assize, was deemed to constitute a single day (*Panter v. A.-G.* (1772), 6 Bro. Parl. Cas. 486). This led to difficulties, for the judges had to take judicial cognisance of the first day of the session, instead of being able to take the day of the passing from the authorised copy of the Act itself (*R. v. Wilde* (1670), 1 Lev. 296; *Latless v. Holmes* (1792), 4 Term Rep. 660); and a man might be convicted of an offence which had not in fact been created by statute at the time it was committed (*R. v. Bailey* (1800), Russ. & Ry. 1; *R. v. Middlesex Justices* (1831), 2 B. & Ad. 818, 821). As to retrospective effect, see pp. 159, 160, *post*.

(*c*) *Re Dalzell, Ex parte Rashleigh* (1875), 2 Ch. D. 9, C. A., followed in *R. v. Smith* (1909), 26 T. L. R. 23, C. C. A. (operation of Prevention of Crime Act, 1908 (8 Edw. 7, c. 59)). In *Burn v. Carvalho* (1834), 1 Ad. & El. 883, 896, Ex. Ch., it was pointed out that the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 44, provided that it should commence and take effect on the 1st June, 1833, although it did not receive the Royal Assent until the 14th August following. It is apprehended that the Act would be without statutory force until the later of the two dates, when it might have a retrospective operation, a result quite permissible in Acts regulating procedure (*Re Athlumney, Ex parte Wilson*, [1898] 2 Q. B. 547); see p. 161, *post*.

(*d*) For instances, see the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), which was to come into operation in each magisterial division on the day next appointed for the holding of the general annual licensing meeting for that division; Licensing Act, 1902 (2 Edw. 7, c. 28), s. 21, which came into operation four years and three months after the rest of the Act; Education Act, 1902 (2 Edw. 7, c. 42), s. 27 (2), which enabled the Board of Education to appoint different days for different purposes and for different provisions of the Act and for different councils. The formula of a commencement clause usually runs: "This Act (save as otherwise expressly provided) shall come into operation on" a named day, which is in most cases the 1st January. But, as the financial year ends on the 31st March, Acts which involve financial operations are usually made to come into operation on the 1st April.

(*e*) For instances, see Licensing Act, 1902 (2 Edw. 7, c. 28); County Courts Act, 1903 (3 Edw. 7, c. 42); Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55).

(*f*) It may be, and generally is, necessary to appoint officers, to prepare and promulgate schemes, rules, or bye-laws, to give notices, and to prescribe forms.

intention appears, be exercised immediately after the passing of the statute, so long as any instrument made thereunder does not, in the absence of necessity or of express enactment, come into operation before the statute itself (*g*).

SECT. 1.
Commence-
ment and
Duration.

298. Any statute may be altered, amended, or repealed in the same session of Parliament (*h*). Of two statutes passed on the same day one may repeal the other (*i*).

Alteration
etc. in same
session.

299. The duration of a statute is *primâ facie* perpetual (*k*). It is, however, possible that statutes may escape repeal by inadvertence (*l*); hence, non-user and inconsistency with more modern legislation may affect the construction put upon them (*m*). Statutes, moreover, may be intended to be temporary as well as perpetual, and express words are not necessary to show whether Parliament intended a particular statute to be one or the other (*n*). A statute which merely enacts the continuance for a limited time of an earlier statute will not necessarily abrogate that part of it which was unlimited in operation (*o*).

Duration.

300. Temporary statutes, which are often tentative (*p*), may be made perpetual by subsequent Acts. The Act so made perpetual becomes in effect perpetual *ab initio* (*q*).

Continuance
of temporary
statutes.

Powers, such as, for instance, to take land by compulsory purchase (*r*), which have expired with the statute creating them, may be prolonged, extended, and even revived by subsequent statutes (*s*). It was formerly the practice to pass a general Act to continue temporary Acts relating to some particular subject (*t*); at present

(*g*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 37.

(*h*) *Ibid.*, s. 10, re-enacting Lord Brougham's Act (stat. (1850) 13 & 14 Vict. c. 21), s. 1. For example, the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), repealed the Companies Act, 1908 (8 Edw. 7, c. 12). As to Parliament generally, see title PARLIAMENT, Vol. XXI., pp. 611 *et seq.*

(*i*) *Sheffield Corporation v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

(*k*) *The "India"* (1864), Brown. & Lush. 221; *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605, 650; *Houghton v. Fear Brothers, Ltd. and Willsher*, [1913] 2 K. B. 343.

(*l*) This would appear to be the case with the Physicians Acts (stat. (1540) 32 Hen. 8, c. 40, and stat. (1553) 1 Mar. sess. 2, c. 9); see further instances given in Craies' Statute Law, 2nd ed., p. 362.

(*m*) *Leigh v. Kent* (1789), 3 Term Rep. 362, 364; *Dobbs v. Grand Junction Waterworks Co.* (1882), 10 Q. B. D. 337, 345, C. A.; *Reid v. Wilson and Ward, Reid v. Wilson and King*, [1895] 1 Q. B. 315, C. A.

(*n*) *R. v. Longmead* (1795), 2 Leach, 694; *Barnes v. White* (1845), 1 C. B. 192; *The "India," supra*.

(*o*) *Prices of Wine* (1618), Hob. 215; *Houghton v. Fear Brothers, Ltd. and Willsher, supra*.

(*p*) For an instance, see the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which was passed for seven years, and since then has been renewed annually.

(*q*) *R. v. Morgan* (1736), 2 Stra. 1066; *R. v. Swiney* (1832), Alc. & N. 131.

(*r*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 62, 63.

(*s*) *Bentley v. Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588, *per* JESSEL, M.R., at p. 593.

(*t*) As various local turnpike Acts by stat. (1834) 4 & 5 Will. 4, c. 10 (*Barnes v. White* (1845), 1 C. B. 192).

SECT. 1.
Commence-
ment and
Duration.

an Expiring Laws Continuance Act, with a schedule attached, including all classes of temporary Acts, is passed every session (*u*).

Statutory provision has been made for the continuance, as from their expiration, of statutes which would expire during a session, when Bills have been introduced for that purpose, but at the time of the expiration have not received the Royal Assent (*w*). Such provision has been found especially necessary for the collection of duties of customs and excise and of income tax (*x*).

Effect of
expiration.

301. After the expiration of a statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced *ipso facto* determine (*y*).

When a definition contained in a statute passed for a limited time is incorporated into another statute for its special purpose, the definition, notwithstanding the expiration of the first statute, survives for the purpose of the surviving statute (*a*).

Repeal by
temporary
statute.

302. A temporary statute may now effect the permanent repeal of enactments inconsistent with it (*b*). Before Lord Brougham's Act (*c*) it would only have suspended their operation (*d*).

Difference
between
repealed and
temporary
statute.

303. A statute which is repealed differs from a temporary statute in that the former, except in so far as it relates to transactions already completed under it (*e*), becomes as if it had never existed, while with respect to the latter the extent of the restrictions imposed and the duration of the provisions are matters of construction (*f*).

Revival.

304. The revival of an expired statute carries with it the revival of statutes explanatory of it (*g*).

(*u*) For the form of these Acts, see that of 1913 (3 & 4 Geo. 5, c. 18).

(*w*) Acts of Parliament (Expiration) Act, 1808 (48 Geo. 3, c. 106). As to the Royal Assent, see title PARLIAMENT, Vol. XXI., pp. 723 *et seq*.

(*x*) Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3).

(*y*) *Miller's Case* (1764), 1 Wm. Bl. 451; *R. v. M'Kenzie* (1820), Russ. & Ry. 429; *Charrington v. Meatheringham* (1837), 2 M. & W. 228; *R. v. Mawgan (Inhabitants)* (1838), 8 Ad. & El. 496; but see *Hough v. Windus* (1884), 12 Q. B. D. 224, where the full Court of Appeal held that goods seized under a writ of *elegit* before the date of repeal of the Act authorising delivery might be delivered after that date. The inconveniences attending temporary Acts which it is intended to renew, and the expedients adopted for allaying them, were discussed in the recent cases of *Bowles v. A.-G.*, [1912] 1 Ch. 123, 132; *Bowles v. Bank of England*, [1913] 1 Ch. 57.

(*a*) Thus, in *Ex parte Higginbotham* (1840), 9 Dowl. 200, it was held that where the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), had declared certain places to be disorderly within the meaning of stat. (1795) 36 Geo. 3, c. 8, attaching penalties to certain offences, they continued to be punishable under the former Act, when the latter expired under a time limit.

(*b*) *Lauri v. Renad*, [1892] 3 Ch. 402, 420, C. A.; *Gwynne v. Drewitt*, [1894] 2 Ch. 616; *Taylor v. New Windsor Corporation*, [1898] 1 Q. B. 186, 205, C. A.; affirmed, [1899] A. C. 41, 50; but see *ibid.*, per Lord HALSBURY, L.C., at p. 46.

(*c*) Stat. (1850) 13 & 14 Vict. c. 21.

(*d*) *Warren v. Windle* (1803), 3 East, 205, 212; *R. v. Rogers* (1809), 10 East, 569, 573.

(*e*) *Hitchcock v. Way* (1837), 6 Ad. & El. 943, 947.

(*f*) *Stevenson v. Oliver* (1841), 8 M. & W. 234, 241; p. 157, *ante*.

(*g*) *Williams v. Rougheedge* (1759), 2 Burr. 747.

SECT. 2.—*Retrospective Effect.*SECT. 2.
Retro-
spective
Effect.SUB-SECT. 1.—*In General.**Primâ facie*
prospective.

305. A statute is *primâ facie* prospective, and does not interfere with existing rights(h), unless it contains clear words to that effect(i), or unless, having regard to its object, it necessarily does so(k).

(h) "*Nova constitutio futuris formam imponere debet, non præteritis*" (2 Co. Inst. 292); see also Bac. Abr. tit. Statute (C.); *Gillmore v. Shuter* (1678), 2 Mod. Rep. 310; *R. v. Lancashire (Inhabitants)* (1831), 2 Ad. & El. 813; *Burn v. Carvalho* (1834), 1 Ad. & El. 883, 895, Ex. Ch.; *Hitchcock v. Way* (1837), 6 Ad. & El. 943; *Thompson v. Lack* (1846), 3 C. B. 540; *Moon v. Durden* (1848), 2 Exch. 22; *Doolubdass Pettamberdas v. Ramlott Thackoorseydass* (1850), 7 Moo. P. C. C. 239 (gaming transactions); *Marsh v. Higgins* (1850), 9 C. B. 551; *Waugh v. Middleton* (1853), 8 Exch. 352; *Larpen v. Bibby* (1855), 5 H. L. Cas. 481; *Noble v. Gadban* (1855), 5 H. L. Cas. 504 (operation of bankruptcy statutes); *Urquhart v. Urquhart* (1853), 1 Macq. 658, 662, H. L.; *Jackson v. Woolley* (1858), 8 E. & B. 778, Ex. Ch.; *Williams v. Smith* (1859), 4 H. & N. 559, Ex. Ch. (Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1); *Midland Rail. Co. v. Pye* (1861), 10 C. B. (n. s.) 179, 191; *Evans v. Williams* (1865), 2 Drew. & Sm. 324 (Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38)); *Williams v. Harding* (1866), L. R. 1 H. L. 9; *Mount v. Taylor* (1868), L. R. 3 C. P. 645; *Levi v. Sanderson* (1869), L. R. 4 Q. B. 330 (operation of restrictive provisions of County Courts Act, 1867 (30 & 31 Vict. c. 142), upon High Court costs); *Re Suche (Joseph) & Co., Ltd.* (1875), 1 Ch. D. 48, 50; *Gardner v. Lucas* (1878), 3 App. Cas. 582, 601; *R. v. Ipswich Union* (1877), 2 Q. B. D. 269; *Tenterden Union Guardians v. St. Mary, Islington, Guardians* (1878), 38 L. T. 485 (poor law settlements); *Hickson v. Darlow* (1883), 23 Ch. D. 690, C. A. (Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43)); *Altkusen v. Brooking* (1884), 26 Ch. D. 559 (Ground Game Act, 1880 (43 & 44 Vict. c. 47)); *Reid v. Reid* (1886), 31 Ch. D. 402, C. A. (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)); *Main v. Stark* (1890), 15 App. Cas. 384, 388, P. C. (status of school teachers); *Re Raison, Ex parte Raison* (1891), 8 Morr. 11; *R. v. Griffiths*, [1891] 2 Q. B. 145, C. C. R.; *Re Norman, Ex parte Board of Trade*, [1893] 2 Q. B. 369, C. A. (all three cases on the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71)); *Knight v. Lee*, [1893] 1 Q. B. 41 (Gaming Act, 1892 (55 & 56 Vict. c. 9)); *Re Pulborough Parish School Board Election*, [1894] 1 Q. B. 725, C. A. (disqualification of bankrupt); *Re Chapman, Cocks v. Chapman*, [1896] 1 Ch. 323 (Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10)); *Re Waverley Type Writer, D'Esterre v. Waverley Type Writer*, [1898] 1 Ch. 699 (Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19)); *Young v. Adams*, [1898] A. C. 469, 476, P. C.; *Smith v. Callander*, [1901] A. C. 297, 301; *The Langdale* (1907), 76 L. J. (P.) 154 (Merchant Shipping Act, 1906 (6 Edw. 7, c. 48)); *Smithies v. National Association of Operative Plasterers*, [1908] 1 K. B. 310, 319 C. A. (Trade Disputes Act, 1906 (6 Edw. 7, c. 47)).

(i) Thus, the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 12, expressly provides that the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 32, shall operate retrospectively.

(k) As in *Quilter v. Mapleson* (1882), 9 Q. B. D. 672, C. A., where, in an action of ejectment, relief against forfeiture under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, was granted by the Court of Appeal, although when the action was before the court of first instance the statute had not come into operation; see, further, *Re Lees* (1843), 5 Beav. 410; *Re Rhodes* (1844), 8 Beav. 224; *Re Eyre* (1848), 2 Ph. 367 (all cases upon the taxability of bills of costs under the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38); *Pardo v. Bingham* (1869), 4 Ch. App. 735, 740 (Statute of Limitations); *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch. (where the principle underlying Acts of indemnity is expounded);

SECT. 2.
Retro-
spective
Effect.

The fact of a statute being remedial (*l*), or designed to protect the public interest (*m*), is matter to which great weight is to be attached. The operation of a statute on a contract so as to alter it (*n*), or to render performance of it impossible (*o*), may be excluded by a sufficiently clear provision in the contract to that effect (*p*), where the terms of the statute in question are consistent with the inclusion of such a provision (*q*).

It does not follow that because a statute does not contain the words "from and after the commencement of this Act" it is retrospective (*r*), or that when it contains them it is not retrospective (*s*). The word "retrospective" is in itself ambiguous (*t*).

A statute is not to be construed to have a greater retrospective operation than its language renders necessary (*a*).

SUB-SECT. 2.—*Disturbance of Rights already Acquired.*

Existing
rights.

306. An enacting clause which interferes with existing rights must be construed strictly (*b*), while the largest and most liberal construction is given to an exception which protects such rights (*c*). In a certain sense all legislation must affect and interfere with existing rights. The rule, therefore, strictly stated, applies to rights which are at the moment of enactment matters of active assertion, and not to rights which may thereafter be the subject of

Re Ashcroft, Ex parte Todd (1887), 19 Q. B. D. 186, 195, C. A. (effect of repeating sections of a repealed statute in a new or consolidating Act); *Kemp v. Wright*, [1895] 1 Ch. 121, C. A.; *West v. Gwynne*, [1911] 2 Ch. 1, 12, C. A. (Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13)).

(*l*) *The "Ironsides"* (1862), Lush. 458.

(*m*) *R. v. Vine* (1875), L. R. 10 Q. B. 195 (where the intention to protect the public was held to override the penal character of the Wine and Beer-house Amendment Act, 1870 (33 & 34 Vict. c. 29) (now repealed)); *Westbury-on-Severn v. Barrow-in-Furness* (1878), 3 Ex. D. 88, 94 (where the statute in question was read to apply to the past as well as the future, its object being to remove difficulty of proof rather than to introduce law intrinsically better).

(*n*) *Brewster v. Kitchell* (1697), 1 Salk. 198; *Doe d. Anglesea (Marquis) v. Rugeley (Churchwardens)* (1844), 6 Q. B. 107; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180, 186; *Newington Local Board v. Cottingham Local Board* (1879), 12 Ch. D. 725.

(*o*) *Oswald v. Berwick-upon-Tweed Corporation* (1856), 5 H. L. Cas. 856.

(*p*) *Devonshire (Duke) v. Barrow Steel Co.* (1877), 2 Q. B. D. 286, C. A.; *Monk v. Arnold*, [1902] 1 K. B. 761, 767; *Horner v. Franklin*, [1905] 1 K. B. 479, 487, C. A.; compare *Stuckey v. Hooke*, [1906] 2 K. B. 20, C. A.

(*q*) *Wooler v. North Eastern Breweries*, [1910] 1 K. B. 247.

(*r*) *Jones v. Bennett* (1890), 63 L. T. 705; *Barber v. Tilson* (1815), 3 M. & S. 429; *R. v. Smith* (1870), L. R. 1 C. C. R. 266, 270.

(*s*) *R. v. Birwistle* (1889), 58 L. J. (M. C.) 158.

(*t*) *R. v. St. Mary, Whitechapel (Inhabitants)* (1848), 12 Q. B. 120, 127; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, 673, C. A.

(*a*) *Lauri v. Renad*, [1892] 3 Ch. 402, C. A., per LINDLEY, L. J., at p. 421.

(*b*) *Steal v. Carey* (1845), 1 C. B. 496; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193, 203; *Western Counties Rail. Co. v. Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, 189, P. C.

(*c*) *Finch v. Birmingham Canal Navigation Co.* (1826), 5 B. & C. 820; *Butchers' Hide, Skin and Wool Co., Ltd. v. Seacombe*, [1913] 2 K. B. 401.

litigation (*d*). A distinction may frequently have to be drawn between a vested right and a mere privilege (*e*).

307. Although an existing right of action is not *primâ facie* taken away by a new statute (*f*), there is no rule that when a person has commenced an action he has a vested right in the then state of the law (*g*). A saving clause in a repealing statute may, however, protect him as regards rights which he may have acquired or liabilities he may have incurred thereunder (*h*).

A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause providing that all rights accrued by virtue of the statute repealed are to be unaffected by such repeal (*i*).

SUB-SECT. 3.—*Alteration in Judicial Procedure.*

308. An enacting clause which affects procedure only is retrospective; for it deals with the mode in which a right of action already existing shall be asserted, and creates no new right of action (*k*).

SECT. 2.
Retro-
spective
Effect.

Right of
action.

Alterations
in procedure
retrospective.

(*d*) For, where a nuisance is authorised by statute (as in *Hammersmith etc. Rail Co. v. Brand* (1869), L. R. 4 H. L. 171; *London and Brighton Rail. Co. v. Truman* (1885), 11 App. Cas. 45; compare title NUISANCE, Vol. XXI., pp. 464, 467, 517 *et seq.*), the whole intention of Parliament is to extinguish rights which otherwise would become enforceable on the happening of certain events. On the other hand, if an action has been commenced, the law existing at the time of its commencement must, in the absence of provision to the contrary, decide the rights of the parties (*Hitchcock v. Way* (1837), 6 Ad. & El. 943, 951; *Restall v. London and South Western Rail. Co.* (1868), L. R. 3 Exch. 141; *Oldreeve v. Puckridge* (1867), L. R. 3 Exch. 145; see, *contra*, *Butcher v. Henderson* (1868), L. R. 3 Q. B. 335). As to the retrospective action of criminal statutes, see *R. v. Austin*, [1913] 1 K. B. 551, 556, C. C. A.; *R. v. O'Connor*, [1913] 1 K. B. 557, C. C. A.

(*e*) *Reynolds v. A.-G. for Nova Scotia*, [1896] A. C. 240, P. C.; *Starey v. Graham*, [1899] 1 Q. B. 406, 411.

(*f*) *Couch v. Jeffries* (1769), 4 Burr. 2460; *Wright v. Hale* (1860), 6 H. & N. 227, 232; *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84, 91.

(*g*) *Hurst v. Hurst* (1882), 21 Ch. D. 278, 295, C. A.; *A.-G. v. Theobald* (1890), 24 Q. B. D. 557, 560; but see *Hitchcock v. Way*, *supra*, and the other cases cited in note (*d*), *supra*.

(*h*) *Foster v. Pritchard* (1857), 2 H. & N. 151.

(*i*) *Abbott v. Minister for Lands*, [1895] A. C. 425, P. C.

(*k*) *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, *per* Lord CAIRNS, L.C., at p. 752; *Burn v. Carvalho* (1834), 1 Ad. & El. 883, 895, Ex. Ch. (distinction drawn between the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 30 and 41); *Wright v. Hale*, *supra*; *Pinhorn v. Souster* (1852), 8 Exch. 138 (both cases under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76)); *Watton v. Watton* (1866), L. R. 1 P. & D. 227, 229; *Ings v. London and South Western Rail. Co.* (1868), L. R. 4 C. P. 17; *Wood v. Hunt* (1868), L. R. 4 C. P. 18, n.; *Kimbray v. Draper* (1868), L. R. 3 Q. B. 160 (cases under the County Courts Act, 1867 (30 & 31 Vict. c. 142)); *Hurst v. Hurst* (1882), 21 Ch. D. 278, 295, C. A.; *Singer v. Hasson* (1884), 50 L. T. 326; *Dibb v. Walker*, [1893] 2 Ch. 429 (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6)); *The Ydun*, [1899] P. 236, C. A. (Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)); *Re Chaffers, Ex parte A.-G.* (1897), 76 L. T. 351 (Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51)); *R. v. Chandra Dharma*, [1905] 2 K. B. 335, C. C. R. (Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5 (1), as extended by the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 27); *Batt v. Mattinson* (1900), 82 L. T. 800

SECT. 2.
Retro-
spective
Effect.

Upon the principle just enunciated declaratory statutes passed to remedy defects in form are retrospective (*l*), although declaratory statutes do not reopen decided cases (*m*).

A right of appeal is not for this purpose a mere matter of procedure (*n*).

SECT. 3.—*Local Limits of Operation.*

Territorial
limits.

309. The operation of a statute *primâ facie* extends to the whole of the United Kingdom, and not to any place outside it (*o*). If the intention is either to limit the operation to a part of the United Kingdom, or to extend the operation beyond, there should be express words to that effect (*p*).

Persons to
whom statutes
apply.

310. As to persons, a statute applies to all persons in the United Kingdom, or in the King's dominions (if the language can be so construed (*q*)), including foreigners who during their

(Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19); compare *Evans v. Morris*, [1913] W. N. 58.

(*l*) Thus, the Poor Relief (Settlement) Act, 1831 (1 Will. 4, c. 18), s. 2, operated retrospectively on the Poor Relief (Settlement) Act, 1825 (6 Geo. 4, c. 57) (*R. v. Dursley (Inhabitants)* (1832), 3 B. & Ad. 465, 469); and the Bastardy Act, 1845 (8 & 9 Vict. c. 10), on the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101) (*R. v. Milner* (1845), 14 L. J. (M. C.) 157; *R. v. Cheshire Justices* (1845), 3 Dow. & L. 337); see also *A.-G. v. Hertford (Marquis)* (1849), 3 Exch. 670, 685; *A.-G. v. Theobald* (1890), 24 Q. B. D. 557; *Jones v. Bennett* (1890), 63 L. T. 705; *Re Lovell and Collard's Contract*, [1907] 1 Ch. 249; *R. v. Austin*, [1913] 1 K. B. 551, C. C. A.

(*m*) *Eyre v. Wynn-Mackenzie*, [1896] 1 Ch. 135, C. A.; *Day v. Kelland*, [1900] 2 Ch. 745, 748, C. A.

(*n*) *Colonial Sugar Refining Co. v. Irving*, [1905] A. C. 369, P. C.

(*o*) *R. v. Jameson*, [1896] 2 Q. B. 425, 430; see, further, *Cope v. Doherty* (1858), 2 De G. & J. 614, C. A.; *R. v. Mallow Union Guardians* (1860), 12 I. C. L. R. 35, 40; *Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522, 532, C. A.; *Tomalin v. Pearson (S.) & Son, Ltd.*, [1909] 2 K. B. 61, C. A.; *Swift v. A.-G. for Ireland*, [1912] A. C. 276.

(*p*) *R. v. Jameson*, *supra*, which particularly considers the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), as directed to "any person within the limits of His Majesty's Dominions." If an Act is to apply to England and Wales only, the extent clause runs: "This Act shall not apply to Scotland or Ireland." The Isle of Man and the Channel Islands are not parts of the United Kingdom, and if it is intended that an Act should apply to them, the application must be made expressly; see title DEPENDENCIES AND COLONIES, Vol. X., p. 573, and compare title CONSTITUTIONAL LAW, Vol. VI., p. 388. Where an Act is to be applied to the Channel Islands the formula runs: "This Act shall apply to the Channel Islands, and the Royal Courts thereof shall register it accordingly." While all statutes passed between 1704 and 1800 apply *primâ facie* to England and Scotland, the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), did not extend to Ireland English or British statutes passed before 1800 (*Lane v. Bennett* (1836), 1 M. & W. 70). Such an Act, on the principle laid down (see p. 159, *ante*), was not retrospective, and where such extension has been desired, special legislation has been necessary for the purpose. Pre-Union Scottish Acts have been revised by the Statute Law Revision (Scotland) Act, 1906 (6 Edw. 7, c. 38).

(*q*) *Rosseter v. Cahlmann* (1853), 8 Exch. 361; *R. v. Mallow Union Guardians*, *supra*; *Callender, Sykes & Co. v. Lagos (Colonial Secretary)*, *Williams v. Davies*, [1891] A. C. 460, P. C.; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Trial of Russell (Earl)*, [1901] A. C. 446.

residence there owe him allegiance (*r*), and to the King's subjects all over the world, wherever they are (*s*). When Parliament uses general words it is dealing only with persons or things over which it has properly jurisdiction (*t*); it would be futile to presume to exercise a jurisdiction which it could not enforce (*u*).

311. *Pari ratione* an English statute binds all landed property within the realm, to whomsoever belonging (*w*), and the movable property of one domiciled in England (*a*). It cannot, however, be applied to the property of foreigners so long as it is situated abroad (*b*), or to land or other immovable property without the realm (*c*).

312. In reference to fiscal statutes imposing duties in respect of the passing of property on death, it has been laid down that, in general, if a British-born subject or a foreigner dies domiciled out of the United Kingdom the whole of his personal estate is to be regarded as situate in the country of domicile, and therefore exempt from the operation of such a statute, but that if such a person dies domiciled here his personal assets, wherever situate, are subject to its operation (*d*).

SECT. 3.
Local
Limits of
Operation.

Property
to which
statutes
apply.

Fiscal
statutes.

(*r*) *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815, 955; *Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522, 532, C. A.

(*s*) *Trial of Russell* (Earl), *supra*, at p. 448.

(*t*) *Jefferys v. Boosey, supra*; *Wallace v. A.-G., Jeves v. Shadwell* (1865), 1 Ch. App. 1, 9; *Re Sawers, Ex parte Blain, supra*; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123, 131, C. A.; *Colquhoun v. Heddon* (1890), 25 Q. B. D. 129, 135, C. A.; *Re A. B. & Co.*, [1900] 1 Q. B. 541, 544, C. A.; affirmed, *sub nom. Cooke v. Vogeler (Charles A.) Co.*, [1901] A. C. 102. The Foreign Jurisdiction Acts have generally been careful to limit their provisions to British subjects, but incidentally the rights or privileges of foreigners may be affected; see Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 2, asserting jurisdiction over persons resorting to countries without regular governments; see also title CONFLICT OF LAWS, Vol. VI., pp. 448 *et seq.*

(*u*) "It is by international law an absolute nullity" (*Sirdar Gurdyal Singh v. Faridkote (Rajah)*, [1894] A. C. 670, P. C., *per* Lord SELBORNE, at p. 684). Though if it pleased Parliament to make laws as to foreigners out of the jurisdiction, it would, apparently, be the duty of courts of justice to execute them (*Cail v. Papayanni, The "Amalia"* (1863), 1 Moo. P. C. C. (N. S.) 471, *per* Dr. LUSHINGTON, at p. 474). A particular statute may contemplate its benefits being enjoyed outside the jurisdiction, as, for instance, by spiritual officers under the Bishops in Foreign Countries Act, 1841 (5 Vict. c. 6) (see title ECCLESIASTICAL LAW, Vol. XI., p. 498), and compensation under a Workmen's Compensation Act, by the dependant of an alien (*Krzus v. Crow's Nest Pass Coal Co., Ltd.*, [1912] A. C. 590, P. C.).

(*w*) *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Freke v. Carbery (Lord)* (1873), L. R. 16 Eq. 461, 466; *Duncan v. Lawson* (1889), 41 Ch. D. 394, 398.

(*a*) *Freke v. Carbery (Lord)*, *supra* (where Lord SELBORNE, L.C., prefers the distinction between land and movables to the conventional one between realty and personalty). Mortgages on land, as well as leaseholds, have been held subject to the *lex situs* (*Re Hoyles, Row v. Jagg*, [1910] 2 Ch. 333; affirmed, [1911] 1 Ch. 179, C. A.; see title CONFLICT OF LAWS, Vol. VI., pp. 196 *et seq.*; and compare title MORTGAGE, Vol. XXI., p. 183). A simple contract debt, on the other hand, is within the area of the local jurisdiction within which the debtor for the time being resides (*Stamps Commissioner v. Hope*, [1891] A. C. 476, P. C.).

(*b*) *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524, 531; *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, 499.

(*c*) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(*d*) *Winans v. A.-G.*, [1910] A. C. 27, 39; see title ESTATE AND OTHER

SECT. 3.

Local
Limits of
Operation.

Other fiscal statutes, such as the Income Tax Acts, cannot be construed by the light of decisions as to death duties (*e*); but some limitation of their scope may be arrived at by considering the machinery provided for enforcing them (*f*).

Criminal
statutes.

313. Statutes dealing with crime are presumed to apply to crimes committed in the United Kingdom (*g*). Such presumption may be displaced in the case of a statute forbidding a crime which, though intended to be carried out in another part of the King's dominions, is initiated here, or which, though initiated elsewhere, is intended to take effect here (*h*). Certain offences committed by British subjects in foreign states are by statute made cognisable and punishable in England (*i*) and in any British possession (*k*).

Territorial
waters.

314. The territorial sovereignty of the Crown extends to territorial waters (*l*).

Colonial
statutes.

315. The Crown having power to create a local legislature in a dependency, a statute enacted by such local legislature has, as to matters within its competence, the operation and force of sovereign legislation (*m*), and any matter lawfully enacted by it must, apparently, be recognised as having statutory authority here (*n*).

SECT. 4.—*Effect on The Crown.*When Crown
bound.

316. The Crown is not bound by the provisions of any statute (*o*), unless directly or by necessary implication referred

DEATH DUTIES, Vol. XIII., p. 192. As to the construction of such statutes in reference to particular duties, see *ibid*.

(*e*) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, 511.

(*f*) *Ibid.*, at p. 506. As to the construction of the Income Tax Acts, see title INCOME TAX, Vol. XVI., pp. 607 *et seq*.

(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 279: It follows from this that a company registered in England may acquire a concession to conduct lotteries in Persia, although the latter would infringe the Lotteries Acts if carried on here (*Macuse v. Persian Investment Corporation* (1890), 44 Ch. D. 306).

(*h*) *R. v. Briston Prison (Governor), Ex parte Savarkar*, [1910] 2 K. B. 1056, C. A. (where the operation of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), is considered); compare the Larceny Act, 1896 (59 & 60 Vict. c. 52); and see title EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., pp. 427, 428.

(*i*) As, for instance, homicide under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 9.

(*k*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 6; see title CONSTITUTIONAL LAW, Vol. VI., pp. 453, 454.

(*l*) Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 7, passed to resolve doubts which had arisen in *R. v. Keyn* (1876), 2 Ex. D. 63, C. C. R.; see title WATERS AND WATERCOURSES.

(*m*) *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 20, Ex. Ch.; and see title CONFLICT OF LAWS, Vol. VI., p. 249.

(*n*) *Phillips v. Eyre*, *supra*. It follows, however, on principle (though the matter has been set at rest by a declaratory statute (Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2)) that any Act of a legislature so created which is repugnant to one of the Imperial Parliament must be *pro tanto* inoperative; but see *R. v. Marais* (1901), 85 L. T. 363, P. C.

(*o*) Certainly not by local and personal Acts (*Mersey Docks and Harbour Board v. Lucas* (1881), 51 L. J. (Q. B.) 114, 115, C. A.), or by colonial statutes (*Théberge v. Laundry* (1876), 2 App. Cas. 102, 106, P. C.; *Cushing v. Dupuy* (1880), 5 App. Cas. 409, 414, 419, P. C.; *Re Wi Matua's Will*, [1908] A. C. 448, P. C.).

to (p). It is, however, entitled to the benefit of any statute though not named (q).

SECT. 4.
Effect on
the Crown.

(p) *R. v. Cook* (1790), 3 Term Rep. 519, 521. It has not always been easy to determine when the Crown is bound by necessary implication. The following rules seem to be laid down in old writers and reports:—(i.) General words do not bar the King of any prerogative, estate, right, title, or interest, which is sole and inseparable to his person (*Magdalen College Case* (1615), 11 Co. Rep. 66 b, 74 b); but in things which are not incident solely and inseparably to his person, but belong to every subject, and may be severed, he may be bound (*Custom Case* (1582), 12 Co. Rep. 17, 18). (ii.) He is bound by an Act made for the public good, and for the prevention of injury to the public (Com. Dig. tit. Parliament (H. 1); Bac. Abr. tit. Prerogative (E.) 5). (iii.) He is bound by an Act made to suppress wrong, though not named, for he is the fountain of justice, and common right, and being God's Lieutenant cannot do a wrong (*Magdalen College Case*, *supra*, at p. 72 a; and see *R. v. Wright* (1834), 1 Ad. & El. 434, 446, Ex. Ch.). (iv.) He is bound by general words which tend to perfect the will of a founder or donor, and provide for the safety of inheritances (*Magdalen College Case*, *supra*, at p. 73 a; *Willion v. Berkley* (1561), Plowd. 223, 236). (v.) He is bound by general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of learning, and for the relief of the poor (*Case of Ecclesiastical Persons* (1601), 5 Co. Rep. 14 b; *Magdalen College Case*, *supra*, at p. 70 b; *R. v. Armagh* (Archbishop) (1722), 1 Str. 516). (vi.) He is bound when he claims in his natural capacity as heir of a subject *per formam doni* (*Case of a Fine* (1604), 7 Co. Rep. 32 a).

In later times the Crown was held not to be bound in *A.-G. v. Newman* (1815), 1 Price, 438 (where a restrictive proviso on right of the Crown to proceed for arrears of duties had not been re-enacted by a repealing and amending statute); *Smithett v. Blythe* (1830), 1 B. & Ad. 509 (where the obligation to pay lighthouse tolls in respect of post packets was negatived, although the lighthouse Act contained an exemption in favour of ships of war only); *Weymouth Corporation v. Nugent* (1865), 6 B. & S. 22 (harbour dues); *A.-G. v. Donaldson* (1842), 10 M. & W. 117, 123 (distress levied for rates in Royal palace); *R. v. Bayly* (1841), 1 Dr. & War. 213 (stat. (1721) 8 Geo. 1, c. 4 (Irish)); *Mersey Docks and Harbour Board v. Cameron*, *Jones v. Mersey Docks and Harbour Board* (1865), 11 H. L. Cas. 443 (Poor Relief Act, 1601 (43 Eliz. c. 2)); *R. v. McCann* (1868), L. R. 3 Q. B. 141 (Commissioners of Works rateable in respect of a bridge); *A.-G. v. Edmunds* (1870), 22 L. T. 667 (Debtors Act, 1869 (32 & 33 Vict. c. 62)); *A.-G. v. Constable* (1879), 4 Ex. D. 172 (Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 24 (5), 34); *Re Bonham*, *Ex parte Postmaster-General* (1879), 10 Ch. D. 595, C. A. (Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)); *Coomber v. Berks Justices* (1883), 9 App. Cas. 61 (Income Tax Acts, 1842 (5 & 6 Vict. c. 35), and 1853 (16 & 17 Vict. c. 34)); *Northam Bridge Co. v. R.* (1886), 55 L. T. 759 (payment of tolls); *R. v. Kent Justices* (1889), 24 Q. B. D. 181 (Weights and Measures Act, 1878 (41 & 42 Vict. c. 49)); *Perry v. Eames*, *Salaman v. Eames*, *Mercers' Co. v. Eames*, [1891] 1 Ch. 658 (Prescription Act, 1832 (2 & 3 Will. 4, c. 71, s. 3)); followed in *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, C. A.; *Hornsey Urban Council v. Hennell*, [1902] 2 K. B. 73; *Gorton Local Board v. Prison Commissioners* (1887), [1904] 2 K. B. 165, n. (Public Health Act, 1875 (38 & 39 Vict. c. 55), not applicable to land acquired and used for purposes of the Crown).

But the Crown has been held bound in *De Bode (Baron) v. R.* (1848), 13 Q. B. 364, 379, Ex. Ch. (Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), which constituted a court to try writs of error); *Westminster Vestry v. Hoskins*, [1899] 2 Q. B. 474 (buildings of volunteer corps subject to the sanitary provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120)); doubted in *Hornsey Urban Council v. Hennell*, *supra*, and in *Stewart v. Thames Conservators*, [1908] 1 K. B. 893, where, upon the construction of their private Act, it was held that the Crown

(q) For note (q), see p. 166, *post*.

SECT. 4.
Effect on
the Crown.

Rules of
construction.

Exercise of
powers.

Intention
of subsequent
statute.

The Crown for this purpose means not only the King personally, but also the officers of state when acting on behalf of the Crown in the discharge of executive duties (*r*), whether in the United Kingdom or anywhere within British dominions (*s*).

317. Statutes made for the benefit of the Crown must be beneficially construed (*t*), and those restraining the prerogative must be strictly construed (*u*).

318. The question has arisen whether a power given to the Crown by statute is exhausted by a single exercise of it (*w*). Where the power is conferred by a statute passed since 1889, the power may be exercised from time to time as occasion requires (*a*). If such a statute confers a power to make rules, regulations, and bye-laws, this power, unless the contrary intention appears, includes a power to rescind, revoke, amend or vary them (*b*).

SECT. 5.—Effect on Existing Law.

319. The common law gives place to statute law, and an older statute to one more recent, where the language and the objects of the latter are inconsistent with those of the former (*c*). Even could not exact from the respondents payment of income tax. It is, however, usual in modern statutes to mention the Crown specifically when it is to be bound; see, for instance, Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 16; and see, generally, titles CONSTITUTIONAL LAW, Vol. VI., p. 409; METROPOLIS, Vol. XX., p. 463.

(*q*) *Willion v. Berkley* (1561), Plowd. 223, 240; *Case of a Fine* (1604), 7 Co. Rep. 32 a; compare title CONSTITUTIONAL LAW, Vol. VI., p. 409.

(*r*) *Gidley v. Palmerston (Lord)* (1822), 1 State Tr. (N. S.) 1263; *Re West London Commercial Bank* (1888), 38 Ch. D. 364; *A.-G. v. Leonard* (1888), 38 Ch. D. 622 (Crown's priority as creditor); *Dunn v. Macdonald*, [1897] 1 Q. B. 555, C. A. It has been held, however, that the Commissioners of Works, who are incorporated for a particular purpose (*Re Wood's Estates, Ex parte Works and Buildings Commissioners* (1886), 31 Ch. D. 607, 621, C. A.), and the Corporation of Trinity House (*Gilbert v. Trinity House Corporation* (1886), 17 Q. B. D. 795) do not represent the Crown. As to the principles upon which servants of the Crown may be sued personally on their contracts, see *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781, per PHILLIMORE, J., at p. 789; title CONSTITUTIONAL LAW, Vol. VII., pp. 5 *et seq.*

(*s*) *Maritime Bank of Canada (Liquidators) v. New Brunswick (Receiver-General)*, [1892] A. C. 437, P. C.; *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179, P. C.; *A.-G. for New South Wales v. Intestate Estates Curator*, [1907] A. C. 519, P. C. In virtue of special enactments, however, the proper officer of the Crown may often be sued (*A.-G. of the Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192, P. C.).

(*t*) Com. Dig. tit. Parliament (R. 21).

(*u*) *A.-G. of British Columbia v. A.-G. of Canada* (1889), 14 App. Cas. 295, P. C. Thus, a section of an Act giving the Crown an option to purchase mines of precious metals from a subject at prices mentioned does not, if not exercised, deprive the Crown of its prerogative right to such metals (*A.-G. v. Morgan*, [1891] 1 Ch. 432, C. A.); compare title CONSTITUTIONAL LAW, Vol. VII., pp. 116 *et seq.*

(*w*) Thus, in face of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 1, it was thought necessary, when it was desired to extend the dignities of the Crown, to pass the Royal Titles Act, 1876 (39 & 40 Vict. c. 10).

(*a*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (1); compare p. 131, *ante*.

(*b*) *Ibid.*, s. 32 (3). It should be noticed that the words "order, warrant, scheme, letters patent," which occur in *ibid.*, s. 31, do not occur here; see p. 125, *ante*.

(*c*) *Leges posteriores priores abrogant: contrarium est multiplex* (2 Co. Inst.

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though the words of a later statute taken strictly and grammatically repeal a former statute, they ought not to be so construed where it is clear that the intention of Parliament is that they should not be so construed (*d*); and no statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied (*e*). *Primâ facie* a later statute, which is supplementary to and intended to be read with an earlier statute dealing with the same matter, is not of wider application than the earlier statute (*f*).

320. Affirmative statutes do not repeal precedent affirmative statutes unless they are contrary or repugnant to them (*g*); for Affirmative statutes.

685); see also *Foster's Case* (1614), 11 Co. Rep. 56 b, 62 b; *Bury v. Cherryholm* (1876), 1 Ex. D. 457, *per* BRAMWELL, B., at 461; and the cases cited in notes (*d*), (*e*), p. 170, *post*. Upon this principle no rules of practice made by a court under its common law powers can nullify the express object of a statute (*R. v. Pawlett* (1873), L. R. 8 Q. B. 491; *Handley v. Handley*, [1891] P. 124, 127, C. A.; *R. v. Bird, Ex parte Needes*, [1898] 2 Q. B. 340). If a later statute again describes an offence created by a former statute and affixes a different punishment, the prosecutor must proceed under the later statute (*Michell v. Brown* (1858), 1 E. & E. 267, 274; approved in *Whitehead v. Smithers* (1877), 2 C. P. D. 553, 557); see pp. 179, 189, note (*b*), 198, *post*. As to the effect of statutory enactments on custom, see title CUSTOM AND USAGES, Vol. X., pp. 247, 248.

(*d*) *Williams v. Pritchard* (1790), 4 Term Rep. 2, *per* Lord KENYON, C.J., at p. 3, approved in *Re St. Pancras (Parish), R. v. Poor Law Commissioners* (1837), 6 Ad. & El. 1, 9; *Re Whitechapel Union, R. v. Poor Law Commissioners* (1837), 6 Ad. & El. 34, 48.

(*e*) Thus, the conditions attached to the Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), are not affected by the general power given by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1), to married women to dispose of their separate property by will (*Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589); nor do the general words of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 101, alter the mode of trial on the Admiralty side of county courts (*The "Theodora,"* [1897] P. 279, 284). See also *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104, 123, 130; *Glaholm v. Barker* (1866), 1 Ch. App. 223; *R. v. Morris* (1867), L. R. 1 C. C. R. 90, 95; *Hill v. Hall* (1876), 1 Ex. D. 411; *Re Cuno, Mansfield v. Mansfield* (1889), 43 Ch. D. 12, 17, C. A.; *Kutner v. Phillips*, [1891] 2 Q. B. 267, 272; *Wandsworth Board of Works v. Pretty*, [1899] 1 Q. B. 1; *Uckfield Rural Council v. Crowborough District Water Co.*, [1899] 2 Q. B. 664; *Burge v. Ashley and Smith, Ltd.*, [1900] 1 Q. B. 744, 750, C. A.; *London County Council v. Wandsworth and Putney Gas Co.* (1900), 82 L. T. 562; *Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595; *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (1903), 88 L. T. 772; *Headland v. Coster*, [1905] 1 K. B. 219, 227, C. A.; *Moran & Son, Ltd. v. Marsland*, [1909] 1 K. B. 744.

(*f*) *Re Perrin* (1842), 2 Dr. & War. 147, 161; *Minet v. Leman* (1855), 20 Beav. 269; *Cox v. Andrews* (1883), 12 Q. B. D. 126.

(*g*) 2 Co. Inst. 200; *Foster's Case* (1614), 11 Co. Rep. 56 b, 61 a; *Middleton v. Crofts* (1736), 2 Atk. 650, 675; *R. v. Pugh* (1779), 1 Doug. (K. B.) 188 (where the judgment is based simply upon the later statute being an affirmative one); compare *Smithett v. Blythe* (1830), 1 B. & Ad. 509, where it was held that an exception of ships of war from the operation of a harbour statute does not impliedly render subject to it packet boats subsequently acquired by the Crown; *Leicester Corporation v. Burgess* (1833), 5 B. & Ad. 246, where it was held that a general statute permitting the general sale of beer by retail does not supersede a custom of a borough requiring an alehouse keeper to be a burgess; *R. v. Johnson* (1839), 6 Cl. & Fin. 41, H. L.; *Escott v. Mastin* (1842), 4 Moo.

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without negative or repealing words, expressed or implied, the intention of Parliament to alter what already existed is not apparent, and it is always to be presumed that there was no such intention (*h*). Where, however, such intention is evident, as by the introduction of that which is inconsistent with the law as it previously existed, either affirmative or negative language may directly or impliedly repeal what is contrary to the purview of the new statute (*i*).

General law.

321. The general law of the country is not altered by special legislation made without particular reference to it (*k*), though a statute passed for a particular purpose must so far as that purpose extends override general enactments (*l*). A general statute may be repealed *pro tanto* by a special statute, an exception being made out of or a condition being imposed upon its general provisions (*m*); or a prior enactment may indirectly be rendered inoperative without actual repeal (*n*). The same principle is applicable where it is provided that two statutes are to be read together (*o*), or one is incorporated by reference in the other (*p*).

P. C. C. 104, 131; *Dakins v. Seaman* (1842), 9 M. & W. 777; *Re Leake, Ex parte Warrington* (1853), 3 De G. M. & G. 159, C. A.; *Mahony v. Wright* (1859), 10 I. C. L. R. 420; *Parsons v. Tinling* (1877), 2 C. P. D. 119, *per* GROVE, J., at p. 123.

(*h*) *Hill v. Hall* (1876), 1 Ex. D. 411, 414; *Chorlton v. Tonge* (1871), L. R. 7 C. P. 178, 183; *Ebbs v. Boulnois* (1875), 10 Ch. App. 479, 484; *R. v. Oastler and Mews* (1880), 50 L. J. (M. C.) 4, C. A.; *Lybbe v. Hart* (1885), 29 Ch. D. 8, 15, C. A.; *Leach v. R.*, [1912] A. C. 305, *per* Lord LOREBURN, L.C., and Lord HALSBURY, at p. 310.

(*i*) *London Corporation v. Gatford* (1675), 2 Mod. Rep. 39; *Harcourt v. Fox* (1694), 1 Show. 520; *Ex parte Carruthers* (1807), 9 East, 44; *Green v. R.* (1876), 1 App. Cas. 513; *Fulham Guardians v. Thanet Guardians* (1881), 7 Q. B. D. 539, C. A.; *Dobbs v. Grand Junction Waterworks Co.* (1883), 9 App. Cas. 49, 58.

(*k*) *Denton v. Manners* (Lord John) (1858), 2 De G. & J. 675, C. A.; *Galsworthy v. Durant* (1860), 6 Jur. (N. S.) 743; *Thames Conservators v. Hall* (1868), L. R. 3 C. P. 415; approved in *Dodds v. Shepherd* (1876), 1 Ex. D. 75, *per* BRAMWELL, B., at p. 78; *Newcastle (Duke) v. Morris* (1870), L. R. 4 H. L. 661; *Garnet v. Bradley* (1877), 2 Ex. D. 349, 351, 352, C. A.; *The Clan Gordon* (1882), 7 P. D. 190.

(*l*) *Weld v. London and South-Western Rail. Co.* (1863), 8 L. T. 13; *City and South London Rail. Co. v. London County Council*, [1891] 2 Q. B. 513, C. A.; *London County Council v. London School Board*, [1892] 2 Q. B. 606; *Surrey Commercial Dock v. Bermondsey Corporation*, [1904] 1 K. B. 474; *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371; *Bessemer & Co., Ltd. v. Gould* (1912), 76 J. P. 349.

(*m*) *Weld v. London and South-Western Rail. Co.*, *supra*; *Mount v. Taylor* (1868), L. R. 3 C. P. 645; *Levi v. Sanderson*, *Mirfin v. Attwood* (1869), L. R. 4 Q. B. 330, 340; *London, Chatham and Dover Rail. Co. v. Wandsworth Board of Works* (1873), L. R. 8 C. P. 185, 189; *Garnett v. Bradley* (1878), 3 App. Cas. 944, 967.

(*n*) *Pilkington v. Cooke* (1847), 16 M. & W. 615, 625; *Shrewsbury (Earl) v. Scott* (1859), 6 C. B. (N. S.) 1, 151; *Daw v. Metropolitan Board of Works* (1862), 12 C. B. (N. S.) 161, 167; *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573, 578.

(*o*) *A.-G. v. Great Eastern Rail. Co.* (1872), 7 Ch. App. 475, 482; *London, Chatham and Dover Rail. Co. v. Wandsworth Board of Works*, *supra*, at p. 189; *Crocker v. Knight*, [1892] 1 Q. B. 702, C. A.

(*p*) *Gaslight and Coke Co. v. Hardy* (1886), 17 Q. B. D. 619, 621, C. A. As to the effect of incorporating a statute which is itself subsequently

322. Where in the same or a subsequent statute a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply (*q*); and it is not to be presumed that a general enactment is intended to interfere with existing customs (*r*). The earlier and the later, whether custom or statute, must be reconciled if possible (*s*), though an intention to the contrary, if manifest, is operative (*t*).

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Existing
Law.

General
enactments.

323. A statute giving a new remedy does not of itself, and necessarily, destroy previously existing rights and remedies to which it does not refer (*a*). It may, however, appear from the statute that Parliament did not intend the two rights to exist together (*b*); and there is a presumption that a statute is intended to operate by way of a repeal if it imposes a different penalty for the same offence (*c*),

New remedy.

incorporated in another statute, see *Commercial Gas Co. v. Scott* (1875), L. R. 10 Q. B. 400; as to incorporation, see also *Mather v. Brown* (1876), 1 C. P. D. 596.

(*q*) *Generalia specialibus non derogant* (*Gregory's Case* (1596), 6 Co. Rep. 19 b); see also *Lyn v. Wyn* (1662), O. Bridg. 122, 127; *London and Blackwall Rail. Co. v. Limehouse Board of Works* (1856), 3 K. & J. 123, 127; *Morisse v. Royal British Bank* (1856), 1 C. B. (N. S.) 67; *Mahony v. Wright* (1859), 10 I. C. L. R. 420; *Fitzgerald v. Champneys* (1861), 2 Hem. & M. 31; *Thames Conservators v. Hall* (1868), L. R. 3 C. P. 415, 421; *Thorpe v. Adams* (1871), L. R. 6 C. P. 125, 135; *R. v. Champneys* (1871), L. R. 6 C. P. 384; *Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395, 410; *Re Turner, Ex parte Attwater* (1877), 5 Ch. D. 27, C. A., per BRAMWELL, J.A., at p. 32; *Garnett v. Bradley* (1878), 3 App. Cas. 944, 967; *Seward v. "Vera Cruz"* (1884), 10 App. Cas. 59, 68; *Hasker v. Wood* (1885), 54 L. J. (Q. B.) 419, C. A.; *Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589; *Reeve v. Gibson*, [1891] 1 Q. B. 652, C. A.; *Great Western Rail. Co. v. Cefn Cribwr Brick Co.*, [1894] 2 Ch. 157; *Tunbridge Wells Corporation v. Baird*, [1896] A. C. 434; *Barker v. Edgar*, [1898] A. C. 748, P. C.; *Ashton-under-Lyne Corporation v. Pugh*, [1898] 1 Q. B. 45, C. A.; *Bostock v. Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A.

(*r*) *Green v. R.* (1876), 1 App. Cas. 513; *Garnett v. Bradley*, *supra*.

(*s*) *Pollock v. Lands Improvement Co.* (1888), 37 Ch. D. 661; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843, 865, C. A.; *Uckfield Rural Council v. Crowborough District Water Co.*, [1899] 2 Q. B. 664.

(*t*) *R. v. Hogg* (1787), 1 Term Rep. 721; *Hayden v. Carroll* (1796), 3 Ridg. Parl. Rep. 545, 592, 599; *Dunbar Magistrates v. Roxburgh (Duchess-Dowager)* (1835), 3 Cl. & Fin. 335, 354, H. L.; *Bramston v. Colchester Corporation* (1856), 6 E. & B. 246; *Daw v. Metropolitan Board of Works* (1862), 12 C. B. (N. S.) 161; *Great Central Gas Consumers' Co. v. Clarke* (1863), 13 C. B. (N. S.) 838; *Duncan v. Scottish North-Eastern Rail. Co.* (1870), L. R. 2 Sc. & Div. 20; *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573; *Charnock v. Merchant*, [1900] 1 Q. B. 474; *London Corporation v. Netherlands Steamboat Co.*, [1906] A. C. 263, 272.

(*a*) *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 23, C. A.; *Seward v. "Vera Cruz"* (1884), 10 App. Cas. 59, 68; *East London Rail. Co. v. Thames Conservators* (1904), 68 J. P. 302, 306; see *R. v. Jackson* (1775), 1 Cowp. 297; *Robinson v. Emerson* (1866), 4 H. & C. 352, 355; *Waterlow v. Dobson* (1857), 8 E. & B. 585; and compare pp. 188 *et seq.*, *post*.

(*b*) *O'Flaherty v. M'Dowell* (1857), 6 H. L. Cas. 142, 157; compare *Harcourt v. Fox* (1693), 1 Show. 506, 520; *Ex parte Caruthers* (1807), 9 East, 44.

(*c*) *Henderson v. Sherborne* (1837), 2 M. & W. 236, 239; *A.-G. v.*

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Existing
Law.Special
statutes.

or introduces special conditions altering the quality of an offence, or the procedure in relation to it (*d*).

324. A special statute is not repealed by a subsequent special statute, unless there are words which operate expressly or by necessary implication to repeal it (*e*).

SECT. 6.—*Operation of Various Kinds of Statutes.*Classes of
statutes.

325. Every statute is made either for the purpose of effecting a change in the law or of declaring the existing law (*f*). What was intended by Parliament in each particular enactment will not necessarily appear from introductory words, for the mere use of words which in their literal signification would import that a statute was declaratory does not render it so if in effect it introduces new law (*g*).

Scope of
declaratory
statutes.

326. A declaratory statute to the effect that the construction placed by an English court upon a section of an English Act is erroneous affects the subsequent construction of a corresponding section in an Act applicable to Scotland only (*h*), and it is submitted that the converse is also true.

Mandatory
and directory
statutes.

327. A distinction is commonly drawn between mandatory and directory statutes, and it is said of the former that they must be fulfilled exactly, but the latter substantially only (*i*).

Upon the principle that the ordinary sense of enacting words

Lockwood (1842), 9 M. & W. 378, 391; *Youle v. Mappin* (1861), 30 L. J. (M. C.) 234, 237. The presumption may be displaced by express words (*Sims v. Pay* (1888), 16 Cox, C. C. 609).

(*d*) As in *R. v. Worcestershire Justices* (1816), 5 M. & S. 457, where a right of appeal was limited; *Stewart v. Greaves* (1842), 10 M. & W. 711, where the common law right of a creditor to sue individual members of a banking corporation was held to be displaced by a statutory provision that the public officer of the company should be sued; *Michell v. Brown* (1858), 1 E. & E. 267, 274, where Lord CAMPBELL, C.J., pointed out that if a later statute altered the quality of an offence by making it a misdemeanour instead of a felony, or *vice versâ*, the offence could not be proceeded against under the earlier statute.

(*e*) *Purnell v. Wolverhampton New Waterworks Co.* (1861), 10 C. B. (N. S.) 576, per ERLE, C.J., at p. 587; *Birkenhead Docks (Trustees) v. Laird and The Birkenhead Dock Co.* (1853), 4 De G. M. & G. 732, C. A.; *Wyatt v. Gems*, [1893] 2 Q. B. 225; *London and North Western Railway v. Walker*, [1903] A. C. 289; *East London Rail. Co. v. Thames Conservators* (1904), 68 J. P. 302, 306. For a repeal by implication, see *Sheffield Corporation v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

(*f*) 2 Co. Inst. 685; 1 Bl. Com. 86; *Ely (Dean and Chapter) v. Bliss* (1842), 5 Beav. 574, 582; *Alexander v. Newman* (1846), 2 C. B. 122, 136.

(*g*) *Harding v. Commissioners of Stamps for Queensland*, [1898] A. C. 769, 775, P. C.

(*h*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754 (where a declaratory statute as to the effect of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 6, was held also to govern the construction of the corresponding Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), s. 11 (now repealed)).

(*i*) *R. v. Sparrow* (1740), 2 Stra. 1123; *R. v. Loxdale* (1758), 1 Burr. 445, 447; *Woodward v. Sarsons* (1875), L. R. 10 C. P. 733, 746; and see title NEGLIGENCE, Vol. XXI., pp. 466, 467.

is primarily to be adhered to (*k*), provisions which appear on the face of them to be imperative cannot without strong reason be held to be directory (*l*); nor are those which are susceptible of a permissive meaning to be construed in the first instance as imperative (*m*). A duty, however, may exist, outside and apart from the enacting words (*n*), whereby those on whom a faculty or power is conferred by the statute are under an obligation to exercise it (*o*). The expressions “shall and may” (*p*), “shall be empowered” (*q*), “it shall be lawful for” (*r*), and “may” simply (*s*), have for this reason, though primarily permissive, been, in certain circumstances, treated as mandatory.

SECT. 6.
Operation
of Various
Kinds of
Statutes.

Mandatory
words.

(*k*) See p. 147, *ante*.

(*l*) *Salford Corporation v. Ackers* (1846), 16 M. & W. 85; *Bowman v. Blyth* (1857), 7 E. & B. 26, 48, Ex. Ch.; *Frend v. Dennett* (1858), 4 C. B. (N. S.) 576; *Hunt v. Wimbledon Local Board* (1878), 4 C. P. D. 48, C. A.; *Young v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517 (these last three cases interpret directions under the Public Health Acts, 1848 (11 & 12 Vict. c. 63) and 1875 (38 & 39 Vict. c. 55)); *Noseworthy v. Buckland-in-the-Moor* (1873), L. R. 9 C. P. 233 (Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18)); *Howard v. Bodington* (1897), 2 P. D. 203 (Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9); *Barker v. Palmer* (1881), 8 Q. B. D. 9 (County Court Rules).

(*m*) “It is for those who assert that such words are imperative to prove it” (*R. v. Oxford (Bishop)* (1879), 4 Q. B. D. 525, C. A., *per* BRAMWELL, L.J., at p. 553; see also *Stamper v. Millar* (1745), 3 Atk. 212; *R. v. Flockwold Inclosure Commissioners* (1817), 2 Chit. 251; *York and North Midland Rail. Co. v. R.* (1853), 1 E. & B. 858, Ex. Ch.; *R. v. South Eastern Rail. Co.* (1853), 4 H. L. Cas. 471; *Edwards v. Hodges* (1855), 15 C. B. 477, 492; *Edinburgh, Perth and Dundee Rail. Co. v. Philip* (1857), 2 Macq. 514, 526, H. L.; *Re Newport Bridge* (1859), 2 E. & E. 377, 380; *Re Bridgman* (1860), 1 Drew. & Sm. 164; *Bell v. Crane* (1873), L. R. 8 Q. B. 481; *Widnes Alkali Co., Ltd. v. Sheffield and Midland Rail. Cos.’ Committee* (1877), 37 L. T. 131, 132; *Julius v. Oxford (Lord Bishop)* (1880), 5 App. Cas. 214; *Re Baker, Nichols v. Baker* (1890), 44 Ch. D. 262, C. A.; *Jarvis v. Hemmings*, [1912] 1 Ch. 412.

(*n*) “The words ‘it shall be lawful’ are not equivocal” (*Julius v. Oxford (Lord Bishop)*, *supra*, *per* Lord CAIRNS, L.C., at p. 222).

(*o*) *Ibid.*, *per* Lord CAIRNS, L.C., at pp. 222, 223, and *per* Lord SELBORNE, at p. 235.

(*p*) *R. v. Barlow* (1694), 2 Salk. 609; *A.-G. v. Lock* (1744), 3 Atk. 164; *Chapman v. Milvain* (1850), 5 Exch. 61 (Country Bankers Act, 1826 (7 Geo. 4, c. 46), s. 9).

(*q*) *R. v. Tithe Commissioners* (1849), 14 Q. B. 459 (Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 7).

(*r*) *Morisse v. Royal British Bank* (1856), 1 C. B. (N. S.) 67 (obligation of the court to order execution to issue under stat. (1844) 7 & 8 Vict. c. 113, s. 113); *Re Neath and Brecon Rail. Co.* (1874), 9 Ch. App. 263, 264 (obligation to grant costs under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 87).

(*s*) *Macdougall v. Paterson* (1851), 11 C. B. 755 (stat. (1850) 13 & 14 Vict. c. 61, s. 13); followed in *Crake v. Powell* (1852), 2 E. & B. 210; *Morisse v. Royal British Bank*, *supra*; *Taylor v. Taylor, Taylor v. Keily, Ex parte Taylor* (1875), 1 Ch. D. 426, 431 (Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 130), s. 16); *R. v. Barclay* (1882), 8 Q. B. D. 486, C. A. (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211); *Davis v. Evans* (1882), 9 Q. B. D. 238 (Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4); *Re Eyre and Leicester Corporation*, [1892] 1 Q. B. 136, 143, C. A. (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5); *R. v. Roberts*, [1901] 2 K. B. 117 (Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 13); *R. (Byrne) v. Dublin Justices*, [1904] 2 I. R. 190 (Beerhouses (Ireland) Act,

SECT. 6.
Operation
of Various
Kinds of
Statutes.

Statutes not
construed as
mandatory.

Broadly speaking, it may be said that powers conferred on courts of law to effectuate legal rights (*t*), provisions as to time in regard to procedure (*a*), and generally in public statutes, where the thing to be done is for the public benefit or in advancement of public justice (*b*), enacting words must be taken to have a compulsory force. On the other hand, statutes conferring private rights (*c*), or prescribing that certain things are to be done within a certain time, time not being of the essence (*d*), or in a certain manner (*e*), or by those whose action the person invoking the aid of the statute is unable to control (*f*), are usually directory only. The courts lean against construing words as mandatory when the result would be that the common law rights of individuals would be infringed (*g*). Much will depend upon the subject-matter, and it is in deciding whether a provision in a statute is imperative or permissive that the intention of Parliament has most strictly to be regarded. The distinctions are often fine (*h*).

A provision in a statute is 'often directory in the sense that it is not a condition precedent, but a condition subsequent, as to which responsible persons may be blamable and punishable if they do not observe it (*i*).

Affirmative
and negative
statutes.

328. In addition to the distinction already drawn between affirmative and negative statutes (*k*), the former are sometimes regarded as *prima facie* directory and the latter as mandatory (*l*). At the same time affirmative mandatory language has been held to prohibit that which is contrary to it (*m*). On the other hand, a

1864 (27 & 28 Vict. c. 35), s. 5); *Golden Horseshoe Estates Co., Ltd. v. The Crown*, [1911] A. C. 480, 486, P. C. (obligation on trading company to deduct from dividends sums payable for duties); *R. v. Mitchell, Ex parte Livesey*, [1913] 1 K. B. 561 (Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 9); *Calico Printers' Association v. Booth* (1913), 29 T. L. R. 664, C. A. (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17)).

(*t*) See the cases cited in notes (*o*), (*r*) and (*s*), p. 171, *ante*.

(*a*) *Barker v. Palmer* (1881), 8 Q. B. D. 9.

(*b*) *A.-G. v. Lock* (1744), 3 Atk. 164, *per* Lord HARDWICKE, L.C., at p. 166; *R. v. Tithe Commissioners* (1849), 14 Q. B. 459, *per* COLERIDGE, J., at p. 474.

(*c*) *Caldow v. Pixell* (1877), 2 C. P. D. 562, 566.

(*d*) *R. v. Loxdale* (1758), 1 Burr. 445.

(*e*) *Jones v. Robson*, [1901] 1 K. B. 673 (Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6).

(*f*) *Caldow v. Pixell*, *supra*, at p. 567; *Middlesex Justices v. R.* (1884), 9 App. Cas. 757, 778.

(*g*) *Canadian Pacific Railway v. Parke*, [1899] A. C. 535, P. C.

(*h*) *Liverpool Borough Bank v. Turner* (1860), 2 De G. F. & J. 502; and see the cases cited in note (*s*), p. 171, *ante*.

(*i*) *Middlesex Justices v. R.*, *supra*, *per* Lord BLACKBURN, at p. 778; *Cole v. Green* (1843), 6 Man. & G. 872, 889; *Jortin v. South Eastern Rail. Co.* (1855), 6 De G. M. & G. 270, 275, C. A.; *Caldow v. Pixell*, *supra*, at p. 566; and see titles NEGLIGENCE, Vol. XXI., pp. 466, 467; TORT, pp. 496, 497, *post*.

(*k*) See pp. 167, 168, *ante*.

(*l*) *Ward v. Scott* (1812), 3 Camp. 284; *R. v. Leicester Justices* (1827), 7 B. & C. 6, 12; *R. v. Birmingham (Inhabitants)* (1828), 8 B. & C. 29; *Pearse v. Morrice* (1834), 2 Ad. & El. 84, 96; *Re Newport Bridge* (1859), 2 E. & E. 377.

(*m*) *Ex parte Stephens* (1876), 3 Ch. D. 659, *per* JESSEL, M.R., at p. 660: "When there is a special affirmative power given which would not be required because there is a general power, it is always read to import

provision derived by inference from negative language may be merely directory (*a*).

Of provisions in the same statute some may be mandatory and others directory (*b*). Directory statutes are to be liberally construed (*c*).

SECT. 6.
Operation
of Various
Kinds of
Statutes.

SECT. 7.—Statutory Duties and Statutory Powers.

329. Statutory powers (*d*) for the purpose of carrying out public or private objects imposed by Parliament on or sought by bodies or persons who otherwise could not carry out those objects without infringing the legal rights of others are rarely granted without the imposition of correlative duties (*e*).

Powers and
duties
correlative.

330. When acts for which statutory powers are required are not done in accordance with the powers granted, the persons doing them can claim no protection in connexion with them in respect of trespass committed or nuisance caused or other tortious acts (*f*). Moreover, correlative duties imposed by the same statute or statutes *in pari materia* must be performed scrupulously and without negligence (*g*). It is immaterial whether non-performance is wilful and

Strict
compliance
necessary.

the negative"; *R. v. All Saints, Wigan (Churchwardens)* (1876), 1 App. Cas. 611, 629.

(*a*) *Stallwood v. Tredger* (1815), 2 Phillim. 287; *Catterall v. Sweetman* (1845), 9 Jur. 951, 954.

(*b*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 148 (Royal Marriage Act, 1772 (12 Geo. 3, c. 11), s. 1); *Woodward v. Sarsons* (1875), L. R. 10 C. P. 733, 749; *Phillips v. Goff* (1886), 17 Q. B. D. 805, 812 (these two cases holding that a different principle applied to the schedules of the Ballot Act, 1872 (35 & 36 Vict. c. 33), from that applicable to the body of the enactment).

(*c*) *Walter v. Rumbal* (1695), 1 Ld. Raym. 53, followed in *Jarvis v. Hemmings*, [1912] 1 Ch. 462; *Mountcashell (Earl) v. O'Neill (Viscount)* (1856), 5 H. L. Cas. 937 (where an affidavit required by statute to be made by a tenant of lands in a prescribed form was held sufficient when made by his agent).

(*d*) *Mersey Docks and Harbour Board v. Gibbs* (1866), 11 H. L. Cas. 686, per BLACKBURN, J., at p. 713: "If the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful"; compare *East Fremantle Corporation v. Annois*, [1902] A. C. 213, P. C. As to the obligations and liabilities of public bodies in executing works under statutory authority, see titles CORPORATIONS, Vol. VIII., pp. 388 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312 *et seq.*; TORT, pp. 480 *et seq.*, *post*. As to the time of exercising of statutory powers and the persons to execute them, see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (1), (2); and p. 166, *ante*.

(*e*) Thus, when a statute authorised the levying of a toll, it was held that the accommodation for which the toll was paid must be provided (*Aiton v. Stephen* (1876), 1 App. Cas. 456). Commissioners incorporated for the execution of works, with rating powers, have implied power to levy a rate to discharge a liability arising out of their servants' negligence (*Gallsworthy v. Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, C. A.); and see titles NEGLIGENCE, Vol. XXI., pp. 464 *et seq.*; NUISANCE, Vol. XXI., pp. 563 *et seq.*

(*f*) *Liverpool and North Wales Steamship Co., Ltd. v. Mersey Trading Co., Ltd.*, [1909] 1 Ch. 209, C. A.; see title TORT, pp. 495 *et seq.*, *post*.

(*g*) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430, 449; *Bagnall v. London and North Western Rail. Co.* (1862), 1 H. & C. 544, Ex. Ch.; *Shoreditch Corporation v. Bull* (1904), 90 L. T. 210, H. L.; *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149.

SECT. 7.
Statutory
Duties and
Statutory
Powers.

Remedy for
breach of
duty.

deliberate (*h*), or due to the negligence of persons necessarily employed; nor is it material that a defendant receives no personal benefit from the thing done (*i*).

331. A statute may impose a duty in such terms that a right of action will accrue to any (*j*) person injured by a breach of or failure to perform it (*k*), even when the statute provides some other sanction for the purpose of ensuring its performance (*l*). When such a right of action accrues it may be of such a nature that it is not open to the defendant to set up by way of defence matters which would be so available in an action at common law, such as negligence, or acquiescence in the breach on the part of the plaintiff, or common employment (*m*). The duty imposed may be absolute (*n*); or it may be such that it is an answer to a claim that reasonable care has been taken (*o*).

Exercise of
statutory
powers.

332. Statutory powers must be exercised *bonâ fide* (*p*),

(*h*) *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; *Brain v. Thomas* (1881), 50 L. J. (Q. B.) 662, C. A.

(*i*) *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *The "Beam,"* [1906] P. 48, C. A.

(*j*) See *Ryall v. Kidwell*, [1913] 3 K. B. 123; *Middleton v. Hall* (1913), 108 L. T. 880 (both cases holding that no general right of action is conferred by the Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15).

(*k*) *Thomas v. Quartermaine* (1887), 18 Q. B. D. 685, 696, C. A.; *Baddeley v. Granville (Earl)* (1887), 19 Q. B. D. 423; and see titles MASTER AND SERVANT, Vol. XX., pp. 129, 130; NEGLIGENCE, Vol. XXI., pp. 424, 425.

(*l*) *Groves v. Wimborne (Lord)*, [1898] 2 Q. B. 402, C. A.; *Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A. C. 74; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149; *Watkins v. Naval Colliery Co. (1897), Ltd.*, [1912] A. C. 693, 702, 703; and see title TORT, pp. 480 *et seq.*, *post*.

(*m*) *Groves v. Wimborne (Lord)*, *supra*; compare *Chapman v. Michaelson*, [1908] 2 Ch. 612; affirmed, [1909] 1 Ch. 238, C. A.; *Jones v. Canadian Pacific Rail. Co. (1913)*, 29 T. L. R. 773, P. C. Where the provision has not been inserted for the protection of life and limb generally, but for the benefit of particular persons, it has, however, been held that they can waive it; compare title MASTER AND SERVANT, Vol. XX., pp. 129, 130. Thus, in *Graham v. Ingleby* (1848), 1 Exch. 651, the plaintiffs were not allowed to set up the breach of a statutory requirement that pleas in abatement should be verified by affidavit, after the issue had been made up; and in *Park Gate Iron Co. v. Coates* (1870), L. R. 5 C. P. 634, a provision for giving notice and depositing security on appeal from a county court was waived by the respondents joining in the settlement of a special case.

(*n*) *Holborn Union Guardians v. St. Leonard, Shoreditch, Vestry* (1876), 2 Q. B. D. 145; *Davis & Sons v. Taff Vale Rail. Co.*, [1895] A. C. 542, 549; *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123, C. A.; *Corbett v. South Eastern and Chatham Railways Managing Committee*, [1906] 2 Ch. 12, C. A.; *Wilson's Music and General Printing Co. v. Finsbury Borough Council*, [1908] 1 K. B. 563.

(*o*) *Hammond v. St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Bateman v. Poplar District Board of Works (No. 2)* (1887), 37 Ch. D. 272; *Re Richmond Gas Co. and Richmond Corporation (Surrey)*, [1893] 1 Q. B. 56; *Stretton's Derby Brewery Co. v. Derby Corporation*, [1894] 1 Ch. 431, 443; *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590.

(*p*) *Galloway v. London Corporation* (1864), 2 De G. J. & Sm. 213, 229, C. A.; (1866), L. R. 1 H. L. 34, 43; *Westminster Corporation v. London and North Western Railway*, [1905] A. C. 426. For a power is generally associated with the exercise of a discretion (*Bell v. Crane* (1873), L. R. 8 Q. B. 481); and see p. 175, *post*.

reasonably (*q*), and without negligence (*r*), and when conferred for a purpose unknown to the common law it is assumed that what is not expressly or impliedly authorised is prohibited (*s*). In considering the manner of exercise the courts have regard to the objects of the statute (*t*), construing more liberally powers exercised for public purposes than those given to private corporations for objects of gain (*a*).

SECT. 7.
Statutory
Duties and
Statutory
Powers.

333. Persons who obtain Acts for specific purposes, though bound to execute them strictly in accordance with their powers if they execute them, are, apart from express language, under no obligation to execute them at all (*b*). Hence it does not necessarily follow that because a statute confers powers the exercise of which might prevent injury to persons who would otherwise be injuriously affected, the donees of such powers are liable in damages for the non-exercise of such powers (*c*). Promoters of private legislation are, however, required to make deposits, which may be made available by the provisions of their statute, when passed, for

How far
exercise of
powers
obligatory.

(*q*) *R. v. Bradford Navigation Co.* (1865), 6 B. & S. 631; *R. v. All Saints, Wigan (Churchwardens)* (1876), 1 App. Cas. 611, 624; *Roberts v. Charing Cross, Euston and Hampstead Rail. Co.* (1903), 87 L. T. 732; *Taff Vale Rail. Co. v. Pontypridd Urban District Council* (1905), 93 L. T. 126.

(*r*) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, 456; *R. v. Williams* (1884), 9 App. Cas. 418, P. C.; *Gibraltar Sanitary Commissioners v. Orfila* (1890), 15 App. Cas. 400, P. C.; compare *Bagnall v. London and North Western Rail. Co.* (1862), 1 H. & C. 544, Ex. Ch.; and titles NEGLIGENCE, Vol. XXI., pp. 465, 467, 521; TORT, p. 481, *post*.

(*s*) *Tinkler v. Wandsworth District Board of Works* (1858), 2 De G. & J. 261, 274, C. A.; *A.-G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, 481; *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904, 924, C. A.; *A.-G. v. Pontypridd Urban Council*, [1906] 2 Ch. 257, C. A.; compare *Coak v. Ward* (1877), 2 C. P. D. 255, 261, C. A. For statutory powers must not be exercised for any purpose of a collateral kind (*Galloway v. London Corporation* (1864), 2 De G. J. & Sm. 213, 229, C. A.; *A.-G. v. West Hartlepool Improvement Commissioners* (1870), L. R. 10 Eq. 152; *Westminster Corporation v. London and North Western Railway*, [1905] A. C. 426, 439; see p. 185, *post*).

(*t*) *Taff Vale Rail. Co. v. Pontypridd Urban District Council*, *supra*; *Lancashire and Yorkshire Rail. Co. v. Davenport* (1906), 70 J. P. 129, C. A.

(*a*) *Dover Gas-Light Co. v. Dover Corporation* (1855), 7 De G. M. & G. 545, C. A.; *Galloway v. London Corporation* (1866), L. R. 1 H. L. 34, 43; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, 669; *Re Dudley Corporation* (1881), 8 Q. B. D. 86, 93, C. A.

(*b*) *York and North Midland Rail. Co. v. R.* (1853), 1 E. & B. 858; *Edinburgh, Perth and Dundee Rail. Co. v. Philip* (1857), 2 Macq. 514, 526, H. L.; *Ex parte a Clergyman* (1873), L. R. 15 Eq. 154; *R. v. French* (1879), 4 Q. B. D. 507, C. A.; *A.-G. v. Simpson*, [1901] 2 Ch. 671, 712, C. A. As to the provisions applicable on the amalgamation of two railway companies by special Act, see title RAILWAYS AND CANALS, Vol. XXIII., p. 707.

(*c*) *Colley v. London and North Western Rail. Co.* (1880), 5 Ex. D. 277; *Stretton's Derby Brewery Co. v. Derby Corporation*, [1894] 1 Ch. 431; followed in *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590; and see *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A., where COLLINS, L.J., at p. 612, distinguishes *Geddis v. Bann Reservoir Proprietors*, *supra*; compare, however, *ibid.*, per Lord HATHERLEY, at p. 449).

SECT. 7.
Statutory
Duties and
Statutory
Powers.

Implied
powers and
duties.

Delegation
of duties.

Exercise of
discretion.

Public
Authorities
Protection
Act, 1893.

recompensing persons injured by the abandonment of any works authorised (*d*).

334. An authority given by statute to do certain work authorises not only all things absolutely necessary for its execution, but all things reasonably necessary (*e*). It carries with it the reciprocal obligation, where the public convenience has been interfered with, to keep any works required by the statute to be created for the purpose of diminishing such interference in reasonable repair (*f*).

335. Although the law does not, strictly speaking, permit the delegation of statutory duties by those on whom the obligation is laid to discharge them (*g*), it does not regard as delegation the employment of one local authority by another to perform work which the latter has decided is necessary to be done (*h*).

336. The exercise of a discretion imposed by statute upon bodies of persons for particular purposes is not a merely ministerial act, and if in the exercise of their discretion they act erroneously, they cannot be held responsible except upon proof of *mala fides* or indirect motive, or of some improper conduct materially affecting such exercise (*i*).

337. Persons or bodies of persons discharging or honestly intending to discharge the duties imposed upon them by any statute may avail themselves of the protection afforded by the provisions of the Public Authorities Protection Act, 1893 (*k*).

(*d*) See titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 154; PARLIAMENT, Vol. XXI., pp. 736 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 626, 627.

(*e*) *Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, *per* VAUGHAN WILLIAMS, J., at p. 411; *Wenlock (Baroness) v. River Dee Co.* (1885), 10 App. Cas. 354, 362; *A.-G. v. Manchester Corporation*, [1906] 1 Ch. 643, 656; *A.-G. v. Mersey Railway*, [1907] A. C. 415; and see title NUISANCE, Vol. XXI., pp. 519 *et seq.*

(*f*) *Hertfordshire County Council v. Great Eastern Railway*, [1909] 2 K. B. 403, 409, C. A.

(*g*) See p. 188, *post*.

(*h*) *Corsellis v. London County Council*, [1908] 1 Ch. 13, 25, C. A.

(*i*) *Partridge v. General Council of Medical Education and Registration of the United Kingdom* (1890), 25 Q. B. D. 90, 96, C. A.; *Tozer v. Child* (1857), 7 E. & B. 377, Ex. Ch.; *Allcroft v. London (Lord Bishop), Lighton v. London (Lord Bishop)*, [1891] A. C. 666, 679. Discretion has been defined in *Rooke's Case* (1598), 5 Co. Rep. 99 b, *per* Sir E. COKE, at p. 100 a; *R. v. Wilkes* (1770), 4 Burr. 2527, *per* Lord MANSFIELD, C.J., at p. 2539; *Re Durham, Ex parte Merchant Banking Co. of London* (1881), 16 Ch. D. 623, C. A., *per* JESSEL, M.R., at p. 635; *Gardner v. Jay* (1885), 29 Ch. D. 50, C. A., *per* BOWEN, L.J., at p. 58; *Board of Education v. Rice*, [1911] A. C. 179, *per* Lord LOREBURN, L.C., at p. 182: "They must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything." See also title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 335, 336.

(*k*) 56 & 57 Vict. c. 61; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 338 *et seq.*

Part V.—Criminal and Penal Statutes.

SECT. 1.—Construction.

338. A penal statute is one of which the primary object is expressly enforceable by fine, imprisonment, or other punishment (*l*).

339. It is a general rule that penal enactments are to be construed strictly (*m*), and that the legal meaning of the words used are not to be departed from, unless it appears from the context that Parliament has intended them to be used in a popular or wider sense (*n*). They are not to be extended by equity or enlarged by parity of reasoning (*o*). On the contrary, no man incurs a penalty unless the act which subjects him to it is within the spirit as well as the letter of the statute imposing such penalty (*p*), and a person against whom a penalty is sought to be enforced is entitled to the benefit of a doubt, if there is any (*q*).

In construing a penal statute, however, as in construing any other, the intention of Parliament as indicated by the language used is the best guide, and courts of law further remedial statutes, though penal, not by making them more penal, but by letting them take their course (*r*).

SECT. 1.
Construction.

Definition
of penal
statute.
Rules of
construction.

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 232, 233.

(*m*) *Stephenson v. Higginson* (1852), 3 H. L. Cas. 638, 685; *Dyke v. Elliott, The "Gauntlet"* (1872), L. R. 4 P. C. 184, 191; *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1, 8. The rule is extended to statutes affecting a man's status (*Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, 271, C. A.). Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were (*R. v. Tolson* (1889), 23 Q. B. D. 168, C. C. R., *per* STEPHEN, J., at p. 187).

(*n*) *R. v. Harvey* (1747), 1 Wils. 164; *Lloyd v. Rosbee* (1810), 2 Camp. 453; *Crowley's Case* (1818), 2 Swan. 1, 68; *Cotterill v. Lempriere* (1890), 24 Q. B. D. 634, 637; *London County Council v. Aylesbury Dairy Co.*, [1898] 1 Q. B. 106, 109. A *casus omissus* cannot be supplied in a statute creating an offence (*Broadhead v. Holdsworth* (1877), 2 Ex. D. 321, *per* CLEASBY, B., at p. 323).

(*o*) *Harrison v. Southcote* (1751), 1 Atk. 528, 537; *Atcheson v. Everitt* (1776), 1 Cowp. 382, 391; *A.-G. v. Sillem* (1863), 2 H. & C. 431, 509; *Willis v. Thorp* (1875), L. R. 10 Q. B. 383, 388; *Graff v. Evans* (1882), 8 Q. B. D. 373, 377; *Tuck & Sons v. Priester* (1887), 19 Q. B. D. 629, 638, C. A.; *A.-G. v. Till*, [1910] A. C. 50, 51 (where, however, the language of the Act—the Income Tax Act, 1842 (5 & 6 Vict. c. 35)—was sufficiently clear to make a penalty payable); compare *Forbes v. Samuel* (1913), 29 T. L. R. 544; *Burnett v. Samuel* (1913), 29 T. L. R. 583; *Re Vexatious Actions Act*, 1896, *Re Boaler* (1913), 29 T. L. R. 767.

(*p*) *Wynne v. Griffith* (1825), 3 Bing. 193, *per* BEST, C.J., at p. 196; *Fletcher v. Sondes (Lord)* (1826), 3 Bing. 501, 580, H. L.; *Simpson v. Unwin* (1832), 3 B. & Ad. 134 (possession in close time of partridge killed before close time; see title GAME, Vol. XV., p. 259, note (*a*)); *Edwards v. Trevellick* (1854), 4 E. & B. 59 (justifiable desertion of ship, though within the words of stat. 7 & 8 Vict. c. 112, held not to be within the intent); *Aberdare Local Board v. Hammett* (1875), L. R. 10 Q. B. 162.

(*q*) *Parry v. Croydon Commercial Gas Co.* (1863), 15 C. B. (N. S.) 568, Ex. Ch.; *Rumball v. Schmidt* (1882), 8 Q. B. D. 603, 608; *Smith v. Wood* (1889), 24 Q. B. D. 23, C. A.; *Crane v. Lawrence* (1890), 25 Q. B. D. 152.

(*r*) *R. v. Vine* (1875), L. R. 10 Q. B. 195 (where the court took the view that a statute prohibiting one convicted of felony from holding a publican's licence was not so much punitive as intended to protect the public);

SECT. 1.
Construc-
tion.

A penal statute which does not create a new offence, but deals only with procedure and punishment, may be retrospective (s).

SECT. 2.—Operation.

Offences
criminal by
statute.

340. It is a principle of criminal law that, ordinarily speaking, a crime is not committed unless a wrongful intention or some other blameworthy condition of mind (*mens rea*) can be imputed to the person charged with an overt act alleged to be criminal (t). Where, therefore, an act in itself indifferent becomes criminal if done with a particular intent, the intent must be proved; on the other hand, if the act is in itself unlawful, the law implies a criminal intent (a). This ancient division of offences into *mala prohibita* and *mala in se* has only a partial application to offences made criminal by statute, because, everyone being assumed to know the statute law, the fact that the offence prohibited is contrary to the moral sense of the community is assumed to be known and recognised by a person sought to be held guilty (b).

*Mala pro-
hibita; mala
in se.*

Classification.

341. Accordingly, a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has in fact been an intention to break the law, or otherwise to do wrong, or not (c). Apart from isolated and extreme instances, such cases may be classed under three heads (d), namely:—

(1) Where the acts are not criminal in any real sense, but are prohibited under a penalty in the public interest (e);

(2) Where the acts are public nuisances; thus, an employer has been held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders (f);

Enniskillen Union Guardians v. Hilliard (1884), 14 L. R. Ir. 214; *Bonnard v. Dott*, [1906] 1 Ch. 740, C. A.

(s) *R. v. Chandra Dharma*, [1905] 2 K. B. 335, C. C. R.; *R. v. Austin*, [1913] 1 K. B. 551, 556.

(t) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 233 *et seq.*

(a) *R. v. Woodfall* (1770), 5 Burr. 2661, *per* Lord MANSFIELD, C.J., at p. 2665.

(b) Even though in a particular case the motive of the person guilty may have been good; see *R. v. Hicklin* (1868), L. R. 3 Q. B. 360; *Steele v. Brannan* (1872), L. R. 7 C. P. 261; *R. v. Prince* (1875), L. R. 2 C. C. R. 154 (which case may, however, be one of those exceptional cases, grounded on the language of a statute, referred to in the text, *infra*).

(c) *R. v. Tolson* (1889), 23 Q. B. D. 168, C. C. R., *per* WILLS, J., at p. 172. As to statutory fraud, see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 762.

(d) *Sherras v. De Rutzen*, [1895] 1 Q. B. 918, *per* WRIGHT, J., at pp. 921, 922. As to the effect of statutes of the nature described in rendering masters or principals liable criminally for acts of their servants or agents, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 234, 235; MASTER AND SERVANT, Vol. XX., pp. 258 *et seq.*

(e) *A.-G. v. Lockwood* (1842), 9 M. & W. 378 (innocent possession of liquorice by beer-seller); *R. v. Woodrow* (1846), 15 M. & W. 404 (innocent possession of adulterated tobacco); *Fitzpatrick v. Kelly* (1873), L. R. 8 Q. B. 337; *Roberts v. Egerton* (1874), L. R. 9 Q. B. 494 (both cases relating to sale of adulterated food); *R. v. Marsh* (1824), 2 B. & C. 717 (innocent possession of game by carrier); *Davies v. Harvey* (1874), L. R. 9 Q. B. 433 (supply of goods for poor by guardian's partner); *R. v. Bishop* (1880), 5 Q. B. D. 259, C. C. R. (innocently receiving lunatic in unlicensed house).

(f) *R. v. Medley* (1834), 6 C. & P. 292; *R. v. Stephens* (1866), L. R. 1 Q. B. 702; *Barnes v. Alkroyd* (1872), L. R. 7 Q. B. 474.

(3) Where, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right (*g*).

SECT. 2.
Operation.

342. A statute may, notwithstanding any legal presumption of non-liability, render a person liable in all circumstances, as, for instance, an employer for the acts of his servants, even if committed in violation of express orders (*h*).

Liability for servants.

343. Where a statute provides for payment of a fine, a body corporate may recover it (*i*), or be liable to it (*j*), though it cannot commit a crime for which imprisonment or death would be the only punishment (*k*). Subject to this it may be indicted (*l*) and convicted under any statute in which *mens rea* is not an element of the offence (*m*).

Liability of corporation.

344. Where an act or omission constitutes an offence under two or more statutes, or both under a statute and at common law, then the offender, unless it is otherwise provided by some statute, is liable to be prosecuted and punished under either or any of these statutes or the common law, though not to be punished twice for the same offence (*n*).

Alternative methods of proceeding.

(*g*) *Lee v. Simpson* (1847), 3 C. B. 871; *Morden v. Porter* (1860), 7 C. B. (N. S.) 641; *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582. A claim of right may be immaterial (*Watkins v. Major* (1875), L. R. 10 C. P. 662).

(*h*) As, for example, statutes passed to prevent adulteration (*Pearks, Gunston, and Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairy Co.*, [1902] 2 K. B. 1, 11; *Pain v. Boughtwood* (1890), 24 Q. B. D. 353; *Dyke v. Gower*, [1892] 1 Q. B. 220; *Parker v. Alder*, [1899] 1 Q. B. 20 (where a consignor was convicted though milk forwarded by rail was adulterated under circumstances over which he had no control); *Laird v. Dobell*, [1906] 1 K. B. 131; *Hobbs v. Winchester Corporation*, [1910] 2 K. B. 471, C. A.), or dealing with the sale of intoxicants (*Police Commissioners v. Cartman*, [1896] 1 Q. B. 655; *Brooks v. Mason*, [1902] 2 K. B. 743). A statute may, though highly penal, substitute, in the modern fashion, presumption for evidence (*R. v. Kent Justices* (1889), 24 Q. B. D. 181, *per* MATHEW, J., at p. 185); compare *Bruhn v. R.*, [1909] A. C. 317, P. C.; *R. v. Phillips* (1909), 73 J. P. 458, C. C. A.; and titles FOOD AND DRUGS, Vol. XV., pp. 38, 39; MASTER AND SERVANT, Vol. XX., pp. 257 *et seq.*

(*i*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 2 (2).

(*j*) *Ibid.*, s. 2 (1).

(*k*) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, 869.

(*l*) *R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A., *per* BOWEN, L.J., at p. 593, approving *R. v. Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223, *per* PATTESON, J., at p. 232, and *R. v. Great North of England Rail. Co.* (1846), 9 Q. B. 315, *per* Lord DENMAN, C.J., at p. 326. As to indictments against a corporation, see title CORPORATIONS, Vol. VIII., p. 392.

(*m*) *Pearks, Gunston, and Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairy Co.*, *supra*, at p. 11. *Mens rea* would seem to be a necessary constituent of the offence where the person convicted was to be deemed a rogue and a vagabond (*Hawke v. Hulton (E.) & Co., Ltd.*, [1909] 2 K. B. 93). As to the criminal liability of a corporation, see, further, title CORPORATIONS, Vol. VIII., pp. 390 *et seq.*

(*n*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33. A difficulty frequently arose where an Act created a new offence, but the facts which constituted that offence also constituted an offence under some other enactment; compare *Crepps v. Durden* (1777), 2 Cowp. 640; *Michell v.*

SECT. 2.
Operation.
Summary
procedure.

If an offence is by statute made punishable "summarily" or "on summary conviction," the whole of the procedure under the Summary Jurisdiction Acts (o) applies to the trial of such offence (p).

Part VI.—Fiscal and Revenue Statutes.

SECT. 1.—Construction.

Taxing
statutes
construed
strictly.

345. The language of a statute imposing a tax must receive a strict construction (q). If the person sought to be taxed comes within the letter of the law, he must be taxed (r). On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however much within the spirit of the law the case might otherwise appear to be (s). There can be no equitable construction admissible in a taxing statute (t).

Statutory
tolls.

The rule as to the strict construction of taxing Acts is not to be extended to cases of statutory tolls and the like, where the payment made is in return for services rendered (u).

Brown (1858), 1 E. & E. 267; *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89. But the law always favoured the maxim, *nemo debet bis pro eadem culpa puniri*; see 2 Hawk. P. C., c. 25, s. 4, cited in *R. v. Hall*, [1891] 1 Q. B. 747, per CHARLES, J., at p. 753; compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 487, 690.

(o) See title MAGISTRATES, Vol. XIX., p. 589, note (a). As to summary procedure generally, see *ibid.*, pp. 589 *et seq.*

(p) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 51.

(q) *Shaw v. Ruddin* (1858), 9 I. C. L. R. 214, 221; *R. v. Mallow Union Guardians* (1859), 12 I. C. L. R. 35, 41; *Parry v. Croydon Commercial Gas and Coke Co.* (1863), 15 C. B. (N. S.) 568, 575, Ex. Ch.; *Ingram v. Drinkwater* (1875), 44 L. J. (P. C.) 83; *Cox v. Rabbits* (1878), 3 App. Cas. 473; *Oriental Bank Corporation v. Wright* (1880), 5 App. Cas. 842, P. C.; *A.-G. v. Seccombe*, [1911] 2 K. B. 688, 709; *Brunton v. New South Wales (Commissioners of Stamps)* (1913), 82 L. J. (P. C.) 139, 146; *Inland Revenue Commissioners v. Gribble*, [1913] 3 K. B. 212, C. A., per BUCKLEY, L.J., at p. 219; and see title CONSTITUTIONAL LAW, Vol. VI., p. 379. As to fiscal and revenue legislation in particular, see titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 180 *et seq.*; INCOME TAX, Vol. XVI., pp. 609 *et seq.*; INHABITED HOUSE DUTY, Vol. XVII., pp. 181 *et seq.*; LAND TAX, Vol. XVIII., pp. 307 *et seq.*; REVENUE, Vol. XXIV., pp. 536 *et seq.*

(r) *Re Thorley (J.)*, *Thorley v. Massam*, *Re Thorley (W. R.)*, *Thorley v. Massam*, [1891] 2 Ch. 613, C. A. (where an annuity left to trustees so long as they should discharge the duties of the trust was held chargeable with legacy duty); *Dublin Corporation v. Trinity College* (1903), 88 L. T. 305, H. L.; *Bristol Corporation v. Canning* (1906), 95 L. T. 183.

(s) *Partington v. A.-G.* (1869), L. R. 4 H. L. 100, per Lord CAIRNS, at p. 122; *Baddeley v. Gingell* (1847), 1 Exch. 319, per POLLOCK, C.B., at p. 332.

(t) "The benefit of the doubt is the right of the subject" (*Re Finance Act, 1894, and Studdert*, [1900] 2 I. R. 400, C. A., per FITZGIBBON, L.J., at p. 410).

(u) The rule probably arose from the fact that there being no *a priori* liability in a subject to pay any particular tax, no reasoning founded on any supposed relationship between taxpayer and taxing authority could

346. In a taxing statute, language, though generally used in its ordinary and popular sense, may sometimes be used in a sense derived from previous legislation *in pari materia* and the practice under it (*w*). When a special meaning is found assigned to a particular word in any statute, that special or technical meaning must be adhered to, even though the technicality may be confined to the jurisprudence of one part of the United Kingdom and the operation of the statute extends to the whole (*x*).

SECT. 1.
Construc-
tion.

Previous
legislation
considered.

347. Words occurring in a statute imposing taxation throughout the United Kingdom should be construed so as to make the incidence of taxation alike in every part of it (*y*). Where legal expressions are taken from the language or style of one part, they must be applied in an analogous or corresponding sense in the other parts (*a*).

Equality
throughout
United
Kingdom.

348. In construing a taxing statute little weight is to be attached to the fact that specific exemptions from its operation are to be found in it. Such exemptions are often introduced to quiet the fears of those whose interests are threatened, and who are apprehensive that they may not fall within some general exception. These may be cases in which *expressio unius* will not be *exclusio alterius* (*b*).

Construc-
tion of
exemptions.

349. A taxing statute should, so far as is consistent with the ordinary canons of construction, be interpreted so as not to operate unreasonably in the case of a foreigner sojourning in this country (*c*).

Application
to foreigners.

SECT. 2.—Operation.

350. Statutes dealing with the management of public or semi-public property, other than Crown property, which provide for the surplus revenue being applied to certain objects and no others, are

Public
property.

be brought to bear upon the construction of the Act (*Pryce v. Monmouthshire Canal and Railway Cos.* (1879), 4 App. Cas. 197, *per* Lord CAIRNS, L.C., at p. 202); compare *Kingston-upon-Hull Dock Co. v. La Marche* (1828), 8 B. & C. 42; *South Staffordshire Waterworks Co. v. Barrow* (1897), 61 J. P. 661, C. A.

(*w*) *Yewens v. Noakes* (1880), 6 Q. B. D. 530, 535, C. A.; approved in *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, 82, C. A.

(*x*) *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A. C. 531, *per* Lord MACNAGHTEN, at pp. 577—579 (discussing *Saltoun (Lord)* v. *Advocate-General* (1860), 3 Macq. 659, H. L.), where the question was whether the technical construction of the phrase “charitable purposes” imputed to English law could be extended to a bequest in Scotland, so as to secure an abatement under the Income Tax Act, 1842 (5 & 6 Vict. c. 35).

(*y*) *R. v. Income Tax Commissioners* (1888), 22 Q. B. D. 296, 310, C. A.; *Re Finance Act, 1894, and Studdert*, [1900] 2 I. R. 400, C. A.

(*a*) *Income Tax Special Purposes Commissioners v. Pemsel*, *supra*, *per* Lord MACNAGHTEN, at p. 579; see pp. 152, 170, *ante*.

(*b*) *Income Tax Special Purposes Commissioners v. Pemsel*, *supra*, *per* Lord HERSCHELL, at p. 574; compare p. 152, *ante*; and see *Mersey Docks v. Lucas* (1883), 8 App. Cas. 891.

(*c*) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, *per* Lord HERSCHELL, at p. 504.

- SECT. 2.
Operation. directory only, and do not relieve the managers or trustees of such property of the payment of charges imposed by law (*d*).
- Exemption. **351.** Where a statute creates an exemption from taxation, such exemption *primâ facie* applies only to those taxes which were in existence at the time of the passing of the same (*e*).
- Retrospective effect. **352.** There is no reason why a fiscal statute should not be retrospective if the language so directs (*f*).
- Effect of penalties. **353.** The fact that something is forbidden under a penalty in order to protect revenue does not necessarily render void the thing done, or prevent an action lying in respect of it, as being against public policy (*g*).

Part VII. — Local, Personal, and Private Statutes.

SECT. 1.—*In General.*

Modes of classification.

354. In addition to the broad distinction between public general statutes and those which are local, personal, and private (*h*), statutes may be further comprehensively distinguished as “public” and “private” (*i*), or “general” and “special,” having regard in the former case to the manner of their enactment, in the latter to the mode of their operation (*k*). Whether a statute is public or private does not depend upon technical considerations, such as whether it

(*d*) *Tyne Improvement Commissioners v. Chirton Overseers* (1859), 1 E. & E. 516; *Mersey Docks and Harbour Board v. Cameron, Jones v. Mersey Docks and Harbour Board* (1864), 11 H. L. Cas. 443, 480; *Mersey Docks v. Lucas* (1883), 8 App. Cas. 891, 901.

(*e*) *Sion College v. London Corporation*, [1901] 1 K. B. 617, C. A.; *Associated Newspapers, Ltd. v. City of London Corporation*, [1913] 2 K. B. 281. Exemption may, however, upon the particular construction of an Act, attach to premises for all time and for all purposes (*London Corporation v. Netherlands Steamboat Co.*, [1906] A. C. 263).

(*f*) *Hume v. Haig* (1799), 8 Bro. Parl. Cas. 196. The annual Revenue Acts, which frequently have not received the Royal Assent before the end of the session, have been made to operate so far as relates to the imposition of both existing and new duties from the date of the Resolution of the House of Commons. But in such cases, until the Act had been passed, there was, formerly, no legal obligation to pay the tax or authority to collect it (*Bowles v. Bank of England*, [1913] 1 Ch. 57); see now, however, Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3).

(*g*) *Swan v. Bank of Scotland* (1835), 2 Mont. & A. 656, 661, H. L.; *Cundell v. Dawson* (1847), 4 C. B. 376; and see the notes to *Collins v. Blantern* (1767), 1 Smith, L. C., 11th ed., p. 369, at pp. 388, 389; see also p. 194, *post*.

(*h*) See p. 114, *ante*. The distinction between public and private statutes is first drawn on the enrolment in Chancery in the thirty-first year of Henry VIII.; see note to *R. v. Milton (Inhabitants)* (1843), 1 Car. & Kir. 58, 61.

(*i*) *Dawson v. Paver* (1847), 5 Hare, 415, *per* WIGRAM, V.-C., at p. 434.

(*k*) Blackstone adopts this double division (1 Bl. Com. 85); see title PARLIAMENT, Vol. XXI., p. 703.

contains a clause declaring it to be a public Act, but upon the nature and substance of the case (*l*).

SECT. 1.
In General.

355. Promoters applying to Parliament for statutory powers to purchase land must show that what they are proposing to do is of such public importance as to make it reasonable that they should be so far enabled to interfere with rights of private property as to compel owners to sell (*m*). For Parliament only permits the rights of individuals to be infringed so far as is necessary in the public interest (*n*), and the courts will take every means of defeating an attempt by a private Act to affect the rights either of the Crown or of other persons who have not been brought in (*o*).

How far
private rights
affected.

A private statute is no exception (*p*) to the rule that the authority of a statute is supreme, and that if a statute by plain, unambiguous, and positive enactment affects rights of parties who were not before Parliament when it was under consideration, whether by oversight or from disregard of the rules prescribed by either House, it is the duty of the courts to carry it into effect (*q*). Such a statute is of as much force and as binding as any public Act relating to the most important interests of the community (*r*).

Generally speaking, however, Parliament in giving its sanction to a private Bill adjusts the rights and obligations of the persons appearing before it, with a reservation of the rights of all others (*s*). It is now the general practice to insert saving clauses.

(*l*) *Dawson v. Paver* (1847), 5 Hare, 415. The expression "private legislation" was objected to in *Shrewsbury (Earl) v. Scott* (1859), 6 C. B. (N. S.) 1, *per* COCKBURN, C.J., at p. 172, where he expressed the opinion that the phrase "legislation for private purposes" would be more correct.

(*m*) *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, 162; *Galloway v. London Corporation* (1866), L. R. 1 H. L. 34, 44; see title RAILWAYS AND CANALS, Vol. XXIII., pp. 619 *et seq.*

(*n*) See p. 173, *ante*, p. 184, *post*. As to the creation of a franchise by statute, see title MARKETS AND FAIRS, Vol. XX., pp. 8, 9.

(*o*) *Great Northern, Piccadilly, and Brompton Railway v. A.-G.*, [1909] A. C. 1, *per* Lord LOREBURN, L.C., at p. 6, criticising the present procedure relating to private Bills.

(*p*) It was at one time thought that a private statute did not bind persons not expressly named in it, even in the absence of a saving clause (*Boswell's Case* (1583), cited in *Barrington's Case* (1610), 3 Co. Rep. 136 b, 138 a; *Lucy v. Levington* (1771), 1 Vent. 175, 176; *Shrewsbury (Earl) v. Scott*, *supra*, *per* COCKBURN, C.J., at p. 157). As to the effect of statutory enactments on custom, see title CUSTOM AND USAGES, Vol. X., p. 247.

(*q*) The view has often been expressed by courts that private statutes are contracts made by Parliament on behalf of every person interested in anything to be done under them (*Blakemore v. Glamorganshire Canal Navigation*, *supra*; *Lee v. Milner* (1837), 2 Y. & C. (EX.) 611, 618; *Aiton v. Stephen* (1876), 1 App. Cas. 456, 462; *Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, 707; *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, 501; *Davis & Sons v. Taff Vale Rail. Co.*, [1895] A. C. 542, 559), even though specific performance of them cannot be decreed (*York and North Midland Rail. Co. v. R.* (1853), 1 E. & B. 858, 864, Ex. Ch.).

(*r*) *Shrewsbury (Earl) v. Scott*, *supra*, at pp. 160, 183, 184, 219, 222; see *Edinburgh Rail. Co. v. Wauchope* (1842), 8 Cl. & Fin. 710; *Aiton v. Stephen*, *supra*; *Davis & Sons v. Taff Vale Rail. Co.*, *supra*, at pp. 549, 556.

(*s*) *Eton College (Provost and Fellows) v. Winchester (Bishop)* (1774), Lofft, 401. As to the procedure relating to private Bills, see title PARLIAMENT, Vol. XXI., pp. 702 *et seq.*

SECT. 2.

Construction.

Strict construction.

Balance of convenience.

SECT. 2.—Construction.

356. Private statutes must be construed strictly (*t*), the more so when, as frequently happens, Parliament has gone into an elaborate and minute investigation of plans and legislated accordingly (*u*). It is never assumed that Parliament has given powers which would infringe existing rights, even though the Act would be inoperative without them (*a*), and clauses to preserve general rights will receive a wide interpretation (*b*). There is a presumption that where private rights are infringed compensation will be provided (*c*).

357. Private statutes being enacted not only for the benefit of the persons or corporations procuring them, but for that of the public, regard should be paid in their construction to the balance of convenience on either side (*d*). As a rule, however, they are construed against the promoters (*e*), for the language must be regarded as theirs (*f*).

(*t*) *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (1885), 15 Q. B. D. 597, C. A., *per* Lord ESHER, M.R., at p. 603 (the reason being that the persons obtaining it ought to take care that that which they desire to obtain is plainly stated); *R. v. Croke* (1774), 1 Cowp. 26; *Kingston-upon-Hull Dock Co. v. La Marche* (1828), 8 B. & C. 42; *Hughes v. Chester and Holyhead Rail. Co.* (1861), 3 De G. F. & J. 352, C. A.; *Simpson v. South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679; *A.-G. v. West Hartlepool Improvement Commissioners* (1870), L. R. 10 Eq. 152; *Turner v. London and South Western Rail. Co.* (1874), L. R. 17 Eq. 561; *Taylor v. St. Helens Corporation* (1877), 6 Ch. D. 264, C. A.; *London County Council v. A. G.*, [1902] A. C. 165; *A.-G. v. Manchester Corporation*, [1906] 1 Ch. 643, C. A.; *A.-G. v. Mersey Railway*, [1907] A. C. 415; *A.-G. v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338, C. A.

(*u*) *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, *per* Lord HALSBURY, L.C., at p. 511. The principles of construction to be applied to private Acts relating to waterworks and to similar undertakings were recently considered in *Bristol Guardians v. Bristol Waterworks Co.*, [1912] 1 Ch. 846, C. A., *per* FLETCHER Moulton, L.J., at p. 859.

(*a*) *Smith v. Bell* (1842), 10 M. & W. 378, *per* PARKE, B., at p. 391: "If the Act in consequence of local peculiarities becomes incapable of being carried into effect, petitioners should suffer rather than those whose interest it is expressly provided shall be saved harmless."

(*b*) *Re London and Birmingham Rail. Co.'s Act* (1833), *Re London and North Western Rail. Co.'s Act* (1846), *Ex parte Eton College* (1850), 20 L. J. (CH.) 1, 9; *Hammersmith etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171, 215; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125, 139; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, 27, C. A.

(*c*) *Steele v. Midland Rail. Co.* (1866), 1 Ch. App. 275, 281; *A.-G. v. Horner* (1884), 14 Q. B. D. 245, 257, C. A.; *London and North Western Rail. Co. v. Evans*, *supra*, at p. 28.

(*d*) *Campbell v. Lang* (1853), 1 Macq. 451, H. L. (where the House of Lords refused to find that a public right of way had been extinguished); *Dixon v. Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820, 827; *Herron v. Rathmines and Rathgar Improvement Commissioners*, *supra*, at p. 501.

(*e*) *Scales v. Pickering* (1828), 4 Bing. 448; *Stourbridge Canal (Proprietors) v. Wheeley* (1831), 2 B. & Ad. 792; *Stockton and Darlington Rail. Co. v.*

(*f*) For note (*f*), see p. 185, *post*.

358. The courts strive against putting a construction on words which will tend to enact something unconnected with or unnecessary for the purpose of the promoters (*g*), and construe a private statute, which gives to an association of persons power to interfere with the rights of private property, in such a way as to prevent the use of such powers for any collateral purpose (*h*).

SECT. 2.
**Construc-
tion.**

Purpose of
statute.

359. So far as a private statute operates as a contract or a *quasi*-contract, it must be construed by the rules of law pertaining to such a contract (*i*). This is necessarily the case where a contract in ordinary form is appended in a schedule (*k*). Where a statute is passed to simplify the intricacies of a private estate, the interests of those not immediately concerned can rarely be affected (*l*).

Contract.

360. The terms used in a private statute may be explained by reference to a similar use of the same terms in a public statute (*m*).

Reference to
public
statutes.

361. Saving clauses and provisoes must be regarded as having little bearing upon the construction of private statutes. They are often inserted at the instance of individuals as the result of private bargains (*n*), in which case they form no part of a scheme of general legislation, and should not be allowed to have any effect upon the construction of general clauses (*o*).

Saving
clauses.

Barrett (1844), 11 Cl. & Fin. 590, H. L.; *Re London and Birmingham Rail. Co's. Act* (1833), *Re London and North Western Rail. Co's Act* (1846), *Ex parte Eton College* (1850), 20 L. J. (CH.) 1; *Scottish Drainage and Improvement Co. v. Campbell* (1889), 14 App. Cas. 139; *Great Northern, Piccadilly, and Brompton Railway v. A.-G.*, [1909] A. C. 1, 6.

(*f*) *A.-G. v. Barnet District Gas and Water Co.* (1909), 101 L. T. 651, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 654, 656.

(*g*) *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, *per* Lord BLACKBURN, at p. 766; *River Lee Navigation Conservators v. Button* (1881), 6 App. Cas. 685; *Taff Vale Rail. Co. v. Davis*, [1894] 1 Q. B. 43, C. A.

(*h*) *Galloway v. London Corporation* (1866), L. R. 1 H. L. 34, 43.

(*i*) *London and South Western Rail. Co. v. Flower* (1875), 1 C. P. D. 77, 85; *Milnes v. Huddersfield Corporation* (1886), 11 App. Cas. 511, 523; *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, 523; *Davis & Sons v. Taff Vale Rail. Co.*, [1895] A. C. 542, 552; compare title CONTRACT, Vol. VII., p. 343, note (*h*).

(*k*) See p. 122, *ante*; *Corbett v. South Eastern and Chatham Railways Managing Committee*, [1906] 2 Ch. 12, C. A., *per* COZENS-HARDY, L.J., at p. 20.

(*l*) As in *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348, 362; *Savin v. Hoylake Rail. Co.* (1865), L. R. 1 Exch. 9, 11. The latter decision, however, must be regarded as qualified by the opinion expressed by the majority of the Court of Appeal in *Corbett v. South Eastern and Chatham Railways Managing Committee*, *supra*.

(*m*) Thus, in *Mersey Docks and Harbour Board v. Henderson Brothers* (1888), 13 App. Cas. 595, the House of Lords in determining the meaning of "trading inwards" and "trading outwards" in the Mersey Dock Act Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), had recourse not only to a series of Liverpool Dock Acts, but to the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), and the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21).

(*n*) *Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395, *per* JESSEL, M.R., at p. 410.

(*o*) *Fitzgerald v. Champneys* (1861), 2 John. & H. 31, 59; *East London Rail. Co. (Directors etc.) v. Whitechurch* (1874), L. R. 7 H. L. 81, 89; *West*

SECT. 2.

Construc-
tion.

Incorporation
of general
statute.

362. Where a special statute incorporates a general statute, any doubt as to the application of the latter to the particular circumstances must be solved by reference to the former (*p*). A special statute containing no provisions inconsistent with a general statute is, however, controlled by the latter, even if this is not expressly incorporated (*q*); and the powers conferred by it are deemed to be in addition to and not in diminution of existing common law rights (*r*).

A general statute incorporated with a special statute must be read as if the sections of the former were written into the latter and formed part of it (*s*). General statutes intended to be incorporated with special statutes, such as the Lands Clauses Consolidation Act, 1845 (*t*), were passed because Parliament thought that general provisions which had been ascertained, after sufficient experience, to be proper and necessary to be introduced into statutes authorising undertakings of the character there referred to had better be enacted once for all in a general form (*a*).

SECT. 3.—Operation.

How far
ordinary law
affected.

363. So far as the rights and obligations of all persons concerned are to be found within the provisions of a statute—which generally directs that compensation shall be made to those whose property has been taken, or whose rights have been injuriously affected (*b*)—the ordinary law applicable to the acts of parties in dealing with their own land or affecting their neighbours may be ousted (*c*).

Derby Union v. Metropolitan Life Assurance Society, [1897] A. C. 647, 656, 657.

(*p*) As, for instance, in determining whether “railway and works” in the circumstances included a station (*Midland Rail. Co. v. Ambergate, Nottingham, and Boston and Eastern Junction Rail. Co.* (1853), 10 Hare, 359); and see *London and Blackwall Rail. Co. v. Limehouse District Board of Works* (1856), 3 K. & J. 123; *A.-G. v. Great Eastern Rail. Co.* (1872), 7 Ch. App. 475, 482; (1873), L. R. 6 H. L. 367, 374; *Great Western Rail. Co. v. Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, 808.

(*q*) *Mersey Docks and Harbour Board v. Lucas* (1881), 51 L. J. (Q. B.) 114, C. A., per BRETT, L.J., at pp. 118, 119; *Uckfield Rural Council v. Crowborough District Water Co.*, [1899] 2 Q. B. 664; and see title RAILWAYS AND CANALS, Vol. XXIII., p. 762.

(*r*) *Ex parte Clayton* (1830), 1 Russ. & M. 369.

(*s*) *Re Barker* (1881), 17 Ch. D. 241, C. A.; *Re Wood's Estate, Ex parte Works and Buildings Commissioners* (1886), 31 Ch. D. 607, 615, C. A.; *London and North Western Rail. Co. v. Runcorn Rural Council*, [1898] 1 Ch. 561, 563, C. A.; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 15.

(*t*) 8 & 9 Vict. c. 18.

(*a*) *Metropolitan District Rail. Co. v. Sharpe* (1880), 5 App. Cas. 425, per Lord SELBORNE, L.C., at p. 430; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12. As to the effect of incorporation, see *ibid.*, p. 15. The general Act may be looked at with reference to the powers conferred upon companies of dealing with land when acquired, but the special Act for the purpose of ascertaining what may be called the contract between landowner and company (*Simpson v. South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679, 687).

(*b*) See p. 184, *ante*.

(*c*) *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (1792), 4 Term Rep. 794; *Dunn v. Birmingham Canal Co.* (1872), L. R.

In the absence of special provision, however, property which is the subject of special statutes does not lose the characteristics attaching to property which is the subject of ordinary contract (*d*); and a direction to deal with it in a particular way does not withdraw it from the obligations and charges imposed on it by the general law (*e*).

SECT. 3.
Operation.

364. The mere fact of promoters having procured the passing of a special statute by representations, made on deposited plans or otherwise, does not establish the accuracy of such representations, unless they are incorporated in the statute (*f*). Parliament may also confer greater rights than are indicated by the deposited plans (*g*).

Representations.

365. General statutes, whether enacted previously (*h*) or subsequently (*i*), do not, if couched in general terms, operate to control special rights granted by private statutes which, while conferring such special rights, have also imposed special obligations (*j*). A subsequent general statute may, however, indicate an express intention to control (*k*) or to abrogate particular rights (*l*), especially where those rights are attached to a particular locality, and the subsequent statute brings to it entirely new benefits (*m*).

Effect of general statutes.

366. Where Parliament authorises the amendment of any local or personal statute by a duly appointed authority, it authorises the amendment of such portion of a statute which is partly public and

Amendment.

7 Q. B. 244, 271; *Hammersmith etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171, per Lord CAIRNS, at p. 215; *East Fremantle Corporation v. Annois*, [1902] A. C. 213, 217, P. C.

(*d*) *Caledonian Rail. Co. v. Sprot (of Garnkirk)* (1856), 2 Macq. 449, H. L.; *Elliot v. North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333, 362.

(*e*) *Mersey Docks and Harbour Board v. Cameron, Jones v. Mersey Docks and Harbour Board* (1865), 11 H. L. Cas. 443, 480; *Mersey Docks and Harbour Board v. Gibbs* (1866), 11 H. L. Cas. 686, 711, 726; *Mersey Docks and Harbour Board v. Lucas* (1881), 51 L. J. (q. b.) 114, C. A.; affirmed (1883), 8 App. Cas. 891; *Brighton Corporation v. Brighton Guardians* (1880), 5 C. P. D. 368.

(*f*) *North British Rail. Co. v. Tod* (1846), 12 Cl. & Fin. 722, H. L.; *A.-G. v. Great Eastern Rail. Co.* (1872), 7 Ch. App. 475, 482; but see *Savin v. Hoylake Rail. Co.* (1865), L. R. 1 Exch. 9.

(*g*) *North British Rail. Co. v. Tod*, *supra*, at p. 732; *Simpson v. South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679, 688; see also title RAILWAYS AND CANALS, Vol. XXIII., pp. 648 *et seq.*

(*h*) As in *City and South London Rail. Co. v. London County Council*, [1891] 2 Q. B. 513, C. A.; *Surrey Commercial Dock Co. v. Bermondsey Corporation*, [1904] 1 K. B. 474.

(*i*) As in *London and Blackwall Rail. Co. v. Limehouse District Board of Works* (1856), 3 K. & J. 123; *Thorpe v. Adams* (1871), L. R. 6 C. P. 125; *Ashton-under-Lyne Corporation v. Pugh*, [1898] 1 Q. B. 45, C. A.

(*j*) *Esquimaux Waterworks Co. v. City of Victoria Corporation*, [1907] A. C. 499, P. C., per WILLS, J., at p. 509; compare *Galway Presentments, Ex parte Kelly* (1874), 9 I. R. C. L. 114.

(*k*) *Dudley Gas Co. v. Warmington* (1881), 50 L. J. (M. C.) 69.

(*l*) *Great Central Gas Consumers Co. v. Clarke* (1863), 13 C. B. (N. S.) 838, Ex. Ch.

(*m*) *Sion College v. London Corporation*, [1900] 2 Q. B. 581, per CHANNELL, J., at p. 586; affirmed, [1901] 1 K. B. 617, C. A.; *Associated Newspapers, Ltd. v. City of London Corporation*, [1913] 2 K. B. 281.

SECT. 3.
Operation.

general and partly local and personal, as is in its nature local and personal (*n*).

Conditional
agreement.

367. A conditional agreement entered into by the promoters of a private Bill that in the event of the Bill becoming law they will deal with the matters brought within their competence by such law in a particular manner is not invalid as contrary to public policy (*o*).

Exercise of
powers.

368. Powers conferred by special statutes must be exercised within a reasonable time (*p*). They are not assignable (*q*).

Part VIII.—Enforcement.

SECT. 1.—Consequences of Non-observance.

SUB-SECT. 1.—In General.

Means of
enforcement.

369. The object of a statute is to command people to do or to abstain from doing some particular thing, and when a statute directs things to be done or not to be done, either the statute itself provides the means for its own enforcement, or Parliament acts upon the supposition that the existing laws of the realm are sufficient to enforce the rights and liabilities arising thereunder (*r*). The mere fact of a statute imposing a penalty for the non-performance of an act implies that there is a legal compulsion to do it, and that is so whatever may be the destination of the penalty (*s*).

Classification
of statutes.

370. For the purpose of enforcement statutes may be divided into three classes, namely:—

(1) Those in which an obligation is affirmed which already exists at common law, and a special and peculiar form of remedy is given;

(2) Those in which an obligation not previously existing at common law is created, but no remedy is provided; and

(*n*) *R. v. London County Council*, [1893] 2 Q. B. 454, C. A. (where the distinction between the two kinds of statutes is discussed at length).

(*o*) *Galloway v. London Corporation* (1866), L. R. 1 H. L. 34, 57, 59.

(*p*) *Richmond v. North London Rail. Co.* (1868), 3 Ch. App. 679; *Tiverton and North Devon Rail. Co. v. Loosemore* (1884), 9 App. Cas. 480, 496. A time is usually limited in the Act for the powers to be exercised; compare *Baker v. Metropolitan Rail. Co.* (1862), 31 Beav. 504, 509; *Ward v. Wolverhampton Waterworks Co.* (1871), L. R. 13 Eq. 243; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 37 *et seq.*

(*q*) *Great Northern Rail. Co. v. Eastern Counties Rail. Co.* (1851), 9 Hare, 306, 311; *Richmond Waterworks Co. and Southwark and Vauxhall Waterworks Co. v. Richmond Vestry (Surrey)* (1876), 3 Ch. D. 82; see also title RAILWAYS AND CANALS, Vol. XXIII., pp. 629, 703.

(*r*) *Weale v. West Middlesex Waterworks Co.* (1820), 1 Jac. & W. 358, per Lord ELDON, L.C., at p. 371 (*ubi jus, ibi remedium*); *Ashby v. White* (1703), 2 Ld. Raym. 938; and see *Fotherby v. Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188, 194.

(*s*) *Redpath v. Allan, The "Hibernian"* (1872), L. R. 4 P. C. 511, 517.

(3) Those in which a new obligation is created, and a special remedy is provided (*t*).

371. In the first class those entitled to enforce the statute may have recourse to the special remedy mentioned or to the common law remedy, for the sanctions are cumulative (*a*). Only one, however, can be exercised (*b*).

372. In the second class, where an obligation is created, but no mode of enforcing its performance is ordained, common law sanctions and incidents will ordinarily attach (*c*).

373. In the third class, where a particular mode of enforcing a new obligation is specified, such obligation, as a general rule, can be enforced in no other manner (*d*), even though this may involve ousting the jurisdiction of a court of law (*e*). Such statutes

SECT. 1.

Consequences of Non-observance.

(1) Cumulative remedies.

(2) Common law remedies.

(3) Statutory remedies.

(*t*) *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C. B. (N. S.) 336, *per* WILLES, J., at p. 356; cited in *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894, *per* FARWELL, J., at p. 903; *R. v. Hall*, [1891] 1 Q. B. 747, *per* CHARLES, J., at p. 754; *Fraser v. Fear* (1912), 107 L. T. 423, C. A. It is not always easy to determine whether remedies are cumulative or exclusive; compare *Collinson v. Newcastle and Darlington Rail. Co.* (1844), 1 Car. & Kir. 546; *Lichfield Corporation v. Simpson* (1845), 8 Q. B. 65; *Great Northern Rail. Co. v. Kennedy* (1849), 4 Exch. 417.

(*a*) *R. v. Robinson* (1759), 2 Burr. 799, *per* Lord MANSFIELD, at p. 803. On the same principle statutes which add cumulative penalties for an existing statutory offence do not repeal the earlier statutes (*R. v. Jackson* (1775), 1 Cowp. 297; *Crepps v. Durden* (1777), 2 Cowp. 640; *Apothecaries' Co. v. Jones*, [1893] 1 Q. B. 89; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33).

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33. Conversely, persons to whom remedies are open under two different statutes must elect to proceed under one of them (*Re Bedford Charity (Masters etc.)* (1819), 2 Swan. 470, 518). Where a later statute describes an offence created by a former statute, and affixes a different punishment, giving an appeal where there was no appeal before, the offence should be proceeded against under the later statute (*Michell v. Brown* (1858), 1 E. & E. 267).

(*c*) *Doe d. Rochester (Bishop) v. Bridges* (1831), 1 B. & Ad. 847, 859; *Booth v. Trail* (1883), 12 Q. B. D. 8; *Ross v. Rugge-Price* (1876), 1 Ex. D. 269. Where a statute refers generally to powers of enforcing obedience, those powers will be the ordinary powers of the court in which proceedings are to be taken (*Green v. Penzance (Lord)* (1881), 6 App. Cas. 657, 675).

(*d*) *Stevens v. Evans* (1761), 2 Burr. 1152, 1157; *Stevens v. Jeacocke* (1848), 11 Q. B. 731, 742; *Watkins v. Great Northern Rail. Co.* (1851), 16 Q. B. 961; *St. Pancras Vestry v. Batterbury* (1857), 2 C. B. (N. S.) 477; *R. v. Lovibond* (1871), 24 L. T. 357; *Handley v. Moffat* (1872), 7 I. R. C. L. 104; *Danby v. Watson* (1877), 46 L. J. (M. C.) 179; *Re International Patent Pulp and Paper Co., Knowles' Mortgage* (1877), 6 Ch. D. 556; *London and Brighton Rail. Co. v. Watson* (1879), 4 C. P. D. 118, C. A.; *West v. Downman* (1880), 14 Ch. D. 111, C. A.; *Bailey v. Bailey* (1884), 13 Q. B. D. 855, C. A. (where an order for alimony made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), was held not enforceable by action); *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667, 687, C. A.; *R. v. Essex County Court Judge* (1887), 18 Q. B. D. 704, 707 (where a county court judgment was held not to carry with it the incidents of a High Court judgment); *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64; *Devonport Corporation v. Tozer*, [1902] 2 Ch. 182; affirmed, [1903] 1 Ch. 759, C. A.; *Fraser v. Fear* (1912), 107 L. T. 423, C. A.

(*e*) *Barraclough v. Brown*, [1897] A. C. 615; *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 384, 625, 629, C. A.; affirmed, *sub*

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Consequences
of Non-
observance.

frequently make provisions which are intended to be a code on the subject dealt with (*f*).

It will not, however, be held, in the absence of clear language, that Parliament intended to destroy the common law rights of the King's subjects by placing them at the mercy of irresponsible tribunals or of an irresponsible State department (*g*). Where, therefore, a particular question has been raised before a special tribunal, and has also come in independent proceedings before a court of law competent to deal with it and to restrain the proceedings before the special tribunal, it may be just and convenient to restrain the proceedings before the special tribunal until the court has determined the question (*h*).

SUB-SECT. 2.—*Public Remedies.*

Indictment
etc.

374. Every breach of a statutory command, or of a rule made under statutory powers (*i*), is, in the absence of specific provisions (*k*), indictable at common law as a misdemeanour (*l*), and in the absence of special remedy created by statute the performance of public duties may be enforced by indictment or by information filed by the Attorney-General (*m*).

nom. Pasmore v. Oswaldtwistle Urban Council, [1898] A. C. 387 (where the only remedy open to persons aggrieved was held to be an appeal to the Local Government Board); followed in *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205; *Johnston and Toronto Type Foundry Co. v. Toronto Consumers' Gas Co.*, [1898] A. C. 447, P. C. (audit by the municipal authorities). The parties may be sent to arbitration (*Pietermaritzburg Corporation v. Natal Land and Colonization Co.* (1888), 13 App. Cas. 478, 488, P. C.; *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1905] A. C. 421; *Norwich Corporation v. Norwich Electric Tramways Co., Ltd.*, [1906] 2 K. B. 119, C. A.), or to a particular court (*Marshall v. Nicholls* (1852), 18 Q. B. 882; *Blackburn Corporation v. Parkinson* (1858), 1 E. & E. 71; *Hanley and Bucknall Coal Co. v. North Staffordshire Rail. Co.* (1891), 64 L. T. 656; *Horner v. Franklin*, [1905] 1 K. B. 479, C. A.; *Stuckey v. Hooke*, [1906] 2 K. B. 20, C. A.).

(*f*) *Lamplugh v. Norton* (1889), 22 Q. B. D. 452, 459, C. A.; *R. v. Monsted (Otto), Ltd.*, [1906] 2 K. B. 456, 463.

(*g*) *Rendall v. Blair* (1890), 45 Ch. D. 139, C. A., *per* BOWEN, L.J., at p. 152; *Brockwell v. Bullock* (1889), 22 Q. B. D. 567, C. A.; *Great Western Rail. Co. v. Sharman* (1892), 61 L. J. (Q. B.) 600; *Stubbs v. Martin*, [1895] 2 I. R. 70, C. A.; *West Ham Corporation v. Sharp*, [1907] 1 K. B. 445; *Morris and Bastert, Ltd. v. Loughborough Corporation*, [1908] 1 K. B. 205, C. A.; *A.-G. v. Lewes Corporation*, [1911] 2 Ch. 495, 507.

(*h*) *Stannard v. St. Giles, Camberwell, Vestry* (1882), 20 Ch. D. 190, 196, C. A.; *Grand Junction Waterworks Co. v. Hampton Urban Council*, [1898] 2 Ch. 331; 67 L. J. (CH.) 603; *Merrick v. Liverpool Corporation*, [1910] 2 Ch. 449, 460.

(*i*) *R. v. Walker* (1875), L. R. 10 Q. B. 355 (breach of rules made by commissioners under the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95)).

(*k*) As, for instance, where as a preliminary to the institution of proceedings, an order of a judge (as under the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8), or the fiat of the Attorney-General (as under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 2 (1), or the Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), s. 6) is required.

(*l*) *R. v. Buchanan* (1846), 8 Q. B. 883; *R. v. Hall*, [1891] 1 Q. B. 747, 753; *A.-G. v. London and North Western Rail. Co.*, [1900] 1 Q. B. 78, 83, C. A.

(*m*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 292, 329,

375. In addition to the common law remedy of indictment, and any specific remedies provided by the statute in question, the Attorney-General may at any time⁽ⁿ⁾ apply to the High Court to exercise its equitable jurisdiction of granting an injunction against the breach of a statutory duty or the infringement or threatened infringement of a public right^(o), and an individual who, save as one of the public, has sustained no special damage can only do so in the Attorney-General's name^(p). Such remedy is conveniently resorted to when the exercise of powers by public bodies^(q), statutory companies^(r), or companies trading under the Companies Acts^(s), is in question. The exercise of this jurisdiction is, however, a matter for the discretion of the court^(t).

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Consequences
of Non-
observance.
Injunction.

376. Where no special sanction is attached to the enforcement of a statutory duty affecting the public, the High Court, in the exercise of its discretion^(a), may grant a mandamus that justice may be done^(b). A mandamus is, however, never addressed for

Mandamus.

330; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 158, 246; JURIES, Vol. XVIII., p. 241; MAGISTRATES, Vol. XIX., p. 557; NUISANCE, Vol. XXI., pp. 552, 553.

⁽ⁿ⁾ Delay will as a rule be no ground for refusing relief in a suit by the Attorney-General (*A.-G. v. South Staffordshire Waterworks Co.* (1909), 25 T. L. R. 408); but doubt has been expressed on the point; see *A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34, per FARWELL, J., at p. 42; *A.-G. v. Grand Junction Canal Co.*, [1909] 2 Ch. 505, per JOYCE, J., at p. 517. As to when time will commence to run, generally, see title LIMITATION OF ACTIONS, Vol. XIX., p. 178.

^(o) See titles INJUNCTION, Vol. XVII., pp. 227 *et seq.*; NUISANCE, Vol. XXI., pp. 552, 553. The jurisdiction is preventive, not *primâ facie* mandatory (*Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A., per JAMES, L.J., at p. 115). It is immaterial whether damage has in fact been sustained by the public (*A.-G. v. London and North Western Rail. Co.*, [1900] 1 Q. B. 78, C. A.).

^(p) As relator, thereby making himself responsible for the costs. As to the disadvantages of letting each individual in a district, or even a local authority, bring an action, see *Glossop v. Heston and Isleworth Local Board*, *supra*, per JAMES, L.J., at p. 115; *Devonport Corporation v. Tozer*, [1903] 1 Ch. 759, 764, C. A.; *A.-G. v. Pontypridd Waterworks Co.*, [1908] 1 Ch. 388, 398.

^(q) *Tynemouth Corporation v. A.-G.*, [1899] A. C. 293; *A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.; *London County Council v. A.-G.*, [1902] A. C. 165; *A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *A.-G. v. Manchester Corporation*, [1906] 1 Ch. 643. See titles LOCAL GOVERNMENT, Vol. XIX., p. 327; MAGISTRATES, Vol. XIX., pp. 657, 662.

^(r) *A.-G. v. Mersey Railway*, [1907] A. C. 415.

^(s) *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *A.-G. v. Churchill's Veterinary Sanatorium, Ltd.*, [1910] 2 Ch. 401.

^(t) *A.-G. v. Wimbledon House Estate Co., Ltd.*, *supra*, per FARWELL, J., at p. 42; *A.-G. v. London and North Western Rail. Co.*, *supra*, per VAUGHAN WILLIAMS, L.J., at p. 87; *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A., per COZENS-HARDY, M.R., at p. 53; affirmed, [1912] A. C. 788.

^(a) The remedy is discretionary (*Re Barlow, Rector of Ewhurst* (1861), 30 L. J. (Q. B.) 271; approved in *R. v. Leicester Union*, [1899] 2 Q. B. 632, 639; *Re Bristol and North Somerset Rail. Co.* (1877), 3 Q. B. D. 10).

^(b) *R. v. Bank of England* (1780), 2 Doug. (K. B.) 524, 526; *R. v. Income Tax Special Purposes Commissioners* (1888), 21 Q. B. D. 313, C. A.; *R. v. Leicester Union*, *supra*; *R. v. Board of Education*, [1910] 2 K. B. 165, C. A., affirmed, *sub nom. Board of Education v. Rice*, [1911] A. C. 179, H. L. As to mandamus generally, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

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Consequences
of Non-
observance.

Recovery of
penalties.

this purpose to the Crown (c), and the court in the exercise of its discretion refuses to grant a mandamus where specific remedies can be resorted to (d).

377. A penalty created by statute, if nothing is said as to who may recover it, and if it is not created for the benefit of a party aggrieved, and the offence is not against an individual, belongs to the Crown, and the Crown alone can sue for it (e).

SUB-SECT. 3.—*Private Remedies.*

Right to
damages.

378. Notwithstanding the fact that a breach of a statutory duty may in some circumstances be excused so far as penal consequences are concerned (f), any person who has sustained injury from the non-performance of a statutory duty can claim damages from the person on whom the duty is imposed, where such non-performance amounts to a breach of a duty owed to the person injured (g).

Measure of
damages.

379. The damages recoverable in respect of a breach of statutory duty may either be imposed by the terms of the statute imposing the duty, or be such as are contemplated by the statute, and flow directly from the breach (h). Such terms may preclude a defendant from raising the defences usually open in an action on the case (i).

Injunction.

380. The remedy by injunction, as a mode of preventing that being done which if done would be an infringement of a right, is open to individuals, even if such right is the creation of statute, and,

(c) *R. v. Woods and Forests Commissioners* (1850), 15 Q. B. 761; *R. v. Treasury (Lords Commissioners)* (1872), L. R. 7 Q. B. 387; *R. v. Secretary of State for War*, [1891] 2 Q. B. 326, 332, C. A.; *R. v. Treasury (Lords Commissioners)*, [1909] 2 K. B. 183, 191.

(d) *Re Nathan* (1883), 12 Q. B. D. 461, C. A., per BRETT, M.R., at p. 473; *Re Barlow, Rector of Ewhurst* (1861), 30 L. J. (Q. B.) 271; *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, 116, C. A.; *R. v. Joint Stock Companies (Registrar)* (1888), 21 Q. B. D. 131; *R. v. Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463; *R. v. London and North Western Railway and Great Western Railway* (1896), 65 L. J. (Q. B.) 516.

(e) *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 358; and see title CROWN PRACTICE, Vol. X., p. 7.

(f) As, for instance, in certain cases where *mens rea* is not established (*Woodgate v. Knatchbull* (1787), 2 Term Rep. 148, 154; *Watkins v. Naval Colliery Co.* (1897), *Ltd.*, [1911] 2 K. B. 162, C. A., per FARWELL, L.J., at p. 185; see p. 179, *ante*).

(g) See, further, title TORT, p. 483, *post*.

(h) See titles DAMAGES, Vol. X., pp. 305, 306; NEGLIGENCE, Vol. XXI., pp. 377, 378.

(i) *Watkins v. Naval Colliery Co.* (1897), *Ltd.*, [1912] A. C. 693. The breach of a statutory provision directed to securing reasonable care is cogent evidence in an action of negligence (*Blamires v. Lancashire and Yorkshire Rail. Co.* (1873), L. R. 8 Exch. 283, Ex. Ch.), and may exclude the defences of *volenti non fit injuria* (*Baddeley v. Granville (Earl)* (1887), 19 Q. B. D. 423), and common employment (*Groves v. Wimborne (Lord)*, [1898] 2 Q. B. 402, C. A.; *Jones v. Canadian Pacific Rail. Co.* (1913), 29 T. L. R. 773, P. C.); it may also shift the burden of proof (*David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146, C. A.; affirmed, [1910] A. C. 74).

in special circumstances, even though a specific remedy is provided under the statute, unless the statute expressly or by necessary implication excludes the remedy by injunction (*k*).

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Consequences
of Non-
observance.

SUB-SECT. 4.—*Illegal Transactions.*

381. Every transaction forbidden by a statute and carried out in violation of it is *primâ facie* illegal and therefore void (*l*). An act for the doing of which a penalty is imposed is, subject to what is stated above (*m*), a thing forbidden (*n*).

Forbidden
transactions.

A contract involving the doing of an act forbidden by statute (*o*) is, like any other contract which is contrary to law (*p*), unenforceable, and no action will lie upon it (*q*). It is immaterial that no specific penalty is attached to the doing of the thing forbidden (*r*). There may, however, be cases in which such a contract will be recognised if the party seeking to enforce it is not privy to the illegality (*s*).

Avoidance
of contracts.

(*k*) *Cooper v. Whittingham* (1880), 15 Ch. D. 501; *Merrick v. Liverpool Corporation*, [1910] 2 Ch. 449, 460; *Carlton Illustrators v. Coleman & Co., Ltd.*, [1911] 1 K. B. 771, 782, 783; *A.-G. v. Lewes Corporation*, [1911] 2 Ch. 495; *Fraser v. Fear* (1912), 107 L. T. 423; and see title INJUNCTION, Vol. XVII., p. 204.

(*l*) *Bartlet v. Viner* (1692), Skin. 322; *De Begnis v. Armistead* (1833), 10 Bing. 107, 110; *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, H. L.; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594, 628; *Chambers v. Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, 609; *Magdalen Hospital (President and Governors) v. Knotts* (1879), 4 App. Cas. 324; *Victorian Daylesford Syndicate, Ltd. v. Dott*, [1905] 2 Ch. 624; *Bonnard v. Dott*, [1906] 1 Ch. 740, C. A.; *Moulis v. Owen*, [1907] 1 K. B. 746, C. A.; *Re Robinson's Settlement, Gant v. Hobbs*, [1912] 1 Ch. 717, C. A. As to the effect of illegality, see, further, title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*m*) See p. 182, *ante*.

(*n*) *Cope v. Rowlands* (1836), 2 M. & W. 149, 157; *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748, 758; *Barton v. Piggott* (1874), L. R. 10 Q. B. 86; *Victorian Daylesford Syndicate v. Dott*, *supra*.

(*o*) *Collins v. Blanner* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., p. 369, at p. 388; *Clugas v. Penaluna* (1791), 4 Term Rep. 466; *Gallini v. Laborie* (1793), 5 Term Rep. 242; *Langton v. Hughes* (1813), 1 M. & S. 593, 596; *Murray v. Reeves* (1828), 8 B. & C. 421; *Redmond v. Smith* (1844), 7 Man. & G. 457, 474; *Gordon v. Howden* (1845), 12 Cl. & Fin. 237, H. L.; *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; *Sherrard v. Gascoigne*, [1900] 2 Q. B. 279.

(*p*) *Elliot v. Richardson* (1870), L. R. 5 C. P. 744; *Re Wilcocks' Settlement* (1875), 1 Ch. D. 229; *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; *Victorian Daylesford Syndicate v. Dott*, *supra*.

(*q*) A test may be whether the illegality forms part of the cause of action (*Gordon v. Metropolitan Police (Chief Commissioner)*, [1910] 2 K. B. 1080, C. A., *per* BUCKLEY, L.J., at p. 1098); compare title CONTRACT, Vol. VII., p. 401.

(*r*) *O'Brien v. Dillon* (1858), 9 I. C. L. R. 318; *Cowan v. Milbourn* (1867), L. R. 2 Exch. 230, 233.

(*s*) *Hodgson v. Temple* (1813), 5 Taunt. 181 (where a person who sold goods knowing they were to be used in an illegal trade, but took no part in the illegal trade, was held entitled to recover the price). This decision seems, however, to conflict with *Cowan v. Milbourn*, *supra*; see also *Wetherell v. Jones* (1832), 3 B. & Ad. 221; *Wilson v. Rankin* (1865), L. R. 1 Q. B. 162, Ex. Ch.; title CONTRACT, Vol. VII. p. 487.

SECT. 1.

Consequences
of Non-
observance.

Tendency of
the court.

382. The court has always drawn a distinction between statutes denying a legal effect to instruments, by declaring them to be void to all intents and purposes, and statutes which merely require formalities to be observed (*t*), and the court will not readily construe contracts so as to bring them within the prohibition of a statute (*a*). The test to be applied is, as a rule, whether the statute was passed to enforce some object of public policy or conduct, or for some indirect object, such as facilitating the collection of revenue (*b*).

Effect of
repeals etc.

383. A contract void at the time of its making as being contrary to statute is not rendered valid by the subsequent repeal of such statute (*c*). On the other hand, on the principle that statutes should have no retrospective operation, a contract not forbidden at the time it was entered into is not, in the absence of express words, rendered unenforceable by the subsequent enactment of a statute forbidding such contracts (*d*).

Prescriptive
title.

384. Prescriptive title cannot be proved by acts prohibited by statute: such acts do not become lawful for this purpose if the statute is repealed (*e*).

Contracts
partly
illegal.

385. An illegal term in a contract does not vitiate the whole, if the good part is not dependent on the bad (*f*). It is otherwise if the considerations are not severable (*g*).

SECT. 2.—*Performance of Statutory Obligation Excused.*

Excuses.

386. Ignorance of the law does not excuse (*h*), but the performance of a statutory obligation is excused if rendered impossible

(*t*) *Davis v. Strathmore (Earl)* (1810), 16 Ves. 419, *per* Lord ELDON, L.C., at p. 428.

(*a*) *Hammond v. Hocking* (1884), 12 Q. B. D. 291; compare *Phillpotts v. Phillpotts* (1850), 10 C. B. 85; *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

(*b*) *Brown v. Duncan* (1829), 10 B. & C. 93, 99; *Swan v. Bank of Scotland* (1835), 2 Mont. & A. 656, 661, H. L.; *Smith v. Mawhood* (1845), 14 M. & W. 452; *Cundell v. Dawson* (1847), 4 C. B. 376; *Taylor v. Crowland Gas and Coke Co.* (1854), 10 Exch. 293; *Learoyd v. Bracken*, [1894] 1 Q. B. 114, C. A.

(*c*) *Jaques v. Withy and Reid* (1788), 1 Hy. Bl. 66; but see *Re Mexican and South American Co.*, *Grisewood and Smith's Case*, *De Pass's Case* (1859), 4 De G. & J. 544, 557, C. A.; *Traill v. McAllister* (1890), 25 L. R. Ir. 524.

(*d*) *Jaques v. Withy and Reid*, *supra*.

(*e*) *Traill v. McAllister*, *supra*. As to estates arising by prescription, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 283.

(*f*) *Mouys v. Leake* (1799), 8 Term Rep. 411; *Kerrison v. Cole* (1807), 8 East, 231; *Wigg v. Shuttleworth* (1810), 13 East, 87; *Howe v. Synge* (1812), 15 East, 440; *Pickering v. Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, 250; *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, C. A.; *Stanton v. Brown*, [1900] 1 Q. B. 671.

(*g*) *Shackell v. Rosier* (1836), 2 Bing. (N. C.) 634, 646; *Champion v. McAllister* (1912), *Times*, 15th May.

(*h*) On this principle a man was convicted of an offence created by a statute notice of which could not have reached the place where he was at the time when he committed it (*E. v. Bailey* (1800), Russ. & Ry. 1); compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 236.

by the act of God (*i*), or by the operation of a subsequently enacted statute (*j*). The subsequently enacted statute, however, need not wholly prevent the performance of the obligation (*k*), and in so far as the obligation remains possible of performance, it must be fulfilled (*l*).

387. A covenant which has been rendered impossible of performance by a subsequent statute is generally unenforceable at law (*m*), for, in the absence of an absolute covenant, persons must be taken to have contracted with reference to the law at the time it was made (*n*). The fact, however, that a special statute has given a remedy over against the promoters to persons compelled by it to break contracts is cogent ground for assuming that Parliament did not intend a covenantor to be entirely released from his obligations (*o*).

388. The fact that a state of things not in accordance with the provisions of a special statute has been acquiesced in for a long period may be ground for a court refusing to enforce such provisions (*p*). Even with general statutes compliance with provisions inserted for the benefit of classes or individuals need not be insisted on by the court (*q*), though it is otherwise where conditions have been imposed in the public interest (*r*).

The reasons upon which these rules have been founded have received expression in various statutory enactments, whereby the right to enforce both statutory and common law obligations has been restricted (*s*).

SECT. 2.
Perform-
ance of
Statutory
Obligation
Excused.

Release from
covenants.

Acquiescence.

Statutory
provisions.

(*i*) *R. v. Leicestershire Justices* (1850), 15 Q. B. 88, 92; *Campbell v. Dalhousie (Earl)* (1868), L. R. 1 Sc. & Div. 259, 272; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743. As to acts of God, see title TORT, pp. 492 *et seq.*, *post*.

(*j*) See p. 160, *ante*.

(*k*) *Wigg v. Shuttleworth* (1810), 13 East, 87; *Howe v. Synge* (1812), 15 East, 440.

(*l*) *Bettesworth v. St. Paul's (Dean and Chapter)* (1728), 1 Bro. Parl. Cas. 240; *Gibbons v. Chambers* (1885), Cab. & El. 577.

(*m*) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180; *Newby v. Sharpe* (1878), 8 Ch. D. 39, C. A.; and *a fortiori* when the covenant is not to do something which the subsequent statute says the covenantor shall do (*Wynn v. Shropshire Union Railways and Canal Co.* (1850), 5 Exch. 420, *per* POLLOCK, C.B., at p. 440).

(*n*) *Baily v. De Crespigny*, *supra*, at p. 186; *Newington Local Board v. Cottingham Local Board* (1879), 12 Ch. D. 725.

(*o*) *Baily v. De Crespigny*, *supra*, at p. 188; *Re Bradford Tramways and Omnibus Co., Ltd. (Courtenay's Case)* (1904), 68 J. P. 362.

(*p*) *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, C. A., where TURNER, L.J., at p. 324, expressed the view that delay on the part of the Attorney-General was a matter for consideration. As to the effect of laches generally, see title EQUIT, Vol. XIII., pp. 168 *et seq.*

(*q*) Thus, effect is not given to the Statutes of Limitation and of Frauds, when not pleaded; see *Hebblethwaite v. Hebblethwaite* (1869), L. R. 2 P. & D. 29.

(*r*) *Goldsmid v. Great Eastern Rail. Co.* (1883), 25 Ch. D. 511, C. A., *per* FRY, L.J., at p. 553. This may even result in shareholders successfully setting up their own wrong (*Taylor v. Chichester and Midhurst Rail. Co.* (1867), L. R. 2 Exch. 356, 379, Ex. Ch.; *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653).

(*s*) As to the Limitation Act, 1623 (21 Jac. 1, c. 16), and the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27), and 1874 (37 & 38 Vict.

SECT. 3.

Waiver of
Statutory
Right.Waiver of
rights.Express
prohibition.

Lapse of time.

Estoppel.

SECT. 3.—*Waiver of Statutory Right.*

389. Persons for whose benefit statutory duties have been imposed may, in the absence of express words in the statute to the contrary, contract with those on whom such duties are laid not to lay claim to the performance of them (*t*). Such a contract may be implied from acquiescence (*a*).

A statutory right which is granted as a privilege may be waived either altogether or in a particular case (*b*).

Statutory conditions, even as to forms, may, however, be imposed in such terms that they cannot be waived (*c*), and rights or obligations imposed by statute may be accompanied by an express provision preventing any variation of them by agreement (*d*). When open to question, clauses in such statutes are to receive a wide or a limited construction, according as the one or the other will best effectuate the purposes of the statute (*e*).

390. A right conferred by a statute does not cease to exist merely because it has not been exercised for a long period of time (*f*); nor can the doctrine of estoppel be applied to a statute (*g*).

c. 57), see title **LIMITATION OF ACTIONS**, Vol. XIX., pp. 33 *et seq.*; as to the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), see p. 176, *ante*; and title **PUBLIC AUTHORITIES AND PUBLIC OFFICERS**, Vol. XXIII., pp. 338 *et seq.*

(*t*) *Griffiths v. Dudley (Earl)* (1882), 9 Q. B. D. 357, 364.

(*a*) *Davis v. Bryan* (1827), 6 B. & C. 651; *Bond v. Rosling* (1861), 1 B. & S. 371, where it was held that an agreement for a lease could be enforced though it was not under seal as required by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. As to this, see the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 5; title **LANDLORD AND TENANT**, Vol. XVIII., p. 540, note (*p*).

(*b*) *Unusquisque potest renunciare juri pro se introducto* (*Great Eastern Rail. Co. v. Goldsmid* (1884), 9 App. Cas. 927, *per* Lord SELBORNE, L.C., at p. 936; *S. C.* (1883), 25 Ch. D. 511, C. A., *per* COTTON, L.J., at p. 536; *Hampstead Corporation v. Midland Railway*, [1905] 1 K. B. 538, C. A.; *Toronto Corporation v. Russell*, [1908] A. C. 493, 500, P. C.). There must be full knowledge of the privilege waived (*Chapman v. Michaelson*, [1908] 2 Ch. 612); see title **EQUITY**, Vol. XIII., p. 166.

(*c*) *Young & Co. v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517 (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174 (1)); *Netherseal Colliery Co. v. Bourne* (1889), 14 App. Cas. 228 (Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 17 (now repealed)). See also the peremptory terms of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9; see title **BILLS OF SALE**, Vol. III., p. 34.

(*d*) For examples, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 73; Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 3; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 75, extended by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3.

(*e*) *Jortin v. South Eastern Rail. Co.* (1855), 6 De G. M. & G. 270, C. A., *per* TURNER, L.J., at p. 275; *Pickering v. Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, 250; *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310, C. A.

(*f*) *Co. Litt.* 115 a; *Edinburgh and Dalkeith Rail. Co. Proprietors v. Wauchope* (1842), 8 Cl. & Fin. 710, H. L.; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37, 50, C. A.; *Midlothian County Council v. Pumpherston Oil Co., Ltd.*, *Midlothian County Council v. Oakbank Oil Co., Ltd.* (1904), 6 F. (Ct. of Sess.) 387.

(*g*) *Barrow's Case* (1880), 14 Ch. D. 432, 441, C. A.

Part IX.—Repeals.

SECT. 1.—Operation of Repealing Enactments.

391. A repealing statute, in the absence of saving clauses, operates from its commencement, whether the alteration of the law affected by it has to do with procedure or with matter of substance (*h*), and a repealed Act, in the absence of saving clauses, and except as to transactions passed and closed, must be considered as if it had never existed (*i*).

SECT. 1.
Operation of
Repealing
Enact-
ments.

Effect of
repeal.

392. A statute is repealed by implication in the following cases, namely:—

Repeal by
implication.

(1) If its provisions are wholly incompatible with a subsequent statute (*k*);

(2) If the two standing together would lead to wholly absurd consequences;

(3) If the entire subject-matter of the first is taken away by the second (*l*).

Repeal by implication, which, whenever it occurs, is the consequence of inconsistent legislation, is never to be favoured, and should not be imputed to Parliament (*m*). It is not to be implied from a mere recital (*n*), or schedule (*o*), or from non-user (*p*).

393. Certain provisions of a repealed enactment may be preserved in a repealing and amending Act by necessary implication (*q*).

Saving by
implication.

394. A repeal may be specifically qualified, and before the 31st December, 1889, every repealing section usually contained, or ought to

Qualifications
on repeal.

(*h*) *R. v. Denton (Inhabitants)* (1852), 18 Q. B. 761, 770. As to the operation of new statutes and their effect in modifying the law, see p. 170, *ante*.

(*i*) *Surtees v. Ellison* (1829), 9 B. & C. 750, 752; *Kay v. Goodwin* (1830), 6 Bing. 576, *per* TINDAL, C.J., at p. 582; *R. v. Mawgan (Inhabitants)* (1838), 8 Ad. & El. 496; *Re Mexican and South American Co., Grisewood and Smith's Case, De Pass's Case* (1859), 4 De G. & J. 544, 557, C. A.; *Dean v. Mellard* (1863), 15 C. B. (N. S.) 19; *Dobbs v. Grand Junction Waterworks Co.* (1882), 10 Q. B. D. 337, C. A., *per* Lord COLERIDGE, C.J., at p. 346; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123, 131, C. A.; *Gwynne v. Drewitt*, [1894] 2 Ch. 616; *Lemm v. Mitchell*, [1912] A. C. 400, P. C.

(*k*) *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371.

(*l*) *The India* (No. 2)₂ (1864), Brown. & Lush. 221, *per* Dr. LUSHINGTON, at p. 224; and see *Michell v. Brown* (1858), 1 E. & E. 267; *West Ham (Churchwardens) v. Fourth City Mutual Building Society*, [1892] 1 Q. B. 654, 658.

(*m*) *Winfield v. Boothroyd* (1886), 54 L. T. 574; *Kutner v. Phillips*, [1891] 2 Q. B. 267, 272.

(*n*) *Dore v. Gray* (1788), 2 Term Rep. 358, 365.

(*o*) *Allen v. Flicker* (1839), 10 Ad. & El. 640, 642.

(*p*) *White v. Boot* (1788), 2 Term Rep. 274.

(*q*) Thus, where a section of a local Act dealing with the construction and maintenance of artisans' dwellings was repealed and replaced by one setting up a different scheme of building, provisions in the repealed section as to selling and letting were implied in the Amendment Act (*Wigram v. Fryer* (1887), 36 Ch. D. 87). As to the effect of the repeal of an enactment giving a short title to another Act, see p. 203, *post*.

SECT. 1.
Operation of
Repealing
Enact-
ments.

have contained, complicated savings so as to prevent any interference with vested rights or unintentional retrospective action (*r*). Since that time savings have, by the operation of the Interpretation Act, 1889 (*s*), automatically attached to a repeal. Unless the contrary intention appears, no repeal is to :

(1) Revive anything not in force or existing at the time when the repeal takes effect (*t*) ;

(2) Affect the previous operation of any enactment so repealed, or anything duly done (*u*) or suffered under any enactment so repealed ;

(3) Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed ;

(4) Affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed ;

(5) Affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment ; and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed as if the repealing Act had not passed (*v*).

Vested
rights.

395. Savings from a repealing clause preserve vested rights both against the operation of the general repeal clause itself and also against that of the previous clauses of the Act (*w*).

Statute Law
Revision Act.

396. A Statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary (*a*). It invariably contains elaborate provisoes (*b*).

Revival of
repealed
statute.

397. A repealed statute can only be revived by express enactment (*c*) ; but one which has been in abeyance, or shorn of its original force by the imposition of a condition, may, it seems, be restored upon repeal of that condition (*d*).

(*r*) As to the effect of these savings, see *Re Busfield, Whaley v. Busfield*, (1886), 32 Ch. D. 123, 131, C. A. ; *Hume v. Somerton* (1890), 25 Q. B. D. 239 ; *Re E.*, [1906] 1 Ch. 730, C. A.

(*s*) 52 & 53 Vict. c. 63.

(*t*) Prior to the passing of Lord Brougham's Act, stat. (1850) 13 & 14 Vict. c. 21, there was an inconvenient common law rule that when an Act was repealed the repeal *ipso facto* revived any enactment which that Act had repealed (*The Bishops' Case* (1606), 12 Co. Rep. 7).

(*u*) As to the meaning of "duly done," see *R. v. West Riding of Yorkshire Justices* (1876), 1 Q. B. D. 220 (rate made under repealed Act).

(*v*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2).

(*w*) *Hough v. Windus* (1884), 12 Q. B. D. 224, C. A., *per* BOWEN, L.J., at p. 236 ; *Re Lush & Co., Ltd.*, [1913] W. N. 35.

(*a*) *Huffam v. North Staffordshire Rail. Co.*, [1894] 2 Q. B. 821 ; *Robins v. Robins*, [1907] 2 K. B. 13, 17 ; compare *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 67, C. A.

(*b*) For the general form of these, see the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 11 (1) ; see note (*g*), p. 197, *ante*.

(*d*) *Mirfin v. Attwood* (1869), L. R. 4 Q. B. 333, *per* HANNEN, J., at p. 340.

SECT. 2.—*Substitution and Re-enactment.*SECT. 2.
Substitution
and
Re-enact-
ment.

Substitution.

398. If after a right has been granted by the Crown, either upon the footing of an extant charter or by prescription, which assumes the former existence of such a charter, a statute creates the same right, or larger or different rights of the same nature and character, in favour of the grantee, the statutory rights emanating from the paramount authority supersede those held from the Crown alone (*e*), and henceforward the rights continue by virtue of the statute, so that, when the statute is repealed, the rights derived from the Crown alone do not revive (*f*). It may, however, appear that on the proper construction of the statute Parliament intended to leave the old rights subsisting by the side of the new statutory rights and obligations (*g*).

399. In construing a codifying statute (*h*) the proper course is, in the first instance, to examine its language and to ask what is its natural meaning. It is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view (*i*). After the language has been examined without presumptions, resort may be had to the previous state of the law for the construction of provisions of doubtful import, or of words which have acquired a technical meaning (*k*). If a distinction is to be drawn between statutes which codify and those which consolidate the law (*l*), it is that in construing the latter there is a presumption that the law was not intended to be altered (*m*).

Codifying
statutes.

400. Where a statute passed after 1850 wholly or partially repeals any former statute, and substitutes provisions for the

Substitution
of provisions.

(*e*) *Manchester Corporation v. Peverley* (1876), 22 Ch. D. 294, n.; approved in *Manchester Corporation v. Lyons* (1882), 22 Ch. D. 287, C. A., per JESSEL, M.R., at p. 301, and in *New Windsor Corporation v. Taylor*, [1899] A. C. 41, per Lord LUDLOW, at p. 51.

(*f*) *New Windsor Corporation v. Taylor*, *supra*, at pp. 41, 45.

(*g*) *Manchester Corporation v. Lyons*, *supra*, per BOWEN, L.J., at p. 310.

(*h*) As, for instance, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The object of a codifying statute has been said to be that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities (*Robinson v. Canadian Pacific Rail. Co.*, [1892] A. C. 481, P. C.).

(*i*) *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, per Lord HERSCHELL, at p. 144; *Robinson v. Canadian Pacific Rail. Co.*, [1892] A. C. 481, P. C.; *Bristol Tramways and Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, C. A., per COZENS-HARDY, M.R., at p. 836; *Hall v. Hayman*, [1912] 2 K. B. 5, 12. See, however, the protest in *Wallis v. Russell*, [1902] 2 I. R. 585, C. A., per PALLES, C.B., at p. 590.

(*k*) *Bank of England v. Vagliano Brothers*, *supra*, per Lord HERSCHELL, at p. 145; *R. v. Abrahams*, [1904] 2 K. B. 859.

(*l*) As to which see *Re Budgett*, *Cooper v. Adams*, [1894] 2 Ch. 557, 561.

(*m*) *Mitchell v. Simpson* (1889), 25 Q. B. D. 183, C. A., per FRY, L.J., at p. 190; *Blantyre (Lord) v. Clyde Navigation Trustees* (1881), 6 App. Cas. 273, per Lord SELBORNE, L.C., at p. 279.

SECT. 2.
Substitution and
Re-enactment.

References
to statutes,
repealed.

Re-enact-
ment.

enactments repealed, the repealed statute remains in force until the substituted provisions come into operation (*n*).

401. Where any statute passed after 1889 repeals and re-enacts, with or without modifications, any provisions of a former statute, references in any other statute are, unless the contrary intention appears, to be construed as references to the provisions so re-enacted (*o*).

402. Where a section of a repealed statute is re-enacted in the repealing statute, such section is generally held to be retrospective (*p*). It does not, however, operate as a repeal of an enactment made subsequently to the re-enacted section and inconsistent with it (*q*).

SECT. 3.—*Repeal of Provisions Incorporated in Another Statute.*

Revival.

403. If a statute passed after 1850 repeals a repealing enactment, it does not revive any enactment previously repealed, unless words are added to that particular effect (*r*). The repeal of a condition annexed to a statute by a later statute may, however, have the effect of reviving the former in its entirety (*s*).

Inconsistent
provisions.

404. A section of an earlier statute may by implication be repealed by provisions in a later statute enacting and substituting matters inconsistent with it (*a*). On the other hand, provisions of an earlier statute adopted by a later statute will not be repealed by the repeal of the former (*b*).

(*n*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 11 (2), re-enacting Lord Brougham's Act, stat. (1850) 13 & 14 Vict. c. 21, s. 6. This section gets over difficulties raised in cases like *R. v. M'Kenzie* (1820), Russ. & Ry. 429. But it may be that if an Act giving a plaintiff certain rights (*e.g.*, as to costs) upon some condition precedent being fulfilled is repealed before such condition has been complied with, his rights are lost (*Butcher v. Henderson* (1868), L. R. 3 Q. B. 335).

(*o*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1). Even though the effect be to enlarge the scope of it (*Stevens v. General Steam Navigation Co.*, [1903] 1 K. B. 890, C. A.). But an intention to extend its operation will not be presumed (*Brown v. McLachlan* (1872), L. R. 4 P. C. 543); compare, however, *Bank of England v. Vagliano Brothers*, [1891] A. C. 107. This rule is of special importance in the case of Consolidation Acts, which, dealing with definite subjects, may fail to embody or exhaust references in other statutes dealing with different subject-matters.

(*p*) *Baddeley v. Denton* (1850), 1 L. M. & P. 172; *Re Ashcroft, Ex parte Todd* (1887), 19 Q. B. D. 186, 195, C. A.

(*q*) *Morisse v. Royal British Bank* (1856), 1 C. B. (N. s.) 67; *Wallace v. Blackwell* (1856), 3 Drew. 538 (both decisions on the operation of the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106)).

(*r*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 11 (1), re-enacting Lord Brougham's Act, stat. (1850) 13 & 14 Vict. c. 21, s. 5; and see note (*t*), p. 198, *ante*.

(*s*) *Levi v. Sanderson, Mirfin v. Attwood* (1869), L. R. 4 Q. B. 330, 340; but see *Oldreeve v. Puckridge* (1867), L. R. 3 Exch. 145; and compare p. 198, *ante*.

(*a*) *Boden v. Smith* (1849), 13 Jur. 428; *Bramston v. Colchester Corporation* (1856), 6 E. & B. 246; *Parry v. Croydon Commercial Gas and Coke Co.* (1862), 11 C. B. (N. s.) 579; affirmed (1863), 15 C. B. (N. s.) 568, Ex. Ch.; *R. v. Glamorganshire Justices* (1889), 22 Q. B. D. 628, 631.

(*b*) Because these provisions have become part of the new statute

Part X.—Proof and Citation.

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Public Acts.

405. The courts have always taken judicial notice of public general statutes (*c*), and every statute passed since 1850, whether public or private, is to be deemed to be a public statute, and as such is to be judicially noticed unless the contrary is expressly provided (*d*). Local, personal, and private Acts passed before 1850, unless providing that they are to be deemed public Acts and judicially noticed as such (*e*), or that they are to be printed by the King's Printer, and that a copy so printed is to be admitted as evidence, must be pleaded and proved (*f*) by an exemplification under the Great Seal, or by a copy sworn to have been compared with the Parliament roll (*g*).

406. Since the 1st November, 1845, copies of local, personal, and private Acts, not being public Acts, if purporting to be printed by the King's Printer, have been admitted as evidence without proof

Local and
personal Acts.

(*R. v. Merionethshire (Inhabitants)* (1844), 6 Q. B. 343; *R. v. Smith* (1873), L. R. 8 Q. B. 146; *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 69; *Chapman, Morsons & Co. v. Auckland Union Guardians* (1889), 23 Q. B. D. 294, 299, C. A.; *Willingale v. Norris*, [1909] 1 K. B. 57; *Jenkins v. Great Central Railway*, [1912] 1 K. B. 1, 8). But see *R. v. Stepney Union* (1874), L. R. 9 Q. B. 383, where COCKBURN, C.J., and BLACKBURN, J., at pp. 392, 396, expressed doubt on this point; *Northam Bridge Co. v. R.* (1886), 55 L. T. 759, where CHITTY, J., assumed that a general repeal of an Act of 1785 repealed a section of it which had been made applicable to a later Act of 1796.

(*c*) Co. Litt. 98 b; Co. Inst. 98 a; *Cromwell's (Lord) Case* (1581), 4 Co. Rep. 12 b, 13 a; *Holland's Case* (1587), 4 Co. Rep. 75 a, 76 a; *Lovell v. London Sheriffs* (1812), 15 East, 320; *Forman v. Dawes* (1841), Car. & M. 127; *Aiton v. Stephen* (1876), 1 App. Cas. 456, 457; *Chilton v. London Corporation* (1878), 7 Ch. D. 735, 740.

(*d*) See title EVIDENCE, Vol. XIII., p. 525.

(*e*) As in *Woodward v. Cotton* (1833), 6 C. & P. 491; *Beaumont v. Mountain* (1834), 10 Bing. 404; *Hargreaves v. Lancaster and Preston Junction Rail. Co.* (1838), 1 Ry. & Can. Cas. 416, 430. But such a clause in a private Act did not fix strangers with notice of them (*Brett v. Beales* (1829), Mood. & M. 416, 421; *Ballard v. Way* (1836), 1 M. & W. 520; *A.-G. v. Marrett* (1846), 10 I. Eq. R. 167).

(*f*) *Kirk v. Nowill* (1786), 1 Term Rep. 118, 124; *Samuel v. Evans* (1788), 2 Term Rep. 569; and see *R. v. Nott* (1843), 4 Q. B. 768, 776.

(*g*) "If they be entered in the Parliament roll, and always allowed for Acts of Parliament, it shall be intended that it was by authority of Parliament" (*The Prince's Case* (1606), 8 Co. Rep. 1 a, 20 b). After the Royal Assent was given the Clerk of the Parliaments transcribed every public Act on to a roll, which was delivered into Chancery, and was considered the only record (*Wiltes Claim of Peerage* (1869), L. R. 4 H. L. 126). Private Acts were not enrolled without the suit of the party (*Thomas' note to The Prince's Case* in Coke's Reports, Vol. IV., p. 180, published 1826, by Butterworth & Son), and the difficulties of proof which might arise if the private Act had not been enrolled and got lost may be seen from the evidence offered and rejected in *Doe d. Bacon v. Brydges (Lady)* (1843), 6 Man. & G. 282. The practice of engrossing Acts, whether public or private, upon rolls of Parliament was discontinued in 1849, soon after the passing of the Evidence Act, 1845 (8 & 9 Vict. c. 113), since when the recognised record is the copy printed by the King's Printer (*Claydon v. Green* (1868), L. R. 3 C. P. 511, *per WILLES, J.*, at p. 522); but there are still two prints on vellum made, one retained by the Clerk of the Parliaments, the other sent to the Record Office.

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that they were so printed (*h*). Since June, 1882, such Acts, as well as proclamations, orders, regulations, and rules, when directed to be evidence or conclusive evidence when printed by the King's Printer or otherwise under His Majesty's authority, are to be such evidence if purporting to be printed under the superintendence or authority of His Majesty's Stationery Office (*i*).

Colonial
and foreign
statutes.

407. Colonial and foreign statutes must be proved, the former by a certified copy, as directed by the Colonial Laws Validity Act, 1865 (*k*), or by a copy purporting to be printed by the Government Printer (*l*), the latter by the evidence of a jurist of the foreign country or other expert (*m*).

Rules etc.

408. Rules, bye-laws, and proclamations made under the authority of statute should be proved in the manner provided by the statute under which they are made; where no special provision is contained in such statute, they may be evidenced by a copy printed by the King's Printer or under the superintendence of the Stationery Office (*n*). In case such evidence is not available, or is disputed, they must be proved in the appropriate manner (*o*).

Mode of
citation.

409. A statute may be cited in any other statute, and in any instrument or document, by its short title, if any, either with or without reference to the chapter, or by reference to the regnal year in which it was passed, and any enactment may be cited by reference to the section or sub-section of the Act in which it is contained. Where there are more statutes or sessions than one in the same regnal year, the citation should specify the statute or the session, as the case may require, and where there are more chapters than one the number of the chapter (*p*).

Short titles.

410. Under an order of the House of Lords every Bill must now have a short title, and if the Bill becomes law, a section of the Act defines the short title by which it may be cited (*q*).

(*h*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3. The court may, however, still refer to the Parliament roll (*Barrow v. Wadkin* (No. 2) (1857), 24 Beav. 327, 330; *R. v. Haslingfield* (1874), L. R. 9 Q. B. 203, 209); see title EVIDENCE, Vol. XIII., p. 525.

(*i*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2.

(*k*) 28 & 29 Vict. c. 63, s. 6; see title EVIDENCE, Vol. XIII., p. 491.

(*l*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1 (1); see title EVIDENCE, Vol. XIII., p. 492.

(*m*) See title EVIDENCE, Vol. XIII., pp. 487 *et seq.*

(*n*) *Ibid.*, p. 525.

(*o*) *Ibid.*, p. 526.

(*p*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 35 (1). The year is almost invariably part of a short title; for an instance to the contrary, see the Army Act (44 & 45 Vict. c. 58), as amended by the Army (Annual) Act, 1890 (53 & 54 Vict. c. 4), s. 4. While the short title alone appears in the text of an Act, it is customary to print in the margin the regnal year and the number of the chapter.

(*q*) Before the days of short titles most Acts of general importance acquired nicknames, but in formal documents they could only be referred to by their full legal title. For example, the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), before its short title was bestowed on it in 1889, was familiarly known among lawyers as "Jervis' Act"; but the only legal way of referring to it in a Bill or Act was as "An Act of the session of the 11th and 12th years of the reign of Her present Majesty Queen Victoria, chapter 43, intituled, An Act to facilitate the performance

To facilitate the citation of Acts of Parliament passed before the universal institution of short titles, the Short Titles Act, 1896 (*r*), schedules some hundreds of Acts, ranging from 1851 to 1893, and bestows on them short titles by which they may be cited. It provides that, notwithstanding the repeal of an enactment giving a short title to an Act, it may, without prejudice to any other mode of citation, continue to be cited by the short title (*s*).

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411. The Short Titles Act, 1896 (*r*), further provides for giving collective titles to various groups of statutes dealing with the same subject-matter (*t*), and enacts that if it is provided that any Act passed after that Act may, as to the whole or any part thereof, be cited with any of the groups of Acts mentioned in the second schedule to that Act, or with any group of Acts to which a collective title has been given by any Act passed before that Act, that group is to be construed as including that Act or part; and if the collective title of the group states the first and last years of the group, the year in which that Act is passed is to be substituted for the last year of the group, and so on, as often as a subsequent Act or part is added to the group (*u*).

Collective
titles.

412. References in any statute passed after 1889 to statutes previously passed are to be read as referring—

References
to statutes.

(1) To the statutes appearing in any revised (*a*) edition of the statutes purporting to be printed by authority;

(2) In the case of those not contained in such revised edition and

of the duties of Justices of the Peace out of sessions within England and Wales with respect to summary convictions and orders."

(*r*) 59 & 60 Vict. c. 14.

(*s*) *Ibid.*, s. 3. As to the effect of repeals generally, see pp. 197 *et seq.*, *ante*.

(*t*) Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 2. For example, there are nineteen Acts, ranging from 1694 to 1892, which regulate the Bank of England. They may all be cited and referred to under the collective title "The Bank of England Acts, 1694 to 1892" (Short Titles Act, 1896 (59 & 60 Vict. c. 14), Sched. II.). Apart from the collective title, when it is necessary to refer to a group of statutes, as, for instance, the Public Health Acts, the only way of doing so is either to enumerate them *seriatim*, or to refer to the earliest Act and "all other Acts amending or extending it."

(*u*) Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 2. It is to be noted that these enactments refer only to the citation of statutes, and not to their construction. If an amending Act is to be construed as well as cited with the group of Acts to which it belongs, express words are inserted to that effect. For instance, the Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 7, provides as follows: "This Act may be cited as the Factory and Workshop Act, 1907, and shall be construed as one with the Factory and Workshop Act, 1901, and the Factory and Workshop Act, 1901, and this Act may be cited together as the Factory and Workshop Acts, 1901 and 1907." For another formula bearing on construction, see the Companies Act, 1907 (7 Edw. 7, c. 50), s. 52.

(*a*) The Statute Law Committee, first appointed in 1868, completed in 1885 in eighteen volumes quarto a revised edition of the statutes up to 1878, and a second revised edition was in 1909 brought down to the year 1900. A chronological table and index to the statutes is now published annually under the supervision of the Statute Law Committee, and an Index to the Statutory Rules and Orders is published every three years. For the history of the Statute Book, see, further, Ilbert's *Legislative Methods and Forms*, ch. II.

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passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission;

(3) In all other cases to copies purporting to be printed by the King's Printer, or under the superintendence or authority of His Majesty's Stationery Office (b).

Quotations
from statute.

413. In any statute passed after 1889 a description or citation of a portion of another statute is, unless a contrary intention appears, to be construed as including the word, section, or other part mentioned or referred to as forming the beginning, and as forming the end, of the portion comprised in the description or citation (c).

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Preambles
and recitals.

414. Preambles and recitals afford strong evidence, perhaps the best (d), of the state of the law when a statute was passed (e), and deposited plans and details of works, when referred to in such preambles or recitals, may usefully be referred to for purposes of interpretation (f). A mere recital, either of fact or law, is not, however, conclusive so as to create an estoppel, to contradict which evidence is not receivable (g), though it carries great weight and may be confirmatory (h).

Private Acts.

415. Recitals in private statutes do not bind those who are not parties to them and who are not within the enacting part (i).

(b) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 35 (2). Different old editions of the statutes do not always agree; thus, the celebrated seventeenth section of the Statute of Frauds (29 Car. 2, c. 3) appears in the revised edition as the sixteenth section, which a reference to the original rolls showed to be correct.

(c) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 35 (3). It is to be noted that in drafting amendments to Bills a different rule is observed, and that the amendment is construed as only referring to intervening words.

(d) *A.-G. v. Powis (Earl)* (1853), Kay, 186, *per* WOOD, V.-C., at p. 207. For forms of preambles, see *Encyclopædia of Forms and Precedents*, Vol. IX., pp. 241, 242.

(e) "By the authority of our author the rehearsal or preamble of a statute is to be taken for truth; for it cannot be thought that a statute which is made by authority of the whole realm, as well of the King as of the lords spiritual and temporal, and of all the commons, will recite a thing against the truth" (Co. Litt. 19 b).

(f) *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, *per* Lord HALSBURY, L.C., at p. 502; *Marriott v. East Grinstead Gas and Water Co.* (1908), 72 J. P. 509.

(g) *Leicester (Earl) v. Heydon* (1571), Plowd. 384, 398; *R. v. Sutton* (1816), 4 M. & S. 532, 542; *Carnarvon (Earl) v. Villebois* (1844), 13 M. & W. 313, 332; *R. v. Houghton (Inhabitants)* (1853), 1 E. & B. 501, 516; approved in *Mersey Docks and Harbour Board v. Cameron*, *Jones v. Mersey Docks and Harbour Board* (1865), 11 H. L. Cas. 443, *per* Lord CHELMSFORD, at p. 518; and see *Headland v. Coster*, [1905] 1 K. B. 219, 231, C. A.; *Houghton v. Fear Brothers* (1913), 29 T. L. R. 410.

(h) *R. v. Sutton*, *supra*, at p. 549; *Norton v. Spooner* (1854), 9 Moo. P. C. C. 103, 129.

(i) *Taylor v. Parry* (1840), 1 Man. & G. 604, 691; *Beaufort (Duke) v. Smith* (1849), 4 Exch. 450, 470; *Shrewsbury (Earl) v. Scott* (1859), 6 C. B.

Mere description in a schedule to a private statute is no ground for holding that the fact is as there stated (*k*).

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Created by
Statute.

Part XII.—On the Drafting of Statutes.

416. In drafting (*l*) a public general statute (*m*), which, as a rule, is based on the hypothesis that the existing law is defective or insufficient and should be changed, it is essential that the draftsman should master the subject-matter to be dealt with, and the method to be employed in dealing with it, and, for that purpose, to ascertain the existing law and practice, the mischief or defects which the law is intended to remove, and the nature of the remedy proposed (*n*). When, as is usually the case (*o*), it is intended that the statute should make some alteration in administrative machinery, mastery of the subject-matter will include complete knowledge of all relevant details relating to the appropriate administrative authorities, their rights, powers, duties and liabilities, and the manner of carrying out and the effect of the proposed alteration (*p*).

Preliminary
considera-
tions for the
draftsman.

When the existing law and practice, and the defects which the law is intended to remove, have been ascertained, it is right to consider to what extent parliamentary legislation is required, and whether the object proposed cannot be obtained by administrative regulation under existing powers (*q*).

Consideration
of alternative
remedies.

(*n. s.*) 1, 157; *Edinburgh and Glasgow Rail. Co. v. Linlithgow Magistrates* (1859), 3 Macq. 691, 704, H. L.; *Polini v. Gray, Sturla v. Freccia* (1879), 12 Ch. D. 411, 432, C. A.; *Merttens v. Hill*, [1901] 1 Ch. 842, 852. The statements of fact recited in Divorce Bills are still formally proved, and formerly it was the practice to refer evidence in support of all private Bills to the judges who reported on it (*The Wharton Peerage* (1845), 12 Cl. & Fin. 295, 302; *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, 12).

(*k*) *Locke-King v. Woking Urban District Council* (1897), 77 L. T. 790.

(*l*) For more detailed observations on the subject of drafting statutes, see Thring's *Practical Legislation*; and Ilbert's *Legislative Methods and Forms*, both of which volumes have been consulted by the authors of this title.

(*m*) As to private Bills and Bills to which the Standing Orders of either House may be applicable, see title *PARLIAMENT*, Vol. XXI., pp. 729 *et seq.*; *Encyclopædia of Forms and Precedents*, Vol. IX., pp. 169 *et seq.*; and see Clifford's *Private Bill Legislation*.

(*n*) As to the cases in which, when a doubtful question of construction arises, the courts are entitled to consider the previous law and practice, see p. 144, *ante*.

(*o*) Reference to the Statute Book shows how small is the proportion of enactments which alter the rules or principles of the common law.

(*p*) The necessity of such intimate knowledge will be appreciated if, to take two examples only where instances can be multiplied, the Local Government Act, 1888 (51 & 52 Vict. c. 41), and the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), are examined and analysed in the light of statutory and case law at the time when they were passed.

(*q*) By rules or Orders in Council; see p. 123, *ante*. The draftsman, having considered these points, will probably embody the results in a memorandum, both for his own assistance and for that of those on whom

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Drafting of
Statutes.

Arrange-
ment : simple
and complex
statutes.

A logical
arrangement
facilitates
administra-
tion : general
clauses pre-
ceding special
and sub-
ordinate pro-
visions.

417. The arrangement of a statute is a matter of supreme importance. A statute may be either simple or complex, simple when its principle can be declared in one clause, complex when several distinct principles have to be enunciated (*r*). Whatever deviation in the arrangement of principles as between themselves may be rendered necessary in particular cases, it is essential for perspicuity that every principle should be separated from every other principle, and should form the subject of a distinct enacting clause (*s*) or series of clauses (*t*).

In the arrangement of a Bill administrative convenience should not be lost sight of. The rules of law to be observed having been laid down, the authority to administer them should be defined, followed by the procedure to be observed in administering them (*a*). Last of all should come provisions which are special (*b*) or exceptional (*c*), transitory or temporary (*d*), saving clauses, definitions (*e*), limitations as to the extent of operation (*f*) and

devolves the duty of carrying the measure through Parliament. The memorandum accompanying the Real Property Bill and the Conveyancing Bill, introduced in 1913 by Lord HALDANE, L.C., in the House of Lords, was presented to the House as a Return to an Order, and printed (14th July, 1913).

(*r*) The Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), is a good example of the simple statute; the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which is divided into fourteen parts, of the complex.

(*s*) As to enacting clauses and sections, see p. 121, *ante*.

(*t*) A Bill should state at the outset, if possible, the main principle or principles which underlie it, for it is with main principles that Parliament is chiefly concerned. The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 3, 4, 5 and 6, are good instances of this rule carried into practice. Sometimes, as with the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), it has been found advisable to connect principal with subordinate enacting clauses by words of reference. When, as with the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), there are several parts, each introduced by headings, and each virtually forming a single measure, an enunciation of principle should lead each new part.

(*a*) Put in another way, normal and general provisions should come first, the simpler preceding the more complex, followed by those subordinate provisions which are required to give the former effect, such as penalty clauses, and power to make bye-laws.

(*b*) Such as those relating to special places, or special classes of persons or things; see, for instance, Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), ss. 4, 5.

(*c*) As, for instance, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 23, providing for the transfer of the Yorkshire registries of deeds to the county council.

(*d*) Such as were rendered necessary on the passing of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66). Coming at the end of an Act, such provisions can be repealed without interfering with the framework of the whole.

(*e*) Each part of a complex statute may require a definition clause, which in this case generally comes first; see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 267. Logically definitions should come first, but in practice in modern statutes they are put at the end, because amendments made in the substantive provisions may render them superfluous or inept.

(*f*) For examples, see Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 159, 160.

duration (*g*), repeals (*h*), and a short-title clause (*i*). Details may be relegated to schedules (*k*), or left to be provided for by rules (*l*).

418. Statutes may be divided into parts (*m*), and clauses may be grouped under separate headings where it is intended to enable provisions to be incorporated with other statutes (*n*), or where in the same statute certain provisions are to be applied to a different subject-matter (*o*).

419. Referential legislation, while improper where those whose duty it is to approve it and those who are to be bound by it must look beyond the four corners of a statute in order to comprehend it (*p*), is proper when the object of the reference is to incorporate certain general Acts, or parts of general Acts, made for and adapted to incorporation (*q*).

420. Consolidation Bills should preserve substance, omit nothing, and make necessary drafting alterations (*r*), but as a rule they should not aim at amendment (*s*).

421. The following general rules may be laid down with regard to the language of statutes:—

(1) Sentences should be short and expressed in simple and untechnical language (*t*).

(2) Words must not be used with different meanings, nor different words to express the same thing (*a*).

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Division
into parts :
headings of
clauses.

Referential
legislation.

Consolidation
Bills.

General rules :

simplicity of
language ;

uniform
meaning of
words ;

(*g*) See p. 157, *ante*.

(*h*) Repeals which are consequential on the proposed Bill may be scheduled only. But those which raise a point of substance should be brought to the attention of Parliament by insertion in a clause.

(*i*) See p. 202, *ante*.

(*k*) See the schedules to the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), and the Shops Act, 1912 (2 & 3 Geo. 5, c. 3).

(*l*) As by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 581, and the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 7.

(*m*) See p. 121, *ante*. Such is now the usual practice in Consolidation Acts ; see the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) ; Children Act, 1908 (8 Edw. 7, c. 67) ; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*n*) As to headings, see p. 121, *ante* ; and see the text, *infra*.

(*o*) See, for instance, the Local Government Act, 1888 (51 & 52 Vict. c. 41).

(*p*) *Knill v. Towse* (1889), 24 Q. B. D. 186, *per* MATHEW, J., at p. 195.

(*q*) Thus, when powers of acquiring land are to be taken, the machinery of the Lands Clauses Acts (as defined in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23) is usefully embodied with them.

(*r*) Alteration of language may be necessary for the sake of clearness and consistency ; for similar expressions may have been held to bear different meanings in the different Acts which it is intended to consolidate.

(*s*) It is often advisable to pass amending statutes dealing with particular points with a view to repealing and re-enacting them almost immediately in a Consolidation Act. Thus, the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), repealed the Companies Act, 1907 (7 Edw. 7, c. 50), and the Companies Act, 1908 (8 Edw. 7, c. 12).

(*t*) For every superfluous word may give rise to contention. A *dictum* attributed to Sir J. F. STEPHEN is that the precision attained in a statute should reach a degree which even a person reading in bad faith cannot misunderstand. Technical language may at times be unavoidable, as, for instance, in real property statutes, but, as a rule, technical terms should be dealt with by interpretation clauses ; see p. 131, *ante*.

(*a*) Many words and expressions having been judicially interpreted

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time from
which statute
speaks ;
terms of
ambiguous
reference ;
and of
ambiguous
meaning ;
generality of
expression ;

persons to
be bound
must be
clearly
defined ;
sanctions ;
scienter ;
sources of
payment ;

offences
punishable
summarily ;

(3) A statute is to be regarded as always speaking. Hence "shall" may be always construed as imperative, and "if," providing for a particular case, should be followed by the indicative.

(4) The words "hereinbefore" and "hereinafter" are to be avoided, as raising a doubt whether they refer to the clause in which they occur or to the whole Bill.

(5) Expressions of doubtful import, as "it shall be lawful," "it shall and may be lawful," or "shall be empowered," should not be used, excepting where it is intended to exempt a person from an obligation or a disability to which he would otherwise be subject (*b*). If the law is imperative, the proper auxiliary of the predicate is "shall" ; if permissive, "may" (*c*).

(6) Principles should be stated in general terms and tested for particular cases (*d*) ; but the enumeration of particular cases should be avoided and, when a rule is subject to qualifications, exceptions, or restrictions, the statement of these should follow the statement of the rule (*e*).

(7) A statute, being intended to confer rights or impose duties, should make it clear on whom the rights are conferred and the duties imposed (*f*). Where no sanction is available, it should provide one (*g*) ; and a penal enactment should put beyond question whether *scienter* is of the essence of the offence (*h*).

(8) When a statute authorises expenditure which is to be provided for by taxation, the sums required must be made payable either out of the Consolidated Fund or out of the annual vote (*i*). In the first case the sum must be made payable "out of the Consolidated Fund or the growing produce thereof," and in the second case "out of money provided by Parliament" (*k*).

(9) When a statute creates an offence which is to be dealt with by justices, it is sufficient to make it punishable "on summary

(see pp. 129, 130, *ante*), such should not be used to convey different ideas from those which are associated with them in the minds not only of lawyers, but often of laymen.

(*b*) As, for instance, "It shall be lawful for" A. B. not to do a specified act.

(*c*) But having regard to the cases in which the courts have construed "may" as mandatory (see p. 171, *ante*), it is frequently expedient to put the meaning of a particular clause beyond question by adopting an expression like "the court may in its discretion" etc.

(*d*) The draftsman must employ a generality of expression and a looseness of framework, which will weather the stress of the committee stage (see title PARLIAMENT, Vol. XXI., pp. 708 *et seq.*), and not be thrown out of gear by a chance amendment.

(*e*) See the Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), ss. 11, 12.

(*f*) Hence the active "shall do" or "may do" is to be preferred to the passive "shall be done" or "may be done."

(*g*) A breach of a statutory duty may give to an individual a right of action for damages (see pp. 174, 192, *ante* ; and see title TORT, p. 483, *post*) ; but where some public object is to be secured, it is inconvenient to rely solely on the rule that every breach of a statutory command is indictable as a common law misdemeanour ; see p. 190. *ante*.

(*h*) See p. 178, *ante*, and the cases there cited.

(*i*) See title PARLIAMENT, Vol. XXI., p. 768.

(*k*) See, for instance, County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 23 ; Irish Land Act, 1903 (3 Edw. 7, c. 37), ss. 29, 52 (4).

conviction," for the use of this phrase automatically incorporates all the provisions of the Summary Jurisdiction Acts (*l*).

(10) The object of the Interpretation Act, 1889 (*m*), is to promote brevity and uniformity in the language of statutes. Its definitions and rules of construction, therefore, apply automatically unless the contrary be expressed. Its provisions must always be borne in mind in drafting, and, if it is intended to vary or depart from them, this must be done in express terms (*n*).

PART XII.

On the
Drafting of
Statutes.

application of
Interpretation
Act, 1889.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 51; see p. 180, *ante*. As to summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq*.

(*m*) 52 & 53 Vict. c. 63.

(*n*) See, for instance, Consular Salaries and Fees Act, 1891 (54 & 55 Vict. c. 36), s. 3, which varies the definition of "consular officer."

STATUTES OF LIMITATION.

See LIMITATION OF ACTIONS.

STATUTORY COMPANIES.

See COMPANIES.

STATUTORY DECLARATION.

See EVIDENCE.

STAY.

See ARBITRATION ; EXECUTION ; JUDGMENTS AND ORDERS ;
PRACTICE AND PROCEDURE.

STEALING.

See CRIMINAL LAW AND PROCEDURE.

STEAM BOILERS.

See FACTORIES AND SHOPS.

STEAM WHISTLES.

See FACTORIES AND SHOPS.

STEAMSHIPS.

See RAILWAYS AND CANALS; SHIPPING AND NAVIGATION.

STEERAGE.

See SHIPPING AND NAVIGATION.

STEVEDORES.

See SHIPPING AND NAVIGATION.

STEWARD.

See AGENCY; COPYHOLDS.

STILLBORN CHILD.

See CRIMINAL LAW AND PROCEDURE ; REGISTRATION OF BIRTHS,
MARRIAGES, AND DEATHS.

STILLS.

See INTOXICATING LIQUORS ; REVENUE.

STINT.

See COMMONS AND RIGHTS OF COMMON.

STIPENDIARY MAGISTRATES.

See MAGISTRATES.

STOCK EXCHANGE.

[NOTE.—It is important to observe throughout this Title that the statements as to custom and practice are, strictly speaking, statements as to usage, and that the decisions cited with reference to any particular usage do not necessarily dispense with proof of such usage in any subsequent case; see p. 227, *post.*—EDS.]

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<i>Banking</i> - - -	"	BANKERS AND BANKING.
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<i>Usages</i>	-	-	-	„	CUSTOM AND USAGES.

Part I.—Introductory.

SECT. 1.—*The Constitution of the London Stock Exchange.*

422. The constitution of the London Stock Exchange (*a*) is regulated by a deed of settlement executed in 1886. The proprietors are an unincorporated company (*b*), and are represented by a body of nine managers, who act as landlords of the building, and fix and alter at their discretion the terms of admission of members (*c*) and their clerks.

SECT. 1.
The Constitution of the London Stock Exchange.

423. Under the provisions of the deed of settlement the members elect annually thirty of their number as a committee for general purposes. This committee is empowered to make the rules and regulations of the Stock Exchange, which, by the deed of settlement, may from time to time be amended, repealed or altered (*d*). The maintenance of good order and government amongst the members in accordance with these rules and regulations is entrusted to the committee, which also regulates the transaction of business on the Stock Exchange (*e*). The committee is responsible for the publication of the official list of prices, and is empowered to determine what securities are to be quoted therein (*f*).

Deed of settlement.
The committee and its powers.

The committee has power to decide a dispute between members as to whether a contract has been fulfilled in accordance with the rules of the Stock Exchange, and its decision is final (*g*).

The committee may dispense with the strict enforcement of any of the rules and regulations, but it has no jurisdiction to pass a resolution effecting an alteration of a contract between the parties (*h*).

(*a*) There are also local Stock Exchanges, as for instance, at Liverpool and Manchester. Broadly speaking, their rules are modelled on those of the London Stock Exchange.

(*b*) See *Watson v. Slack* (1885), 16 Q. B. D. 270. As to unincorporated companies generally, see title COMPANIES, Vol. V., pp. 12 *et seq.*

(*c*) The admission of members to the Stock Exchange is at present regulated by Rules 21—50 of the Stock Exchange Rules, 1911. A candidate for admission must, as a rule, find three members to be his sureties in the event of his default within five years; and such sureties must not be indemnified (*ibid.*, r. 32 (1)).

(*d*) Deed of Settlement, 1886, s. xii., clause 95; Stock Exchange Rules, 1911, r. 5.

(*e*) As to the effect of the rules and regulations upon members of the public, see p. 226, *post*.

(*f*) Stock Exchange Rules, 1911, rr. 151—158.

(*g*) *Harker v. Edwards* (1887), 57 L. J. (Q. B.) 147, C. A.; *Smith v. Reynolds* (1892), 66 L. T. 808, C. A.; affirmed, *sub nom. Reynolds v. Smith* (1893), 9 T. L. R. 494, H. L. The court will construe the rules of the Stock Exchange to see whether the committee had power under them to take cognisance of the matter in dispute (*Smith v. Reynolds, supra*).

(*h*) *Union Corporation v. Charrington* (1902), 8 Com. Cas. 99; *Benjamin v. Barnett* (1903), 8 Com. Cas. 244.

SECT. 1.
The Con-
stitution
of the
London
Stock
Exchange.

Relation of
members
inter se.
Goodwill.
Broker.

Jobber.

Settlements.

Special
settlements.

Carry-over.

424. The Stock Exchange does not recognise in its dealings any parties other than its own members. All members, therefore, are in the position of principals in their dealings with each other (*i*).

Upon the death of a partner in a stockbroker's business the goodwill of the business may be sold, unless there is something in the deed of partnership to prevent a sale (*j*).

SECT. 2.—*Definitions.*

425. A "broker" is a member of the Stock Exchange whose business is to deal in securities for non-members who employ him in that behalf (*k*).

A "jobber" or "dealer" is a member of the Stock Exchange who deals with other members as a principal (*l*).

426. "Settlements" are the periodical occasions fixed for the settlement of bargains. The "Consols settlement" occurs monthly, and consists of (1) "Contango day," on which stock which is not to be taken up is carried over; (2) "Making-up day," on which tickets are passed to bring together the ultimate seller and ultimate purchaser of stock which is to be taken up; and (3) "Account day," also called "Settling day" or "Pay day," on which all differences on carrying over and on passing tickets have to be paid, and on which also securities may be delivered and, if delivered, must be paid for. The ordinary settlement occurs fortnightly, and consists of a "General Contango day," a "Making-up or Ticket day," and an "Account day," and, in addition, a "Mining Contango day" for the carrying over of mining securities (*m*).

The period between two Account days is spoken of as an "Account."

"Special settlements" are the occasions specially appointed for the first settlement of bargains in new issues.

427. "Carry-over" or "continuation" consists of two operations, namely:—(1) a repurchase for the current account of securities sold for that account (or conversely a resale of securities bought) effected in order to close an existing bargain; and (2) a new sale or purchase, as the case may be, for the new account (*n*).

(*i*) *Harker v. Edwards* (1887), 57 L. J. (Q. B.) 147, C. A.; *Smith v. Reynolds* (1892), 66 L. T. 808, C. A.; *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A., *per* COLLINS, L.J., at p. 63. By the Stock Exchange Rules, 1911, r. 72, members are prohibited from suing each other except by consent or by leave of the committee.

(*j*) *Hill v. Fearis* (1905), 21 T. L. R. 187, not following *Wilson v. Williams* (1892), 29 L. R. Ir. 176. As to the disposal of goodwill on the dissolution of a partnership generally, see title PARTNERSHIP, Vol. XXII., pp. 104 *et seq.*

(*k*) See pp. 218 *et seq.*, *post*.

(*l*) See p. 225, *post*. Members may not act in the dual capacity of broker and jobber (Stock Exchange Rules, 1911, rr. 85, 86), and may only change from the one category to the other on one month's notice to the committee (*ibid.*, r. 22).

(*m*) Stock Exchange Rules, 1911, r. 89.

(*n*) See p. 231, *post*.

“Contango” is the consideration paid to the seller by a purchaser desiring to carry over a bargain; it is usually reckoned either at a price per share or as a percentage on the price of the security (o). SECT. 2.
Definitions.
Contango.

428. “Backwardation” is the consideration for postponing the completion of a bargain paid to the purchaser by a seller who is unable or unwilling to deliver; it is usually reckoned in the same way as contango. Backwarda-
tion.

429. “Making-up” consists in the setting off against each other of two converse bargains made between the same parties or parties brought together by the passing of tickets. Making-up.

“Making-down” consists in one of two parties who have dealt together agreeing, by a fresh contract, to accept a third person in substitution for the party with whom he originally dealt. Making-
down.

“Taking-in” is a carrying over done either by the original seller of the securities, or by a third party who pays the original seller and enters into a contract with the purchaser for a sale to him of the securities for the new account (p). Taking-in.

430. “Ticket” is a document issued by a purchaser who intends to take up the securities purchased. It is issued on or before ticket day, and contains an intimation that the issuer will pay for the securities and a statement of the name and address of the person into whose name he wishes the securities transferred. The ticket is handed by the purchaser to his immediate seller, and, if the latter does not himself intend to deliver, he, in turn, passes it to his seller until it reaches a seller who does intend to deliver (q). Ticket.

431. “Defaulter” is a member of the Stock Exchange publicly declared to be unable to fulfil his engagements. A person declared a defaulter ceases at once to be a member (r). Defaulter.

“Hammering” is the declaration of a member as a defaulter. Hammering.

The “official assignee” is a member appointed by the committee to administer the estates of defaulters (s). Official
assignee.

“Hammer price” is a price publicly fixed by the official assignee immediately before the declaration of a defaulter. All members having accounts open with a defaulter must close their bargains with him at this price and pay to or claim from the official assignee the difference, if any, between the bargain price and the hammer price (t). These differences are called “hammer price differences.” Hammer
price

Hammer
price differ-
ences.

(o) For form of a “contango note,” see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 197.

(p) See p. 231, *post*.

(q) See pp. 239 *et seq.*, *post*. For various forms of tickets, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 194 *et seq.*

(r) *Stock Exchange Rules*, 1911, r. 160. As to the procedure on default, see pp. 256 *et seq.*, *post*.

(s) As to the position of the official assignee, see p. 257, *post*.

(t) *Stock Exchange Rules*, 1911, r. 164.

Part II.—Relation between Parties to Stock Exchange Transactions.

SECT. 1.

Broker and Client.

Character of relation.

SECT. 1.—*Broker and Client.*

SUB-SECT. 1.—*Fiduciary Relation.*

432. The relation of a stockbroker to his client, though not strictly that of a trustee to his *cestui que trust*, is of a fiduciary character (*u*), and money placed in a stockbroker's hands by his client for investment (*w*), money coming into his hands as the proceeds of the sale of his client's securities (*x*), and securities which belong to his client (*y*) may be followed (*a*).

Payments into bank.

433. A stockbroker may, however, properly pay into his current account at his bank a cheque received from a client for the express purpose of taking up stock purchased by him for that client (*b*), and there may well be cases in which he may be acting properly in doing so, even though his current account be overdrawn. A banker receiving money from a stockbroker is not bound to inquire into the source from which the broker has received the money; he may, therefore, retain it against a debt due from the broker even if he knows it to be money received by the broker on account of a client, unless he has reason to believe that it is being dealt with in fraud of the client (*c*).

Pledges to bank.

The same principle applies to securities pledged by a stockbroker with his bank. Brokers in the ordinary course of business are employed to sell and to buy and to raise money upon as well as to keep in custody the securities of their clients, and, consequently, the banker is entitled to assume, in the absence of indications to the contrary, that the broker has full authority to deal with a client's securities (*d*).

Running account.

434. The fiduciary character of the relation between broker and client does not extend to differences arising in favour of the client upon speculative bargains carried over (*e*) from account to account where, upon the facts, it appears, not that the broker is a trustee in

(*u*) *Re Strachan, Ex parte Cooke* (1876), 4 Ch. D. 123, C. A.; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Hancock v. Smith* (1889), 41 Ch. D. 456, C. A.; see title EQUITY, Vol. XIII., pp. 154 *et seq.*

(*w*) *Taylor v. Plumer, supra.*

(*x*) *Re Strachan, Ex parte Cooke, supra.*

(*y*) *Mutton v. Peat*, [1900] 2 Ch. 79, C. A.; *Re Burge, Woodall & Co., Ex parte Skryme*, [1912] 1 K. B. 393.

(*a*) *Re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, C. A.; see, further, titles EQUITY, Vol. XIII., pp. 159 *et seq.*; TRUSTS AND TRUSTEES.

(*b*) *Mutton v. Peat, supra, per LINDLEY, M.R.*, at p. 83, C. A.

(*c*) *Thomson v. Clydesdale Bank, Ltd.*, [1893] A. C. 282; see, generally, title BANKERS AND BANKING, Vol. I., pp. 583 *et seq.*; and compare title SET-OFF AND COUNTERCLAIM, Vol. XXV., pp. 497, 498.

(*d*) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, distinguishing and explaining *Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333.

(*e*) As to carrying over, see p. 216, *ante*; p. 231, *post*.

respect of each item, but that there is a running account the balance of which is to be paid to or received by the client as the case may be (*f*).

SECT. 1.
Broker and
Client.

SUB-SECT. 2.—*Duties of Broker to Client.*

435. A broker, who has bought securities for a client (*g*), is under no obligation to resell them (*h*) or to procure them to be carried over for his client (*i*) or to make down the bargain with another broker (*j*). Limits on broker's duties.

A broker accepting an order (*k*) does not warrant that he will execute it at all events, but only that he will use reasonable diligence in the endeavour to do so (*l*); nor, if he executes the order, does he become a *del credere* agent (*m*).

436. A broker employed to sell may not, as a general rule, himself become the purchaser even though he does so at the proper market price current at the time (*n*), and any such transaction will be set aside by the court at the instance of the client (*o*). Broker as principal.

If a broker employed to buy does so and adds to the price paid by him and charges the higher price to his client, the transaction amounts to a sale by the broker of his own shares (*p*), and the transaction does not bind the client even though the broker is prepared to give credit for the amount added by him to the price paid (*q*).

It is, however, perfectly legal to employ a broker to buy or sell at

(*f*) *King v. Hutton*, [1900] 2 Q. B. 504, C. A.; *Re Woodd, Ex parte King* (1900), 82 L. T. 504.

(*g*) As to the duties and liabilities of agents generally, see title AGENCY, Vol. I., pp. 145 *et seq.*

(*h*) *Thacker v. Hardy* (1878), 4 Q. B. D. 685, C. A., *per* BRAMWELL, L.J., at p. 691.

(*i*) *Cullum v. Hodges* (1901), 18 T. L. R. 6, C. A. If, however, he is requested to carry over and does not intend to comply, he must give notice to his client (*Re Hewitt, Ex parte Paddon* (1893), 9 T. L. R. 166, C. A.). An agreement to carry over may be implied from the conduct of the parties (*Campbell & Co. v. Brass* (1891), 7 T. L. R. 612).

(*j*) *Currie v. Booth Brothers* (1902), 7 Com. Cas. 77, C. A. As to the meaning of making-down, see p. 217, *ante*.

(*k*) For forms of instructions relating to buying in and selling out stock, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 196, 197.

(*l*) *Fletcher v. Marshall* (1846), 15 M. & W. 755.

(*m*) *Gill v. Shepherd & Co.* (1902), 8 Com. Cas. 48; compare *Wildy v. Stephenson* (1882), Cab. & El. 3; and see title AGENCY, Vol. I., pp. 153, 184.

(*n*) *Rothschild v. Brookman* (1831), 5 Bli. (N. S.) 165, H. L.; *Skelton v. Wood* (1894), 71 L. T. 616; *Stange & Co. v. Lowitz* (1898), 14 T. L. R. 468, C. A.; *Nicholson v. Mansfield & Co.* (1901), 17 T. L. R. 259; *King Viall and Benson v. Howell* (1910), 27 T. L. R. 114, C. A.; see titles EQUITY, Vol. XIII., pp. 156 *et seq.*; TRUSTS AND TRUSTEES. As to the right of a broker on the death of his client to take the shares himself, see *Re Finlay, Wilson (C. S.) & Co. v. Finlay*, [1913] 1 Ch. 565, C. A.; p. 251, *post*.

(*o*) *Rothschild v. Brookman*, *supra*. As to transactions which may be impeached by reason of the relation of the parties generally, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.*

(*p*) *Thompson v. Meade* (1891), 7 T. L. R. 698; *Stange & Co. v. Lowitz*, *supra*; *Nicholson v. Mansfield & Co.*, *supra*; *Johnson v. Kearley*, [1908] 2 K. B. 514, C. A.; compare title AGENCY, Vol. I., p. 190.

(*q*) *Stange & Co. v. Lowitz*, *supra*.

SECT. 1.
Broker and
Client.

a fixed price and to give him as his remuneration for his agency any advantage he may obtain in the price (r).

A broker may not, without making full disclosure, act for both vendor and purchaser at the same time (s).

Obedience to
instructions.

437. A broker must act in accordance with the instructions of his principal (t). Whether he has acted in accordance with his instructions or not is a question of fact (a).

If the instructions of the principal are given in such uncertain terms as to be susceptible of two different meanings and the broker *bonâ fide* adopts one of them, it is not competent to the principal to repudiate what the broker has done as unauthorised because he meant the order to be read in the other sense of which it is equally capable (b).

Price.

438. Where a broker has accepted orders to buy or sell and no price is fixed by his principal, it is his duty to effect a bargain at once at the best price obtainable (c).

Where a limit is placed upon the price at which the broker may deal, the order, in the absence of special arrangements, holds good only during the currency of the Stock Exchange Account for which it is given (d).

Duties as
to contract.

439. It is the duty of a broker employed to deal for a client to make for his principal an enforceable contract with a third party (e). If the contract authorised by the principal and that made by the broker with the third party differ as to price (f), or as to quantity (g), no privity of contract is created (h); and the third party can maintain no action on the contract against the client (i).

(r) *Platt v. Rowe* (1909), 26 T. L. R. 49; *Morgan v. Elford* (1876), 4 Ch. D. 352, C. A.

(s) *M'Devitt v. Connolly* (1885), 15 L. R. Ir. 500, C. A.; *Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635; compare *Hippisley v. Knee Brothers*, [1905] 1 K. B. 1.

(t) See title AGENCY, Vol. I., p. 183.

(a) *May and Hart v. Angeli* (1898), 14 T. L. R. 551, H. L.; *Mitchell v. Newhall* (1846), 15 M. & W. 308, where it was held that a jury might properly find that an order to a broker to purchase "shares" was well executed by a purchase of letters of allotment for shares; *Lamert v. Heath* (1846), 15 M. & W. 486; *Aston v. Kelsey*, [1913] 3 K. B. 314, C. A.; *Henderson and Boal v. Martin* (1912), 46 I. L. T. 13.

(b) *Loring v. Davis* (1886), 32 Ch. D. 625, following *Ireland v. Livingstone* (1872), L. R. 5 H. L. 395.

(c) *Thompson v. Meade* (1891), 7 T. L. R. 698.

(d) *Lawford & Co. v. Harris* (1896), 12 T. L. R. 275.

(e) *Neilson v. James* (1882), 9 Q. B. D. 546, C. A.; *Coates, Son & Co. v. Pacey* (1892), 8 T. L. R. 474, C. A.; *Nicholson v. Mansfield & Co.* (1901), 17 T. L. R. 259; compare title AGENCY, Vol. I., p. 186.

(f) *Thompson v. Meade*, *supra*; *Stange & Co. v. Lowitz* (1898), 14 T. L. R. 468, C. A.; *Johnson v. Kearley*, [1908] 2 K. B. 514, C. A.; distinguished in *Aston v. Kelsey*, *supra*.

(g) *May v. Angeli* (1897), 13 T. L. R. 568, C. A. (reversed (1898), 14 T. L. R. 551, H. L., on the ground that the employment of the brokers by the client was not the ordinary employment to buy him shares); *Beckhuson and Gibbs v. Hamblet*, [1900] 2 Q. B. 18 (affirmed [1901] 2 K. B. 73, C. A.), following *Robinson v. Mollett* (1875), L. R. 7 H. L. 802.

(h) As to privity of contract, see, further, pp. 221, 224, *post*; and see, generally, title CONTRACT, Vol. VII., pp. 345 *et seq.*

(i) *Beckhuson and Gibbs v. Hamblet*, *supra*.

A broker, however, who is instructed to buy or sell is not bound to do the whole bargain with one third party, but may subdivide it and thus make privity of contract between his client and each of the persons with whom he deals (*k*).

Where a broker is instructed by several clients at the same time to deal in the same kind of security he is, by custom of the Stock Exchange, permitted to enter into one contract with a jobber in respect of the whole of the securities, the jobber being bound to recognise the fact that the broker is, or may be, acting for more than one client, and to carry out his contract with each client individually (*l*). Privity of contract is established in such a case between the jobber and the individual clients, even though the one contract made with the jobber contains some shares as to which the broker was dealing for himself (*m*).

440. A broker fails in his duty to make an enforceable bargain when he obtains a mere honourable understanding with a member of the Stock Exchange (*n*), unless there are circumstances in the case from which an authority so to deal can be established by the broker (*o*).

A broker who has effected a bargain for his client with a third party is bound, in the absence of any breach of contract by the client (*p*), to keep it open until the time for completion has arrived (*q*).

441. Where a broker, instructed to carry over a bargain (*a*), himself takes in (*b*) the securities, he becomes a principal in the transaction (*c*). He may, nevertheless, recover differences and his remuneration for so acting from his client provided that he has the consent of his client to the adoption of this method of business. Consent will be presumed where the client knew that the broker had so acted on previous occasions and raised no objection (*d*), or where the client received notice on the particular occasion of what the broker had done, and did not repudiate his act (*e*).

SECT. 1.
Broker and Client.

Dividing orders.
Lumping orders.

Engagements binding in honour

Keeping bargain open.

Duties in carrying over

(*k*) *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A.

(*l*) *Scott and Horton v. Godfrey*, [1901] 2 K. B. 726. This case is not really an exception to the general rule that contracts made by a broker must agree as to quantity with those authorised by his principal, the *ratio decidendi* being that the jobber, knowing that the broker may be dealing for more than one client, intends to make as many contracts as there may happen to be persons for whom the broker is dealing (*Consolidated Goldfields of South Africa v. Spiegel & Co.* (1909), 100 L. T. 351; and compare *Re Rogers, Ex parte Rogers* (1880), 15 Ch. D. 207, C. A.).

(*m*) *Scott and Horton v. Godfrey*, *supra*.

(*n*) *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A., distinguishing *Seymour v. Bridge* (1885), 14 Q. B. D. 460.

(*o*) *Seymour v. Bridge*, *supra*, following *Read v. Anderson* (1884), 13 Q. B. D. 779, C. A.

(*p*) See p. 250, *post*.

(*q*) *Skelton v. Wood* (1894), 71 L. T. 616; *Ellis v. Pond*, [1898] 1 Q. B. 426, C. A.

(*a*) As to the effect of carrying over, see p. 216, *ante*; p. 231, *post*.

(*b*) As to the meaning of taking-in, see p. 217, *ante*, and note (*o*), p. 231, *post*.

(*c*) *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120.

(*d*) *Sachs v. Spielmann* (1889), 5 T. L. R. 487.

(*e*) *Petre v. Sutherland* (1887), 3 T. L. R. 422.

SECT. 1.
Broker and
Client.

Duty to
observe rules.
Duty to
account.

442. A broker dealing for a client must, in the absence of instructions to the contrary, deal according to the ordinary rules of the market (*f*).

443. It is one of the first duties of every agent to be constantly ready with his account (*g*), and to communicate the contents of it to his principal (*h*). For this reason, in an action by a client against a broker, the client is entitled to see his account apart from the rules as to discovery (*i*), and, indeed, an action lies by the client to enforce production of the account to himself or to any proper person appointed by him (*k*), but he cannot insist upon its production to a person to whom reasonable objection may be made by the broker (*l*).

SUB-SECT. 3.—*Authority of Broker.*

Implied
authority

444. A broker employed to do business on a Stock Exchange is, in the absence of anything to show the contrary, taken to be employed on the terms of that Stock Exchange (*m*), and the authority thus given by a principal to his broker cannot, so far as third parties are concerned, be limited by private instructions given to the broker (*n*). The authority may, however, be revoked at any time before it has been acted upon (*o*). Once, however, a broker has made a bargain for his client, his authority to complete it and so rid himself of the personal liability undertaken by him cannot be revoked (*p*).

Authority to
carry over.

445. In the absence of instructions to do so, a broker has no authority to carry over his client's bargains (*q*). Such instructions will not be implied from the fact that a client who has purchased does not provide money by account day with which to take up the securities bought (*r*); but an authority to carry over may be

(*f*) *Wiltshire v. Sims* (1808), 1 Camp. 258.

(*g*) *Pearse v. Green* (1819), 1 Jac. & W. 135; see title AGENCY, Vol. I., p. 186.

(*h*) *Chedworth (Lord) v. Edwards* (1802), 8 Ves. 46.

(*i*) *Leitch v. Abbott* (1886), 31 Ch. D. 374, C. A.; compare title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 105.

(*k*) *Makepeace v. Rogers* (1865), 4 De G. J. & Sm. 649, C. A.; *Bevan v. Webb*, [1901] 2 Ch. 59, C. A.; compare *Foley v. Hill* (1848), 2 H. L. Cas. 28.

(*l*) *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, C. A.

(*m*) *Forget v. Baxter*, [1900] A. C. 467, P. C.; *Chapman v. Shepherd, Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Bayliffe v. Butterworth* (1847), 1 Exch. 425. As to how far a broker is authorised to deal subject to rules or customs of which the client is ignorant, see pp. 226, 227, *post*.

(*n*) *Coles v. Bristowe* (1868), 4 Ch. App. 3.

(*o*) *Fletcher v. Marshall* (1846), 15 M. & W. 755.

(*p*) *Taylor v. Stray* (1857), 2 C. B. (N. S.) 175, 197, Ex. Ch.; compare *Read v. Anderson* (1884), 13 Q. B. D. 779, C. A.; *Smart v. Sandars* (1848), 5 C. B. 895.

(*q*) *Fenwick v. Buck* (1871), 24 L. T. 274; *Maxted v. Paine* (1869), L. R. 4 Exch. 81; *Phillips v. Jones* (1888), 4 T. L. R. 401; *Re Overweg, Haas v. Durant*, [1900] 1 Ch. 209 (where the carry-over was split up into its component parts, the first being treated as closing the client's account and the second as a new bargain made by the broker for himself).

(*r*) *Maxted v. Morris* (1869), 21 L. T. 535; but see *Campbell & Co. v. Brass* (1891), 7 T. L. R. 612, where evidence was given of a custom entitling a broker to carry over if his client does not take up.

implied from instructions to do so given in respect of a previous account and not revoked (*s*).

A continuing authority to carry over from account to account is determined by the death of the client (*t*).

SECT. 1.
Broker and
Client.

446. A broker who represents himself as possessing the authority of his client warrants the truth of that representation, and is liable in damages to anyone who, relying upon the truth of it, acts to his detriment, whether by entering into a contract with the broker or otherwise (*a*).

Warranty of
authority.

The measure of the damages in cases of breach of warranty of authority to make a contract is the loss by the plaintiff of the gain which he would have made had he obtained the contract which the defendant warranted his authority to make (*b*). Therefore, in assessing the damages, the solvency of the alleged principal must be taken into consideration (*c*).

In cases where the transaction undertaken on the faith of the broker's warranty of authority does not result in a contract, the principle is the same, and the broker is bound to indemnify the person who has acted upon his false assertion of authority against any damage which is the natural and proximate consequence of his having so acted (*d*).

In every case of breach of warranty of authority, all costs properly incurred in reliance upon the existence of the authority are recoverable from the broker (*e*).

SUB-SECT. 4.—*Broker's Right of Indemnity.*

447. A broker who has properly carried out his instructions is entitled to a full indemnity from his client against any loss or liability incurred by him by reason of his having entered into a contract on behalf of his client (*f*). This right to indemnity extends

Extent of
right.

(*s*) *Campbell & Co. v. Brass* (1891), 7 T. L. R. 612.

(*t*) *Phillips v. Jones* (1888), 4 T. L. R. 401; see pp. 239, 251, *post*.

(*a*) *Starkey v. Bank of England*, [1903] A. C. 114, applying and explaining *Collen v. Wright* (1857), 8 E. & B. 647, Ex. Ch.; *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch. D. 367, C. A. As to warranty of authority by broker issuing ticket, see p. 241, *post*; as to warranty of authority generally, see title AGENCY, Vol. I., pp. 221, 222.

(*b*) *Re National Coffee Palace Co., Ex parte Panmure, supra*; *Meek v. Wendt* (1888), 21 Q. B. D. 126.

(*c*) *Re National Coffee Palace Co., Ex parte Panmure, supra*; *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276, *per* BLACKBURN, J., at p. 279; *Weeks v. Probert* (1873), L. R. 8 C. P. 427, *per* HONYMAN, J., at p. 439.

(*d*) *Cherry and M'Dougall v. Colonial Bank of Australasia* (1869), L. R. 3 P. C. 24; *Starkey v. Bank of England, supra*.

(*e*) *Collen v. Wright, supra*; *Oliver v. Bank of England, Starkey, Leveson and Cooke, Third Parties*, [1901] 1 Ch. 652; compare *Randell v. Trimen* (1856), 18 C. B. 786; *Hughes v. Graeme* (1864), 33 L. J. (Q. B.) 335.

(*f*) *Smith v. Reynolds* (1892), 66 L. T. 808, C. A.; affirmed, *sub nom. Reynolds v. Smith* (1893), 9 T. L. R. 494, H. L.; *Bayley v. Wilkins* (1849), 7 C. B. 886; *Sutton v. Tatham* (1839), 10 Ad. & El. 27; *Young v. Cole* (1837), 3 Bing. (N. C.) 724; *Hunt, Cox & Co. v. Chamberlain* (1896), 12 T. L. R. 186, C. A.; *M'Ewen v. Woods* (1847), 12 Jur. 329; *Franklin & Co. v. Dawson* (1913), 29 T. L. R. 479 (where the client to the knowledge of the broker intended to deal in differences). As to the rights of an agent against his principal generally, see title AGENCY, Vol. I., pp. 193 *et seq.*

SECT. 1.
Broker and
Client.

When right
does not
arise.

Breach of
duty.

to anticipated liabilities as well as to losses already sustained (*g*), and a broker is entitled to be put in funds by account day (*h*) to pay the purchase price of securities bought by him for his client (*i*).

448. He is not, however, entitled to an indemnity where the loss is caused by his own default, as, for instance, by his failure to keep the bargain open till the time for completion has arrived (*k*), or by his own unreasonable action (*l*), or by his having made a payment which he was not legally bound to make (*m*), or where the transaction is one which is *ultra vires* the client for whom he has acted (*n*).

449. A broker is not entitled to an indemnity where he has not fulfilled his duty to his client (*o*). Thus, he forfeits his right to indemnity where he has assumed the position of a principal towards his client by being himself the purchaser (*a*) or seller (*b*) of the shares in which he was instructed to deal. Similarly, he forfeits his right to indemnity when he disobeys the instructions of his principal, as, for instance, where he is instructed to deal through a sub-agent, and instead of doing so makes a contract in which the sub-agent is a principal (*c*). Nor can he claim an indemnity where he has failed to establish privity of contract between his client and the third party (*d*), or where the transaction is binding in honour only (*e*), in which case he may also be liable in damages to his client (*f*).

(*g*) *Lacey v. Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(*h*) As to account day, see p. 216, *ante*.

(*i*) *Stock and Share Auction and Advance Co. v. Galmoye* (1887), 3 T. L. R. 808; *Macoun v. Erskine, Oxenford & Co.*, [1901] 2 K. B. 493, C. A. As to the rights of the broker on breach of contract by a client, see pp. 250 *et seq.*, *post*.

(*k*) *Skelton v. Wood* (1894), 71 L. T. 616; *Ellis v. Pond*, [1898] 1 Q. B. 426, C. A. He does not lose his right of indemnity in respect of other bargains (*Duncan v. Hill* (1873), L. R. 8 Exch. 242, Ex. Ch.). As to the effect of the broker's default, see p. 256, *post*.

(*l*) *Clegg v. Townshend* (1867), 16 L. T. 180.

(*m*) *Boulby v. Bell* (1846), 3 C. B. 284 (where the broker paid a loss on an unwarranted buying in); *Benjamin v. Barnett* (1903), 8 Com. Cas. 244 (where the broker paid on tender of a transfer which was out of time).

(*n*) *Re London, Hamburg and Continental Exchange Bank, Zulueta's Claim* (1870), 5 Ch. App. 444 (where the broker was acting for a company which was buying its own shares). A company may pay a reasonable commission for the placing of its own shares (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (3)); see title COMPANIES, Vol. V., p. 95.

(*o*) See title AGENCY, Vol. I., pp. 196, 197.

(*a*) *Rothschild v. Brookman* (1831), 5 Bli. (N. S.) 165, H. L.

(*b*) *Stange & Co. v. Lowitz* (1898), 14 T. L. R. 468, C. A.

(*c*) *Johnson v. Kearley*, [1908] 2 K. B. 514, C. A. (where the plaintiff, a country stockbroker, who was instructed by the defendant to effect purchases and sales of shares through brokers on the London Stock Exchange, effected the contracts with the London brokers as principals); compare *Tallentire v. Ayre* (1884), 1 T. L. R. 143, C. A.; *Aston v. Kelsey*, [1913] 3 K. B. 314, C. A., distinguishing *Johnson v. Kearley*, *supra*; *Blaker v. Hawes and Brown* (1913), 29 T. L. R. 609.

(*d*) *May v. Angeli* (1897), 13 T. L. R. 568, C. A.; reversed on the facts (1898), 14 T. L. R. 551, H. L.; but see *Platt v. Rowe* (1909), 26 T. L. R. 49, where there was a special agreement with the broker.

(*e*) *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A.; *Coates, Son & Co. v. Pacey* (1892), 8 T. L. R. 474, C. A.

(*f*) *Neilson v. James* (1882), 9 Q. B. D. 546, C. A. As to the measure of damages, compare titles AGENCY, Vol. I., pp. 191, 192; DAMAGES, Vol. X., pp. 331 *et seq.*

Where the client, instead of repudiating the agency of a defaulting broker, elects to treat him as still his agent, the broker is entitled to indemnity notwithstanding his default (*g*).

SECT. 1.
Broker and
Client.

SECT. 2.—*Client and Jobber.*

450. The contract of the jobber with the client on a purchase of securities by the jobber is that at the settling day (*h*) he will either take them himself, in which case he is bound to accept and register a transfer and to indemnify the seller, or will give the names of one or more transferees to whom no reasonable objection can be made, and who will accept and pay for the securities (*i*).

Nature of
the contract.

451. Privity of contract exists between client and jobber, and the client may sue the jobber direct in respect of the contract entered into for him by his broker (*j*), for the rule of the Stock Exchange making all members principals *inter se* (*k*) does not take away the right of the real principal to sue in respect of his own rights in his own name (*l*).

Privity of
contract.

SECT. 3.—*Runners.*

452. A runner or *remisier* is a person employed by a broker to introduce clients to the broker. The usual terms of such an employment, namely, that the runner is remunerated by a share of the commission earned by the broker from the business introduced by him, and agrees to bear a proportion of any loss which the broker may incur by the failure of persons introduced to fulfil their obligations, does not constitute a partnership between the runner and the broker (*m*), and such an arrangement, being a contract of indemnity on the part of the runner rather than a guarantee, does not require to be in writing (*a*) under the Statute of Frauds (*b*).

Relation of
runner to
broker.

There is no custom of the Stock Exchange entitling a runner who is remunerated by a share of commission to participate in charges paid to the broker for carrying over (*c*).

Remunera-
tion.

(*g*) *Hartas v. Ribbons* (1889), 22 Q. B. D. 254, C. A.

(*h*) See p. 216, *ante*.

(*i*) *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Grissell v. Bristowe* (1868), L. R. 4 C. P. 36, Ex. Ch.; *Sheppard v. Murphy* (1868), 16 W. R. 948; *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Musgrave and Hart's Case* (1867), L. R. 5 Eq. 193; *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309, Ex. Ch.; *Nickalls v. Merry* (1875), L. R. 7 H. L. 530. As to the release of the jobber from liability to indemnify when a name is passed, and as to whether a client can similarly relieve himself from further liability by passing a name, see pp. 240, 241, *post*.

(*j*) *Mortimer v. McCallan* (1840), 6 M. & W. 58; *Stray v. Russell* (1859), 1 E. & E. 888; *Russell v. Bendigo Goldfields* (1896), *Times*, 28th November; *Union Corporation v. Charrington* (1902), 8 Com. Cas. 99.

(*k*) See p. 216, *ante*.

(*l*) *Langton v. Waite* (1868), L. R. 6 Eq. 165; *Humphrey v. Lucas* (1845), 2 Car. & Kir. 152.

(*m*) *Sutton & Co. v. Grey*, [1894] 1 Q. B. 285.

(*a*) *Ibid.*, following *Couturier v. Hastie* (1852), 8 Exch. 40; *Harburg India-rubber Comb Co. v. Martin* (1902), 86 L. T. 505, C. A.; compare title GUARANTEE, Vol. XV., pp. 444, 463.

(*b*) 29 Car. 2, c. 3; see title GUARANTEE, Vol. XV., pp. 454 *et seq.*

(*c*) *Von Taysen v. Baer, Ellissen & Co.* (1912), 56 Sol. Jo. 224.

SECT. 3.

Runners.

Authority.

453. The authority of the runner to bind the broker, or the person introduced, depends upon the particular circumstances of each case. The mere fact that the broker has accepted some orders given to the runner is not sufficient to render him liable on subsequent orders given to and accepted by the runner but not communicated to or acted upon by the broker (*d*).

Part III.—Course of Business.

SECT. 1.—Rules and Customs.

How far
incorporated
in contracts.

454. Contracts upon the London Stock Exchange are made subject to the rules and regulations of that institution, and notice that this is the case is invariably given on the face of the contract note (*e*). The rules, therefore, are incorporated in the contract, and are binding upon members of the public who instruct their brokers to deal upon that Stock Exchange (*f*). Customs (*g*) only bind the client of a broker in so far as either they are known to him or are in themselves reasonable (*h*).

A rule or custom which involved a violation of the law of the land would be utterly void and of no effect against the outside world (*i*).

Effect of
employing
a broker.

455. Where a person employs a broker to do business upon a Stock Exchange he should, in the absence of anything to show the contrary, be taken to have employed the broker according to the rules and customs of that Stock Exchange (*j*).

Rules or customs, however, which are applicable only to the domestic forum of the Stock Exchange do not bind outsiders (*k*).

(*d*) *Spooner v. Browning*, [1898] 1 Q. B. 528, C. A.

(*e*) As to the contract note, see pp. 228 *et seq.*, *post*.

(*f*) *Benjamin v. Barnett* (1903), 8 Com. Cas. 244, *per* KENNEDY, J., at pp. 247, 248. It is submitted that the view expressed by KENNEDY, J., and adopted in the text is the correct view. There is, however, a considerable body of authority in favour of the proposition that a client who is ignorant of a rule is not bound by it if it be unreasonable, any more than he would be if it were a custom merely and not a rule; see *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A.; *Harker v. Edwards* (1887), 57 L. J. (Q. B.) 147, C. A.; *Smith v. Reynolds* (1892), 66 L. T. 808, C. A.; *Duncan v. Hill* (1873), L. R. 8 Exch. 242, 248, Ex. Ch. In none of these cases, however, was the distinction between a rule and a custom adverted to, and in none of them, except perhaps *Perry v. Barnett*, *supra*, were the *dicta* upon this point necessary for the decision.

(*g*) "Usages" of the Stock Exchange are almost invariably referred to in the reported cases as "customs," and therefore the word "customs," though not strictly correct, is made use of in this section. For the distinction between usage and custom, see title CUSTOM AND USAGES, Vol. X., pp. 221, 267.

(*h*) See note (*f*), *supra*. As to persons bound by usages, see, generally, title CUSTOM AND USAGES, Vol. X., pp. 266 *et seq.*; as to proof of a usage, see *ibid.*, pp. 270 *et seq.*

(*i*) *Re Plumby, Ex parte Grant* (1880), 13 Ch. D. 667, C. A., *per* JAMES, L.J., at p. 679.

(*j*) See p. 222, *ante*.

(*k*) *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A.; *Ponsolle v. Webber*,

456. The existence of a custom is a question of fact for the jury in each case (*l*), but where a custom has been frequently proved in courts of law the courts will take judicial notice of it without proof, and treat it as part of the law merchant (*m*).

SECT. 1.
Rules and
Customs.

Recognition
of customs.

SECT. 2.—*The Contract.*

SUB-SECT. 1.—*Formation and Nature of Contract.*

457. The contract for the purchase and sale of shares is, in practice, made verbally between members of the London Stock Exchange, each making a note of the transaction in his own book, which is the only record of the transaction (*n*). Verbal contract valid.

A contract for the sale of shares in a joint-stock company is not a contract for the sale of goods within the meaning of the Sale of Goods Act, 1893 (*o*), and is therefore enforceable though by parol only (*p*).

458. Whether any particular security forms an interest in land so as to require that a contract for the sale of it should be in writing under s. 4 of the Statute of Frauds (*q*) is a question depending upon the constitution of the body issuing the security, and upon the nature of the security itself (*r*). How far shares interest in land.

Shares in companies incorporated by Act of Parliament and owning land are not an interest in land (*s*). Nor are shares in companies incorporated under the Companies Acts (*t*), or in

[1908] 1 Ch. 254 (both cases as to the closing of a client's account on the default of his broker). For an instance of such a rule, see p. 232, *post*.

(*l*) *Dent v. Nickalls* (1874), 30 L. T. 644, Ex. Ch.

(*m*) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, 346, Ex. Ch.; affirmed (1876), 1 App. Cas. 476; see, generally, title CUSTOM AND USAGES, Vol. X., pp. 270 *et seq.*

(*n*) *Scott and Horton v. Godfrey*, [1901] 2 K. B. 726, 733; see title COMPANIES, Vol. V., p. 184. Bargains made on the London Stock Exchange are called over and checked by or on behalf of the respective members on the day following that upon which they were entered into. As to contract notes, see pp. 228 *et seq.*, *post*.

(*o*) 56 & 57 Vict. c. 71, s. 4; see title SALE OF GOODS, Vol. XXV., pp. 127 *et seq.*

(*p*) *Humble v. Mitchell* (1839), 11 Ad. & El. 205; *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Tempest v. Kilner* (1846), 3 C. B. 249; *Bowlby v. Bell* (1846), 3 C. B. 284, 291; *Heseltine v. Siggers* (1848), 1 Exch. 856; compare *Knight v. Barber* (1846), 16 M. & W. 66; title SALE OF GOODS, Vol. XXV., p. 112. But shares in a joint-stock company are "goods" within R. S. C., Ord. 50, r. 2, and may, therefore, be sold under that rule in a pending action (*Evans v. Davies*, [1893] 2 Ch. 216).

(*q*) 29 Car. 2, c. 3; see title CONTRACT, Vol. VII., p. 361.

(*r*) *Watson v. Spratley* (1854), 10 Exch. 222.

(*s*) *Bligh v. Brent* (1837), 2 Y. & C. (EX.) 268 (Chelsea Waterworks Company); *Bradley v. Holdsworth* (1838), 3 M. & W. 422 (railway company); *Duncuft v. Albrecht*, *supra* (railway company); *Sparling v. Parker* (1846), 9 Beav. 450 (Liverpool Gas Light Company); *Hilton v. Giraud* (1847), 1 De G. & Sm. 183 (London Dock Company and East and West India Dock Company); *Walker v. Milne* (1849), 11 Beav. 507 (dock and canal shares and bonds); *Edwards v. Hall* (1855), 6 De G. M. & G. 74 (annuities, bank, canal and waterworks stock); see, generally, title COMPANIES, Vol. V., pp. 674 *et seq.*

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22 (1); *Bulmer v. Norris* (1860), 9 C. B. (N. S.) 19; see title COMPANIES, Vol. V., p. 630.

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joint-stock companies established by deed (*a*), or in cost-book mining companies (*b*). Where, on the other hand, land is vested in the shareholders of a corporation, and the corporation has the management only of the land, its shares do represent an interest in land (*c*).

Mortgage
debentures.

459. Mortgage debentures in the form given in Schedule C to the Companies Clauses Consolidation Act, 1845 (*d*), do not confer upon their holders an interest in land (*e*), nor does debenture stock created by a railway company under the provisions of the Companies Clauses Act, 1863 (*f*), Part III (*g*). On the other hand, an interest in land is conferred by debentures issued by a company incorporated under the Companies (Consolidation) Act, 1908 (*h*), charging its undertaking and all its property whatsoever, if the company possesses leasehold or freehold property (*i*).

SUB-SECT. 2.—*The Contract Note.*

Definition.

460. A contract note is a note sent by a broker or agent to his principal, or by a dealer in stocks or marketable securities to his seller or purchaser, advising him of the sale or purchase of any stock or marketable security. For the purposes of the stamp duties on contract notes, the definition does not include a note sent by a broker or agent to his principal where that principal is himself acting as broker or agent for a principal, and is either a member of a Stock Exchange in the United Kingdom or a person who *bonâ fide* carries on the business of a stockbroker in the United Kingdom and is registered as such in the list (*j*) of stockbrokers kept by the Commissioners of Inland Revenue (*k*).

How far con-
tract notes
necessary.

461. It is not the practice of members of a Stock Exchange to exchange contract notes between themselves (*l*), and they are exempted from any obligation to do so (*m*). With this exception,

(*a*) *Watson v. Slack* (1885), 16 Q. B. D. 270; *Sparling v. Parker* (1846), 9 Beav. 450; *Myers v. Perigal* (1852), 2 De G. M. & G. 599; *Bennett v. Blain* (1863), 15 C. B. (N. S.) 518; *Freeman v. Gainsford* (1865), 18 C. B. (N. S.) 185.

(*b*) *Watson v. Spratley* (1854), 10 Exch. 222; *Powell v. Jessopp* (1856), 18 C. B. 336; see, generally, title COMPANIES, Vol. V., pp. 674 *et seq.*

(*c*) *Townsend (Lord) v. Ash* (1745), 3 Atk. 336; compare *Buckeridge v. Ingram* (1795), 2 Ves. 652; *Boyce v. Green* (1826), Batt. 608; *Watson v. Spratley*, *supra*, at p. 241.

(*d*) 8 & 9 Vict. c. 16.

(*e*) *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; *Holdsworth v. Davenport* (1876), 3 Ch. D. 185; *Re Mitchell's Estate*, *Mitchell v. Moberly* (1877), 6 Ch. D. 655; compare *Re Parker*, *Wignall v. Park*, [1891] 1 Ch. 682.

(*f*) 26 & 27 Vict. c. 118.

(*g*) *Attree v. Hawe* (1878), 9 Ch. D. 337, C. A.

(*h*) 8 Edw. 7, c. 69.

(*i*) *Driver v. Broad*, [1893] 1 Q. B. 744, C. A.

(*j*) See Official Circular of Board of Inland Revenue, 26th July, 1899.

(*k*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), ss. 77 (3).

(*l*) *Scott and Horton v. Godfrey*, [1901] 2 K. B. 726, 733; see p. 227, *ante*.

(*m*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (1). For forms of contract notes, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 193, 194.

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any person who effects the sale or purchase of any stock or marketable security of the value of £5 or upwards as a broker or agent, and any person who, by way of business, deals or holds himself out as dealing as a principal in any stock or marketable security to the value of £5 or upwards, must forthwith make and execute or transmit a contract note to his principal, or to his vendor or purchaser as the case may be (*n*).

A contract in writing or memorandum between two principals who do not, by way of business, deal or hold themselves out as dealing in stocks or securities, is not a contract note within the above definition. It must, however, be stamped as a memorandum of agreement with a 6*d.* stamp (*o*).

462. Every contract note as above defined for or relating to the sale or purchase of any marketable security must be stamped with an *ad valorem* stamp duty (*p*), which is to be denoted by an adhesive stamp effectively cancelled by the person by whom the note is made by writing on or across the stamp his name or initials or the name or initials of his firm and the date of his so writing (*q*).

Stamping of
contract
notes.

Where the contract note is a continuation or carrying over (*r*) note, though it is made in respect of both a sale and a purchase, it is chargeable with duty on one of those transactions only, and, if different rates are chargeable in respect of the two transactions to which it relates, then with duty on that one of them upon which the rate is the higher (*s*).

Carrying
over.

Where a contract note advises the sale or purchase of more than one description of stock or marketable security, the note must be stamped as though it were as many separate contract notes as there are descriptions of stock or securities included in it (*t*).

Several
stocks.

The stamp duty on a contract note may be added to the charge

(*n*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (1). As to the penalty for omission, see p. 230, *post*.

(*o*) *Knight v. Barber* (1846), 16 M. & W. 66; Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Agreement"; compare *Humble v. Mitchell* (1839), 11 Ad. & El. 205; *Heseltine v. Siggers* (1848), 1 Exch. 856, where shares in a joint-stock company were held not to be goods, wares and merchandise within the Statute of Frauds (29 Car. 2, c. 3), s. 17.

(*p*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 77 (1), by which the following scale of duty is imposed:—

Where the value of the stock or marketable security—

is £5 and does not exceed £100	.	.	.	6 <i>d.</i>
exceeds £100 and does not exceed £500	.	.	.	1 <i>s.</i>
" £500	"	"	"	2 <i>s.</i>
" £1,000	"	"	"	3 <i>s.</i>
" £1,500	"	"	"	4 <i>s.</i>
" £2,500	"	"	"	6 <i>s.</i>
" £5,000	"	"	"	8 <i>s.</i>
" £7,500	"	"	"	10 <i>s.</i>
" £10,000	"	"	"	12 <i>s.</i>
" £12,500	"	"	"	14 <i>s.</i>
" £15,000	"	"	"	16 <i>s.</i>
" £17,500	"	"	"	18 <i>s.</i>
" £20,000	.	.	.	£1

(*q*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (4).

(*r*) As to continuation or carrying over, see pp. 231, 232, *post*.

(*s*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 77 (2).

(*t*) *Ibid.*, s. 77 (4).

SECT. 2.

The
Contract.Penalty for
not stamping.

for brokerage or agency, and is made recoverable as part of such charge (*u*).

463. Any person who is under obligation to make and execute or to stamp a contract note, and who either neglects to make and execute one (*v*) or to stamp it duly (*a*), incurs a penalty of £20; and if a broker, in this or any other respect, fails to comply with the provisions of the Finance (1909—10) Act, 1910 (*b*), s. 78 (*c*), he loses any legal claim to any charge for brokerage, commission, or agency with reference to the transaction in question (*d*).

Stamp duty
on options.

464. The obligations to make and execute and to stamp a contract note apply equally to any contract under which an option is given or taken to purchase or sell any stock or marketable security at a future time at a certain price as it applies to a present sale or purchase (*e*). Only half the duty chargeable upon a purchase or sale is chargeable upon a contract for an option; if, however, a double option is given or taken under the contract, it is to be deemed to be a separate contract in respect of each option (*e*).

Where a contract note is made in consequence of the exercise of an option given or taken under a properly stamped contract note, and bears upon its face a certificate by the broker or dealer to the effect that it is so made, it is chargeable with only half of the duty which would otherwise have been chargeable thereon (*f*).

Contract note
in broker's
name.

465. Where a broker employed to sell securities gives to the broker of the purchaser a contract note professing to sell in his own name, he becomes liable as a principal to the purchaser (*g*). As between broker and client, however, the use of the words "bought for" or "sold to" in the contract note does not conclude the question as to what was the real relation between the parties, and either the broker (*h*) or the client (*i*) can give evidence to establish the real relationship.

Rectification.

466. The contract note is not necessarily conclusive as to the subject-matter of the transaction in reference to which it is given (*k*).

A mistake in a contract note may be subsequently rectified

(*u*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (5).

(*v*) *Ibid.*, s. 78 (1).

(*a*) *Ibid.*, s. 78 (2).

(*b*) 10 Edw. 7, c. 8.

(*c*) See pp. 228, 229, *ante*.

(*d*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (3), (4).

(*e*) *Ibid.*, s. 79 (1).

(*f*) *Ibid.*, s. 79 (2).

(*g*) *Royal Exchange Assurance v. Moore* (1863), 8 L. T. 242, following *Higgins v. Senior* (1841), 8 M. & W. 834, and *Jones v. Littledale* (1837), 6 Ad. & El. 486.

(*h*) *Stock and Share Auction and Advance Co. v. Galmoye* (1887), 3 T. L. R. 808.

(*i*) *Re Wreford, Carmichael v. Rudkin* (1897), 13 T. L. R. 153.

(*k*) *May and Hart v. Angeli* (1898), 14 T. L. R. 551, H. L. (where it was held that a broker had fulfilled his instructions by acquiring for his client an interest in a pool, though the contract note purported to record a purchase of a number of shares in a company).

although the client has acted upon the faith of the correctness of the contract note as rendered (*l*).

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SECT. 3.—Continuation.

SUB-SECT. 1.—On Stock Exchange.

467. Continuation or carrying over is in form and in law a sale and repurchase, or a purchase and resale, as the case may be (*m*). It is a new contract, and not merely getting further time for the performance of the old contract (*n*). New contract.

A continuation being a contract of sale and repurchase and not a loan, the taker-in (*o*) becomes the absolute owner of the securities carried over, and is not bound to redeliver the identical securities but an equal amount of similar securities (*p*). If, therefore, he sells the securities taken in by him and makes a profit thereon, he may retain it to his own use (*q*). In the case of a loan, however, if the lender sells the securities deposited, the borrower may charge him with the price obtained for them if he finds it his interest to do so (*r*).

SUB-SECT. 2.—Continuation with Aid of a Bank.

468. It is a frequent practice on the London Stock Exchange for a broker who has been instructed to take in securities for his client, instead of carrying them over on the Stock Exchange, to find the money to do so by depositing them with his banker against an advance. Securities so taken in by a broker and deposited with his bank may be held by the bank against the general balance due to it from the broker (*s*). Deposit of securities.

469. It is customary for brokers who have taken in clients' securities and pledged them with their bank in the above manner, to charge a contango (*t*) to their clients exceeding the rate of interest Contango.

(*l*) *Dails v. Lloyd* (1848), 12 Q. B. 531. As to mistake generally, see title MISTAKE, Vol. XXI., pp. 1 *et seq.*

(*m*) *Bongiovanni v. Société Générale* (1886), 54 L. T. 320, C. A.; *Re Overweg, Haas v. Durant*, [1900] 1 Ch. 209; compare Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 77 (2). As to the effect of the death of the seller on shares which are being carried over, see pp. 239, 251, *post*.

(*n*) *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A., *per* ROMER, L.J., at p. 71. As to the broker's authority to carry over his clients' bargains, see pp. 222, 223, *ante*.

(*o*) A party carrying over securities himself is said to "take in" the securities; as to taking in, when done by a broker himself for his client, see p. 221, *ante*.

(*p*) *Bongiovanni v. Société Générale*, *supra*; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120, *per* NORTH, J., at p. 141; *Ponsolle v. Webber*, [1908] 1 Ch. 254.

(*q*) *Bongiovanni v. Société Générale*, *supra*.

(*r*) *Langton v. Waite* (1868), L. R. 6 Eq. 165; reversed upon other grounds (1869), 4 Ch. App. 402.

(*s*) *Bentinck v. London Joint Stock Bank*, *supra*. Though this method of postponing the time when the client must make payment for securities purchased is sometimes spoken of as carrying over with a bank, the position of the bank in such a case is that of pledgee or mortgagee, as the case may be, and not that of a taker-in of securities.

(*t*) See p. 217, *ante*.

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Continuation.

charged to the brokers by the bank. Such a contango may be recovered by the broker from a client who was aware of the custom (a).

SECT. 4.—*Stock Exchange Loans.*

Deposit of
securities.

470. Stock Exchange loans are loans at interest made by one member to another against a deposit of securities repayable on the next ensuing account day. The loan may be continued from account to account, the amount of the loan being adjusted each account day by repayment of a part if the market price of the securities has fallen, or a further advance corresponding to any rise in the price (b).

Return of
securities.

471. Where the securities deposited are negotiable, the lender loses his rights against the securities as pledgee by returning them to the borrower against a cheque which is subsequently dishonoured (c).

Default of
borrower.

472. The rule of the London Stock Exchange (d) which provides that in the event of the default of a borrower the lender shall realise his securities within three clear days, unless his creditors consent to a longer delay, or shall take them at a price to be fixed by the officials of the Stock Exchange, is a rule regulating the relations of members *inter se*, and has no effect upon the principal who stands behind (e).

If a defaulter becomes bankrupt the amount due from him on a Stock Exchange loan, arrived at as prescribed by the rules, is a debt provable in bankruptcy (f).

SECT. 5.—*Security.*

SUB-SECT. 1.—*Distinction between Mortgage and Pledge.*

Mortgage
and pledge
distinguished.

473. The distinction between a mortgage and a pledge is that, whilst in the case of a pledge only a special property passes to the

(a) *Sachs v. Spielmann* (1889), 5 T. L. R. 487. Contango is in effect a charge for interest on the purchase price made in respect of the postponement of payment. As to the extent to which a client is bound by Stock Exchange custom, see p. 226, *ante*.

(b) *Re Morgan, Ex parte Phillips, Ex parte Marnham* (1860), 2 De G. F. & J. 634, C. A. The custom of the London Stock Exchange stated in this case that if the loan is not paid on account day the lender may either keep the securities or sell them and recover in either case the deficiency from the borrower, is no longer followed. If the borrower does not repay the loan when due he is declared a defaulter and the securities are dealt with according to the rules applicable to default; see *Ponsolle v. Webber*, [1908] 1 Ch. 254; pp. 256 *et seq.*, *post*.

(c) *Lloyds Bank, Ltd. v. Swiss Bankverein, Union of London and Smiths Bank v. Same* (1913), 29 T. L. R. 219, C. A., questioning *Burra v. Ricardo* (1885), Cab. & El. 478. The practice stated in the latter case of returning securities on account day without payment is obsolete. As to pledges generally, see title PAWNS AND PLEDGES, Vol. XXII., pp. 233 *et seq.*

(d) Stock Exchange Rules, 1911, r. 172.

(e) *Ponsolle v. Webber*, *supra*.

(f) *Re Morgan, Ex parte Phillips, Ex parte Marnham*, *supra*.

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pledgee entitling him to the custody till the condition is performed and, on performance of the condition, the whole property vests in the pledgor, a mortgage is an immediate conveyance and gives to the mortgagee a title, legal or equitable as the case may be, subject only to the power to redeem which is left in the mortgagor (*g*).

A mortgage is created by contract independently of possession, but a pledge is incomplete without delivery, actual or constructive, of the thing pledged (*h*).

Securities mortgaged or pledged with a broker to secure the amount due or to become due to him from his client are spoken of as "cover" (*i*). Cover.

474. A deposit of share certificates to secure a debt, or as cover, whether accompanied (*k*) or unaccompanied (*l*) by a transfer in blank as to the name of the transferee, amounts to an equitable mortgage and not a pledge (*m*); *a fortiori* where the legal estate in the shares is transferred to the lender the transaction is a mortgage (*n*). Examples.

A security given by the deposit of bearer securities has on the other hand been treated as a pledge (*o*).

475. A mortgagee or pledgee has, by implication of law, the right to submortgage or to repledge the securities to the extent of his own interest therein without an express agreement to that effect (*p*). Submortgage and repledging

(*g*) *Ryall v. Rowles* (1750), 1 Ves. Sen. 348, *per* BURNET, J., at p. 359; see also titles MORTGAGE, Vol. XXI., p. 73; PAWNS AND PLEDGES, Vol. XXII., p. 235.

(*h*) *Martin v. Reid* (1862), 11 C. B. (N. S.) 730; see title PAWNS AND PLEDGES, Vol. XXII., p. 235. For a form of document accompanying deposit of securities, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 202.

(*i*) *Stubbs v. Slater*, [1910] 1 Ch. 632, C. A., *per* COZENS-HARDY, M.R., at p. 638.

(*k*) *Ibid.*; *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *France v. Clark* (1884), 26 Ch. D. 257, C. A., *per* Lord SELBORNE, L.C., at p. 262; compare *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A. For form of memorandum of deposit of share certificates, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 201.

(*l*) *Harrold v. Plenty*, [1901] 2 Ch. 314; *Re Davies, Ex parte Moss* (1849), 3 De G. & Sm. 599; *Re Shelley, Ex parte Stewart* (1864), 4 De G. J. & Sm. 543; *Re Harrison and Ingram, Ex parte Whinney*, [1905] W. N. 143.

(*m*) In some cases in which the distinction between a mortgage and a pledge was not material to the decision the word "pledge" has been used as applicable to a security by deposit of certificates of shares; see *Halliday v. Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch.; *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273, where JESSEL, M.R., also uses the word "mortgagee" for the same transaction; *Colonial Bank v. Cady and Williams, London Chartered Bank of Australia v. Cady and Williams* (1890), 15 App. Cas. 267; and title COMPANIES, Vol. V., p. 197.

(*n*) *Deverges v. Sandeman, Clark & Co.*, *supra*; *General Credit and Discount Co. v. Glegg* (1883), 22 Ch. D. 549.

(*o*) *Gorgier v. Mieville* (1824), 3 B. & C. 45; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Carter v. Wake* (1877), 4 Ch. D. 605, doubted in *Harrold v. Plenty, supra, per* COZENS-HARDY, J., at p. 316, and in *Sadler v. Worley*, [1894] 2 Ch. 170, *per* KEKEWICH, J., at p. 175; see also *Stubbs v. Slater, supra*.

(*p*) *Donald v. Suckling, supra*; *Re Tahiti Cotton Co., Ex parte Sargent, supra*; *France v. Clark, supra*; *Mocatta v. Bell* (1857), 24 Beav. 585; see also *Story on Bailments*, 9th ed., s. 328; and titles MORTGAGE,

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But any attempt to submortgage or to repledge beyond that extent is, apart from the case of negotiable securities, taken *bonâ fide* and for value (*q*), and from cases where the submortgagee or subpledgee has otherwise acquired a good legal title (*r*), inoperative, and the original mortgagor or pledgor can recover them from the submortgagee or subpledgee upon payment of the amount due from him upon them (*s*).

SUB-SECT. 2.—*Remedies of Lender.*

Where time
fixed for
repayment.

476. Both pledge and mortgage of securities imply a contract that they shall be made effectual to discharge the debt if not paid when due, and, consequently, if there is a time fixed for repayment, and the debt is not then paid, the mortgagee or pledgee of securities may at once sell them without express power to sell and without bringing an action for foreclosure (*t*).

Where no
time fixed.

477. If no time is fixed for repayment, the debt is payable upon demand, and a demand must be made and reasonable notice given before the lender may sell (*a*).

Notice.

The notice must be in all respects reasonable, regard being had to the circumstances of the case. It is desirable that it should fix a day for payment and also convey to the mind of the borrower that, if he fails to avail himself of the opportunity given to redeem, the lender will be in a position to enforce his rights (*b*), but it is not necessary that the notice should state that the lender will sell (*c*).

In the case of a mortgage the fact that the mortgagee, in giving notice, makes a mistake in the amount due and demands too much is not a ground for invalidating the exercise of his power of sale, and apparently the same principle applies to a notice from a pledgee to a pledgor (*d*).

Vol. XXI., pp. 82, 132, 169 *et seq.*; PAWNS AND PLEDGES, Vol. XXII., p. 244.

(*q*) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

(*r*) See pp. 235, 236, *post*.

(*s*) *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *France v. Clark* (1884), 26 Ch. D. 257, C. A.; *Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333; compare *Re Burge, Woodall & Co., Ex parte Skyrme*, [1912] 1 K. B. 393.

(*t*) *Wilson v. Tooker* (1714), 5 Bro. Parl. Cas. 193; *Lockwood v. Ewer* (1742), 2 Atk. 303; *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222, C. A., *per* COTTON, L.J., at p. 232; *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A., *per* STIRLING, L.J., at p. 592; see titles MORTGAGE, Vol. XXI., pp. 246, 247; PAWNS AND PLEDGES, Vol. XXII., p. 243.

(*a*) *Re Morritt, Ex parte Official Receiver, supra*; *Deverges v. Sandeman, Clark & Co., supra*; see titles MORTGAGE, Vol. XXI., p. 247; PAWNS AND PLEDGES, Vol. XXII., p. 244.

(*b*) *Deverges v. Sandeman, Clark & Co., supra, per* STIRLING, L.J., at p. 593.

(*c*) *Ibid., per* COZENS-HARDY, L.J., at pp. 596, 597, where it is stated that, in the case of Stock Exchange securities, a fortnight or at most a month is sufficient length of notice; see also title MORTGAGE, Vol. XXI., p. 247, note (*i*).

(*d*) *Stubbs v. Slater*, [1910] 1 Ch. 632, C. A. (where it is pointed out that the headnote to *Pigot v. Cubley* (1864), 15 C. B. (N. S.) 701, in so far as it states that a notice that the pledgee will sell unless an excessive sum be paid immediately is not such a notice as will justify the sale of a pledge, is not borne out by the judgments).

478. The mortgagor or pledgor may redeem at any time before the actual sale (*e*). On redemption the mortgagee or pledgee must return the identical securities pledged, if capable of identification, or, if he has sold them during the currency of the loan, must account to the mortgagor or pledgor for the proceeds of such sale (*f*).

SECT. 5.
Security.
Redemption.

479. A mortgagee or pledgee who exercises his power of sale must account to his mortgagor or pledgor for any surplus realised by him over and above the debt, interest and necessary expenses of realisation (*g*).

Surplus after sale.

480. Where securities have been assigned or deposited to secure a debt or as cover in circumstances which constitute a mortgage of them, either legal (*h*) or equitable (*i*), a decree of foreclosure may be obtained. Where, however, the transaction amounts to no more than a pledge, foreclosure cannot be obtained and the only remedy of the pledgee is by sale (*k*).

Foreclosure.

SUB-SECT. 3.—Priorities.

481. A legal title acquired in perfection of an equitable title obtained without notice of prior equities will oust those equities, even though its holder acquired the legal title with notice of the prior equities (*l*). If, however, an equitable title is acquired with

Effect of obtaining legal title.

(*e*) *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222, C. A.; *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A.; compare titles MORTGAGE, Vol. XXI., pp. 138, 139; PAWNS AND PLEDGES, Vol. XXII., pp. 241, 242, 244.

(*f*) *Langton v. Waite* (1868), L. R. 6 Eq. 165, following *Ex parte Dennison* (1797), 3 Ves. 552. In *Langton v. Waite*, *supra* (reversed on appeal upon a question of fact (1869), 4 Ch. App. 402), a suggested custom of the London Stock Exchange entitling the mortgagee or pledgee to deal with the securities the subject of the mortgage or pledge was disproved by evidence of members of the London Stock Exchange.

(*g*) *Wilson v. Tooker* (1714), 5 Bro. Parl. Cas. 193; *Harrison v. Hart* (1726), 2 Eq. Cas. Abr. 6; see Story on Bailments, 9th ed., s. 343; and compare title MORTGAGE, Vol. XXI., pp. 260, 261. Apparently, however, he is not bound to watch the market so as to sell at the highest price (*Re McMurdo, Penfield v. McMurdo*, [1902] 2 Ch. 684, C. A.).

(*h*) *General Credit and Discount Co. v. Glegg* (1883), 22 Ch. D. 549.

(*i*) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Harrold v. Plenty*, [1901] 2 Ch. 314; see, further, title COMPANIES, Vol. V., p. 197, note (*d*).

(*k*) *Carter v. Wake* (1877), 4 Ch. D. 605; *Hamilton v. Young* (1881), 7 L. R. Ir. 289; *Gilligan and Nugent v. National Bank*, [1901] 2 I. R. 513. The authority of these cases in the English courts, in so far as they decide that bearer securities form the subject of pledge and not of mortgage, must be considered as doubtful in view of the comments in *Sadler v. Worley*, [1894] 2 Ch. 170, *per KEKEWICH, J.*, at p. 175; *Harrold v. Plenty*, *supra*, *per COZENS-HARDY, J.*, at p. 316; see also *Stubbs v. Slater*, [1910] 1 Ch. 632, C. A.

(*l*) *Dodds v. Hills* (1865), 2 Hem. & M. 424; *Goleborn v. Alcock* (1829), 2 Sim. 552; *Blackwood v. London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92. As to what constitutes a legal title to securities in this connexion, see *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, *per Lord SELBORNE*, at pp. 28, 29, and *per Lord BLACKBURN*, at p. 41; *Roots v. Williamson* (1888), 38 Ch. D. 485, *per STIRLING, J.*, at p. 498; *Moore v. North Western Bank*, [1891] 2 Ch. 599; *Ireland v. Hart*, [1902] 1 Ch. 522; *Peat v. Clayton*, [1906] 1 Ch. 659; see, generally, title EQUITY,

SECT. 5.
Security.

Notice of
equities.

notice of prior equities, the subsequent getting in of the legal title does not assist the holder and he takes subject to the prior equities (*m*). Notice of prior equities is imputed where the circumstances are such as to make it reasonable that inquiry should be made as to the title of the person proposing to deal with the securities (*n*); thus, a person receiving from another, who is not the registered owner of the securities, a certificate accompanied by a transfer signed in blank by the registered owner is affected with notice of a possible infirmity in the title of him from whom he receives them (*o*). On the other hand, knowledge merely of the fact that the person proposing to deal with the securities is a broker (*p*), or that the persons so proposing are joint owners thereof (*q*), is not sufficient to raise an imputation of notice of an infirmity in the title.

Shares in
company.

482. Equitable titles to shares in companies registered under the Companies Acts (*r*) rank in order of date (*s*).

The principle of equity that a notice of charge given by a second equitable mortgagee enables him to take precedence over a first equitable mortgagee (*t*) is inapplicable to the case of shares in a registered company, and a holder of an equitable title to such shares can get no advantage over holders of prior equities by giving notice to the company (*u*).

Such a notice is not, however, inoperative for all purposes, and the receipt of notice by a company of a charge upon some of its shares will prevent the company from availing itself as against those shares of any lien under its articles of association for a debt to the company incurred subsequently to its receipt of the notice (*v*).

SUB-SECT. 4.—*Blank Transfers.*

Equitable
mortgage.

483. The most common method of rendering registered securities available as cover, or as security for a debt, is by depositing with

Vol. XIII., pp. 82 *et seq.*; and compare title MORTGAGE, Vol. XXI., p. 328.

(*m*) *Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333.

(*n*) *Ibid.*

(*o*) *France v. Clark* (1884), 26 Ch. D. 257, C. A.; *Fox v. Martin* (1895), 64 L. J. (CH.) 473; *Hutchison v. Colorado United Mining Co. and Hamill* (1886), 3 T. L. R. 265, C. A.

(*p*) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

(*q*) *Kaemena v. Central Bank of London* (1888), 4 T. L. R. 657.

(*r*) See title COMPANIES, Vol. V., pp. 1 *et seq.*

(*s*) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

(*t*) *Dearle v. Hall* (1828), 3 Russ. 1; see also title COMPANIES, Vol. V., pp. 197, 198.

(*u*) *Société Générale de Paris v. Walker*, *supra*; see titles COMPANIES, Vol. V., p. 197; MORTGAGE, Vol. XXI., p. 340.

(*v*) *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29, applying the principle of *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; see titles COMPANIES, Vol. V., p. 198; MORTGAGE, Vol. XXI., p. 340, note (*p*). The dictum of Lord SELBORNE, in *Société Générale de Paris v. Walker*, *supra*, at p. 30, to the effect that the proper construction of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30, renders such a notice absolutely inoperative to affect the company with any trust, is not part of the decision and is not the law (*Bradford Banking Co. v. Briggs*, *supra*, per Lord HALSBURY, L.C., at p. 31).

the lender the certificate relating to the same accompanied by a transfer specifying the securities and executed by the registered holder, but in blank as to the date and the name of the transferee. Such a transaction constitutes an equitable mortgage (a).

SECT. 5.
Security.

484. If the registered holder of securities gives a blank form of transfer, together with the certificates for the shares, to a creditor by way of security, he thereby confers upon him authority to complete his security by filling up the transfer and obtaining registration (b).

Authority
conferred by
blank
transfer.

A registered holder of shares who gives a blank transfer also comes under an implied obligation to do nothing to impede or prevent the registration of anyone whose name is properly inserted in the blank transfer as transferee, and is liable to an action for damages at the suit of the transferee if he acts in breach of this obligation (c).

In the case of transfers indorsed upon the certificates of American companies which, when signed in blank by the registered holder, customarily pass from hand to hand by delivery, each prior holder confers upon the *bond fide* holder for the time being an authority to fill in the name of the transferee, and is estopped to this extent, and to this extent only, from denying the title of the holder (d).

American
securities.

485. Where the constitution of the company requires transfers to be by deed, a transfer executed in blank and not redelivered by the transferor after completion is ineffectual to pass the legal estate (e), even though it has been acted on by the company and the transferee registered in the company's books (f).

Transfers by
deed.

Redelivery by an agent of the transferor is not effectual unless the agent be authorised by deed (g).

Though a blank transfer is inoperative as a transfer, the deposit of a blank transfer accompanied by a certificate may nevertheless

(a) *Stubbs v. Slater*, [1910] 1 Ch. 632, C. A.; *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *France v. Clark* (1884), 26 Ch. D. 257, C. A.; see titles BANKERS AND BANKING, Vol. I., p. 636; COMPANIES, Vol. V., pp. 191, 192, 197.

(b) *France v. Clark*, *supra*; *Re Kimberley North Block Diamond Mining Co., Ex parte Werhner* (1888), 58 L. T. 305; see title COMPANIES, Vol. V., pp. 191, 192.

(c) *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.

(d) *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36; *Colonial Bank v. Cady and Williams*, *London Chartered Bank of Australia v. Cady and Williams* (1890), 15 App. Cas. 267, *per* Lord HERSCHELL, at p. 286; *Hone v. Boyle* (1891), L. R. Ir. 27 Ch. 137, C. A.

(e) *Taylor v. Great Indian Peninsula Rail. Co.* (1859), 4 De G. & J. 559, C. A.; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Nanney v. Morgan* (1887), 37 Ch. D. 346, C. A.; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Moore v. North Western Bank*, [1891] 2 Ch. 599; see title COMPANIES, Vol. V., p. 190.

(f) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, C. A.; compare *Re Barnard's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105.

(g) *Hibblewhite v. M'Morine* (1840), 6 M. & W. 200; *Powell v. London and Provincial Bank*, *supra*.

SECT. 5.
Security.

Deposit by
agent.

be evidence that the deposit of the certificate was intended to be as a security (*h*).

486. Where a registered owner has given a blank transfer and a certificate to another and has authorised him to deal with the shares as his agent, the case falls within the principles governing the cases of authority given by a principal to an agent (*i*). The owner, therefore, comes under a duty to those persons whom he intends to act upon such authority to give them notice of any limit that he places on the apparent authority of the agent, and, in the absence of notice of any limitation, is bound by any disposition of the property made by the agent within the limits of his apparent authority (*j*).

Forgery.

If, however, the person to whom a blank transfer is given fraudulently fills in, as the property to be transferred, shares which the signatory of the blank transfer has not authorised him to deal with at all, the document is a forgery and passes no title to a purchaser (*k*).

SUB-SECT. 5.—*Broker's Lien.*

General lien.

487. A broker has a general lien upon all securities of his client which are in his possession, including securities deposited to secure a specific loan, unless the securities are deposited in pursuance of a special contract which is inconsistent with the general lien (*l*).

The fact that the securities in the broker's hands are the property of persons other than the client who deposited them does not prevent the broker's lien attaching to them provided that the broker did not know that they did not belong to his client and was not put upon inquiry as to his client's title by the circumstances of the case (*m*).

SECT. 6.—*Completion.*

SUB-SECT. 1.—*Time for Completion.*

How fixed.

488. The time for completion of bargains upon a Stock Exchange is, in the absence of special agreement, fixed by the rules of that institution (*n*).

(*h*) *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426, *per* Lord BLACKBURN, at p. 433.

(*i*) See title AGENCY, Vol. I., p. 205.

(*j*) *Perry Herrick v. Attwood* (1857), 2 De G. & J. 21; *Brocklesby v. Temperance Building Society*, [1895] A. C. 173; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.; *Fry v. Smellie*, [1912] 3 K. B. 282, C. A. Where an agent with authority to pledge sells the property the true owner will, apparently, in a proper case, be allowed by equity to redeem it (*Fry v. Smellie*, *supra*, *per* FARWELL, L. J., at p. 296).

(*k*) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch.; see also Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 1. As to estoppel by negligence, see title ESTOPPEL, Vol. XIII., pp. 398 *et seq.*

(*l*) *Jones v. Peppercorne* (1858), John. 430; *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416, approved in *Hope (John D.) & Co. v. Glendinning*, [1911] A. C. 419. As to general lien, see also title LIEN, Vol. XIX., pp. 7 *et seq.*

(*m*) *Jones v. Peppercorne*, *supra*.

(*n*) *Union Corporation v. Charrington* (1902), 8 Com. Cas. 99; see

489. Time is of the essence of a contract for the purchase and sale of stocks and shares, and, if completion does not take place within the proper time, the purchaser may refuse to accept (*o*). The same principle applies where the time originally fixed has been altered by agreement, the extended time being substituted for the original time (*p*). Similarly, in the case of a contract to be completed on the coming out (*q*) of certificates in a new company, if the coming out is unreasonably delayed, the purchaser may rescind the contract (*r*).

SECT. 6.
Completion
Essence of
the contract.

490. In the case of a contract for special settlement, there is no implied term that the special settlement shall take place within a reasonable time, and the contract must be performed whenever a special settlement takes place (*s*).

Special
settlement

The fact that a special settlement has been obtained by fraud does not affect bargains between persons not parties to the fraud, even though persons interested in obtaining the special settlement were members of the committee who granted it (*t*).

491. Where it has been agreed between a seller and purchaser of shares that the seller shall carry over the shares from account to account for an indefinite time, and the seller dies during the currency of that arrangement, the time for completion of the contract of purchase and sale is on the account day next following the death of the seller (*u*).

Carrying
over.

SUB-SECT. 2.—*Release of Intermediaries.*

492. The seller of securities transferable by deed, otherwise than by mere delivery (*a*), has ten days from ticket day (*b*) in which to make delivery (*c*), during which time it is open to him to inquire

Right to
object to
proposed
transferee.

Stock Exchange Rules, 1911, r. 91, under which, except for bargains made after the account has begun, all bargains in securities in respect of which a special settlement has already taken place, are for the current account, and all bargains in securities for which no special settlement has yet been fixed are for special settlement. As to special settlements, see p. 216, *ante*.

(*o*) *Doloret v. Rothschild* (1824), 1 Sim. & St. 590; *Fletcher v. Marshall* (1846), 15 M. & W. 755; *Union Corporation v. Charrington* (1902), 8 Com. Cas. 99; *Benjamin v. Barnett* (1903), 8 Com. Cas. 244; *Re Schwabacher, Stern v. Schwabacher, Koritschner's Claim* (1908), 98 L. T. 127. As to the time for performance of contracts generally, see title CONTRACT, Vol. VII., pp. 412 *et seq.*

(*p*) *Barclay v. Messenger* (1874), 43 L. J. (CH.) 449.

(*q*) *Hunt, Cox & Co. v. Chamberlain* (1895), 12 T. L. R. 74.

(*r*) *Goldmann v. Kann* (1907), 23 T. L. R. 287.

(*s*) *Consolidated Goldfields of South Africa v. Spiegel & Co.* (1909), 14 Com. Cas. 61, distinguishing and doubting *Goldmann v. Kann, supra*. It is submitted that it is not possible to distinguish these two cases in principle.

(*t*) *Re Ward, Ex parte Ward* (1882), 20 Ch. D. 356, C. A.

(*u*) *Re Schwabacher, Stern v. Schwabacher, Koritschner's Claim, supra*. As to carrying over, see pp. 216, 231, *ante*.

(*a*) As to mode of transfer, see, generally, title COMPANIES, Vol. V., pp. 186 *et seq.*

(*b*) As to ticket day, see p. 217, *ante*.

(*c*) *Sheppard v. Murphy* (1868), 16 W. R. 948. As to the purchasing jobber's contract with the seller, see p. 225, *ante*.

SECT. 6. into the responsibility of the person whose name is passed to him
Completion. as the transferee (*d*).

In the case of an ordinary sale to a jobber, if the name passed is accepted without objection (*e*), and the seller executes a transfer of the securities and receives payment of the price thereof, he cannot afterwards object to the transferee on the score of his pecuniary responsibility, and the jobber is released from liability though the transferee does not get registered (*f*), and though the name be that of a man of straw who is unable to indemnify the seller in respect of calls on the shares (*g*). On the other hand, where the name passed is that of a person who has not agreed to become the purchaser of the shares (*h*), or that of a foreigner resident abroad (*i*), or that of a person incapable of contracting (*j*), the jobber remains liable.

Registration
guaranteed.

493. Where there is superadded to the ordinary contract an express provision that registration is guaranteed (*k*), the jobber is not released from his liability until he procures some purchaser to become the registered holder, though he may have passed the name of a person who is liable to him as purchaser (*l*). The jobber in such a case is entitled to an indemnity over against the purchaser from himself, since, by his default in obtaining registration, such purchaser has rendered the jobber liable to his own seller (*m*).

Waiver of
inquiry.

494. There is no obligation upon the seller to inquire into the capacity and willingness to contract of the person whose name is passed to him as purchaser, and the seller, if content to waive inquiry as to his responsibility, is entitled to assume the capacity of the purchaser, and that he has authorised his broker to contract for him (*n*).

(*d*) *Nickalls v. Merry* (1875), L. R. 7 H. L. 530.

(*e*) If any such objection is made, the parties, in default of agreement, may, by virtue of the practice of the Stock Exchange, appeal to the committee of that body, which has power, if it thinks the objection good, to order the jobber to give a better name; see *Maxted v. Paine* (1869), L. R. 4 Exch. 203; affirmed (1871), L. R. 6 Exch. 133, Ex. Ch.; *Nickalls v. Merry*, *supra*. As to tickets and the passing of names, see p. 217, *ante*.

(*f*) *Grissell v. Bristowe* (1868), L. R. 4 C. P. 36; *Coles v. Bristowe* (1868), 4 Ch. App. 3.

(*g*) *Maxted v. Paine*, *supra*. As to liability to indemnify against calls, see title COMPANIES, Vol. V., pp. 162, 195, 196, 488.

(*h*) *Maxted v. Paine* (1869), L. R. 4 Exch. 81; *Maxted v. Morris* (1869), 21 L. T. 535.

(*i*) *Allen v. Graves* (1870), L. R. 5 Q. B. 478 (where it was held that a foreigner resident abroad was not a person to whom no reasonable objection could be taken).

(*j*) *Nickalls v. Merry*, *supra* (where the name passed was that of an infant); see also *Nickalls v. Eaton* (1870), 23 L. T. 689; *Dent v. Nickalls* (1874), 30 L. T. 644, Ex. Ch. In *Nickalls v. Merry*, *supra*, the case of a married woman is given as an instance of a name the acceptance of which would not release the jobber; but *quære* whether this would be so since the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63); see title HUSBAND AND WIFE, Vol. XVI., p. 411.

(*k*) As is done sometimes where there is an uncalled liability upon shares which the vendor wishes to escape. As to registration, see pp. 248, 249, *post*.

(*l*) *Cruse v. Paine* (1869), 4 Ch. App. 441.

(*m*) *Paine v. Hutchinson* (1868), 3 Ch. App. 388.

(*n*) *Nickalls v. Merry*, *supra*, per Lord CAIRNS, L.C., at p. 541.

495. A broker who issues a ticket professes to be the agent of the person who is named on the ticket as purchaser, and represents that he has authority to bind him, that such purchaser is a person capable of accepting the shares, and that he, the broker, has authority to accept the transfer on his account so as to bind him. If any of these representations is untrue, the broker, whether he has acted fraudulently or not, is liable to make good the representation to any person to whom the ticket passes in the ordinary course of business, if such person alters his position and incurs any pecuniary loss from trusting in the truth of the representation (o).

SECT. 6.
Completion.

Liability of
broker.

496. Where a purchasing client has instructed his broker to pass a name which is not that of a person able and willing to contract, and the broker has, in consequence, come under a liability to indemnify the seller, the broker is entitled to an indemnity over against his client (p).

Indemnity to
broker.

497. A person who has instructed a broker to buy and then instructs him, instead of passing his own name as transferee, to pass the name of a third person able and willing to contract, ceases to be liable when the seller accepts the name of the third person and transfers to him (q). Where, however, the name passed is that of a mere nominee of the real purchaser, the real purchaser can be compelled to indemnify the seller (r).

Substituted
transferee.

(o) *Merry v. Nickalls* (1872), 7 Ch. App. 733, *per* MELLISH, L.J., at p. 755 (affirmed, *sub nom. Nickalls v. Merry* (1875), 7 H. L. Cas. 530, where, however, this point was not dealt with). This is in accordance with the practice of the Stock Exchange, under which a broker who passes the name of a person incapable of contracting, or who has not authorised the broker to purchase for him, is compelled to indemnify any member who suffers loss through the passing of such a ticket: see the evidence given in *Merry v. Nickalls*, *supra*; *Peppercorne v. Clench* (1872), 26 L. T. 656. The same is the case where one broker acts for both buyer and seller (*Queensland Investment and Land Co., Ltd. v. O'Connell and Palmer* (1896), 12 T. L. R. 502). As to warranty of authority, see, generally, title AGENCY, Vol. I., pp. 222 *et seq.*

(p) *Peppercorne v. Clench*, *supra*; compare title AGENCY, Vol. I., pp. 196, 197.

(q) *Torrington v. Lowe* (1868), L. R. 4 C. P. 26; *Maxted v. Paine* (1871), L. R. 6 Exch. 133, Ex. Ch., where BLACKBURN, J., at p. 167, dissented from *Torrington v. Lowe*, *supra*, without overruling it, on the ground that the principal of a broker who issues a ticket impliedly contracts with the seller that he will keep him indemnified against all liability in respect of the shares sold, and that it is only the intermediate parties between the issuer of the ticket and the seller who are released; see the comments on this in *Merry v. Nickalls* (1872), 7 Ch. App. 733, 750, 757, 758. It is submitted that there is no ground for implying such a contract as BLACKBURN, J., suggests in the case of the issuer of the ticket any more than in the case of the intermediate parties who pass it on.

(r) *Castellan v. Hobson* (1870), L. R. 10 Eq. 47; *Brown v. Black* (1873), L. R. 15 Eq. 363; 8 Ch. App. 939. A nominee, if called upon to pay calls, is also entitled to indemnity from the beneficial owner (*Hardoon v. Belilios*, [1901] A. C. 118, P. C.; *James v. May* (1873), L. R. 6 H. L. 328); see title COMPANIES, Vol. V., p. 150. In deciding whether a transferee is a nominee or not the relative positions of the parties and the amount of the consideration paid are elements to be taken into consideration (*Re Mexican and South American Co., Hyam's Case* (1859), 1 De G. F. & J. 75, C. A.;

SECT. 6.
Completion.

Position of
seller.

498. When a name is passed by the purchaser and accepted by the seller and the seller has executed transfers and received the price, a novation takes place by which privity of contract is established between the transferor and the person whose name is passed, whether the latter has executed the transfer (s) or not (t). The person who has allowed his name to be passed and has accepted transfers from the seller is liable to indemnify the seller against all liability in respect to the shares (a). The seller is also entitled as against him to a decree for specific performance (b).

SUB-SECT. 3.—*Delivery.*

Prompt
delivery
essential.

Delivery
where no
time fixed.

499. A prompt and proper delivery is essential, and if this is not obtained the purchaser may rescind the contract (c).

Where no time is specified in the contract delivery must be made within a reasonable time; and, in considering what is a reasonable time, the court will, in the case of a contract on that Stock Exchange, look at the rules of the London Stock Exchange, which fix the times within which delivery of securities of various natures must be made (d).

Re Electric Telegraph Co. of Ireland, Budd's Case (1861), 3 De G. F. & J. 297, C. A.; *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95). As regards companies within the Stannaries jurisdiction, see also Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 35; title COMPANIES, Vol. V., p. 665.

(s) *Maxted v. Paine* (1871), L. R. 6 Exch. 132, Ex. Ch.; *Torrington v. Lowe* (1868), L. R. 4 C. P. 26; *Evans v. Wood* (1867), L. R. 5 Eq. 9.

(t) *Wynne v. Price* (1849), 3 De G. & Sm. 310; *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309, Ex. Ch.; *Sheppard v. Murphy* (1868), 16 W. R. 948; *Grissell v. Bristowe* (1868), L. R. 4 C. P. 36, 51, Ex. Ch.; *Davis v. Haycock* (1869), L. R. 4 Exch. 373, per KELLY, C.B., and PIGOTT, B., at p. 383; *Loring v. Davis* (1886), 32 Ch. D. 625; *Hawkins v. Maltby* (1867), 3 Ch. App. 188, per Lord CHELMSFORD, L.C., at p. 193; *Musgrave and Hart's Case* (1867), L. R. 5 Eq. 193; compare *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Shaw v. Fisher* (1855), 5 De G. M. & G. 596.

(a) *Wynne v. Price*, *supra*; *Coles v. Bristowe*, *supra*; *Loring v. Davis*, *supra*; *Evans v. Wood*, *supra*; *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Castellan v. Hobson* (1870), L. R. 10 Eq. 47; *Paine v. Hutchinson* (1868), 3 Ch. App. 388; *Hawkins v. Maltby* (1869), 4 Ch. App. 200 (on the ground that he becomes equitable owner); *Shepherd v. Gillespie* (1868), 3 Ch. App. 764 (on the ground of estoppel); *Grissell v. Bristowe*, *supra*; *Walker v. Bartlett* (1856), 18 C. B. 845; *Bowring v. Shepherd*, *supra* (on the ground of an implied contract at common law).

(b) *Wynne v. Price*, *supra*; *Sheppard v. Murphy*, *supra*; *Shepherd v. Gillespie*, *supra*; *Cruse v. Paine* (1868), L. R. 6 Eq. 641; *Musgrave and Hart's Case*, *supra*, per MALINS, V.-C., at p. 202; *Evans v. Wood*, *supra*, per Lord ROMILLY, M.R., at p. 15; *Grissell v. Bristowe*, *supra*, per COCKBURN, C.J., at p. 51. For cases as to specific performance of contracts for sale of shares, see, generally, p. 254, *post*; as to specific performance generally, see title SPECIFIC PERFORMANCE, pp. 1 *et seq.*, *ante*.

(c) *Doloret v. Rothschild* (1824), 1 Sim. & St. 590; *Fletcher v. Marshall* (1846), 15 M. & W. 755; *Union Corporation v. Charrington* (1902), 8 Com. Cas. 99; *Benjamin v. Barnett* (1903), 8 Com. Cas. 244. As to other remedies for breach of contract, see p. 253, *post*.

(d) *Fletcher v. Marshall*, *supra*; *Union Corporation v. Charrington*, *supra*; *Benjamin v. Barnett*, *supra*; *Sheppard v. Murphy*, *supra*; compare *Re Schwabacher*, *Stern v. Schwabacher*, *Koritschner's Claim* (1908), 98 L. T. 127.

The time for delivery does not depend upon circumstances which were not known to the purchaser at the time of making the contract, and, consequently, the seller is responsible for a delay in delivery occasioned by circumstances over which the seller has no control, but which were not disclosed by him to the purchaser (*e*). SECT. 6.
Completion.
Delay beyond
seller's
control.

500. It being a well-known practice of the London Stock Exchange that shares to make up any particular quantity sold may be obtained from more than one ultimate seller (*f*), a purchaser is not entitled to refuse delivery of a part of the shares purchased by him (*g*). Part delivery.

501. Where a call has been made upon shares which are deliverable before the call becomes payable, the deliverer may himself pay the call and claim the amount thereof from the issuer of the ticket (*h*). Calls.

SUB-SECT. 4.—*Payment.*

502. Differences on carrying over transactions are payable upon pay day of the account (*i*), as are the differences arising on the passing of tickets (*k*). Hammer price differences (*l*) arising upon a default are payable on the day for which the contracts are entered into (*m*). Differences.

503. The price of registered securities is payable against delivery of the certificate and transfer (*n*). Price.

504. It is customary for a broker to deliver securities against the crossed cheque of another member of the London Stock Exchange, and it is no evidence of negligence on his part that he has done so without first inquiring whether the other member has assets sufficient to meet the cheque (*o*). Cheques.

SUB-SECT. 5.—*Disposal of Proceeds of Sale.*

505. A broker who receives the price of securities sold must account for the price to the owner of the securities, or pay it to some agent authorised by him to receive payment on his behalf; and a custom, if one were proved to exist, that a broker need only Duty of
broker.

(*e*) *De Waal v. Adler* (1886), 12 App. Cas. 141, P. C.

(*f*) See p. 221, *ante*.

(*g*) *Benjamin v. Barnett* (1903), 8 Com. Cas. 244.

(*h*) *Bayley v. Wilkins* (1849), 7 C. B. 886; compare *Allen v. Graves* (1870), L. R. 5 Q. B. 478.

(*i*) *Davis & Co. v. Howard* (1890), 24 Q. B. D. 691. As to pay day of the account, see p. 216, *ante*.

(*k*) *Re Woodd, Ex parte King* (1900), 82 L. T. 504. As to passing of tickets, see p. 217, *ante*.

(*l*) See p. 217, *ante*.

(*m*) *Re Plumbly, Ex parte Grant* (1880), 13 Ch. D. 667, 675, C. A. (evidence of official assignee).

(*n*) *Stray v. Russell* (1859), 1 E. & E. 888, *per* Lord CAMPBELL, C.J., at p. 897; *London Founders Association v. Clarke* (1888), 20 Q. B. D. 576, C. A. Rule 121 of the Stock Exchange Rules, 1911, provides that a certificated transfer must also be paid for.

(*o*) *Mocatta v. Bell* (1857), 24 Beav. 585; compare *Bridges v. Garrett* (1870), L. R. 5 C. P. 451, Ex. Ch.

SECT. 6. recognise the person instructing him would be unreasonable and Completion. would not bind anyone who was ignorant of it (*p*).

Payment to agent.

506. No authority, implied or ostensible, to receive payment is conferred upon an agent acting for a disclosed principal by the fact alone that he has been instructed to sell (*q*). Where, however, a stockbroker is entrusted with transfers containing receipts for the purchase-money, he has an implied authority to receive payment (*r*).

Mode of payment.

507. Payment to an agent, to constitute a discharge against the principal, must be made in money, payment by cheque duly cashed being equivalent to payment in cash (*s*); it cannot be made by setting off a debt due from the agent (*t*), or by a bill which cannot be allocated to the specific transaction (*a*). If, however, the agent is authorised to keep part of the purchase-money, that part need not be paid in cash, but may be set off or otherwise dealt with (*b*).

Joint owners.

508. A broker employed to sell securities, if he finds that the securities stand in the name of any person other than the client instructing him (*c*), or jointly in the name of his client and of someone else (*d*), is affected with notice that his client is not solely entitled to the securities, and he is bound to make inquiry of the other persons appearing to be interested before he deals with the proceeds as belonging solely to his client.

SUB-SECT. 6.—*Transfer.*

Preparation of transfer.

509. In Stock Exchange transactions the transfer is, in practice, prepared by the transferor (*e*). In transactions where no custom

(*p*) *Blackburn v. Mason* (1893), 68 L. T. 510, C. A.; *Pearson v. Scott* (1878), 9 Ch. D. 198; *Crossley v. Magniac*, [1893] 1 Ch. 594. As to the effect of a custom, see also *p*. 226, *ante*.

(*q*) *Baring v. Corrie* (1818), 2 B. & Ald. 137; see, generally, title AGENCY, Vol. I., *p*. 210.

(*r*) *Pearson v. Scott*, *supra*, per FRY, J., at *p*. 204; *Magnus v. Queensland National Bank* (1888), 37 Ch. D. 466, C. A., per COTTON, L.J., at *p*. 474; compare Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56, by which such authority is given to a solicitor; and see title SALE OF LAND, Vol. XXV., *p*. 439.

(*s*) *Crossley v. Magniac*, [1893] 1 Ch. 594, per ROMER, J., at *p*. 599.

(*t*) *Ibid.*; *Sweeting v. Pearce* (1859), 7 C. B. (N. S.) 449, per BYLES, J., at *p*. 485; affirmed (1861), 9 C. B. (N. S.) 534, Ex. Ch.; *Pearson v. Scott*, *supra*; *Blackburn v. Mason*, *supra*; *Anderson v. Sutherland*, *Craig v. Sutherland* (1897), 2 Com. Cas. 65 (where the jury negatived the existence of an alleged custom enabling a London broker to discharge himself of liability to a client of a country broker for whom he had acted by settling his own account with the country broker). As to set-off generally, see title SET-OFF AND COUNTERCLAIM, Vol. XXV., *pp*. 484 *et seq*.

(*a*) *Pearson v. Scott*, *supra*; see also title AGENCY, Vol. I., *p*. 210.

(*b*) *Barker v. Greenwood* (1836), 2 Y. & C. (EX.) 414; *Re Shanks, Ex parte Swinbanks* (1879), 11 Ch. D. 525, C. A.

(*c*) *Pearson v. Scott*, *supra*.

(*d*) *Magnus v. Queensland National Bank* (1888), 37 Ch. D. 466, C. A.

(*e*) *London Founders Association v. Clarke*, *supra*. It would be impracticable in Stock Exchange transactions for the transferee to prepare the transfer, as he does not know who will be the transferor, whereas the

applies it is the duty of the transferee to prepare and tender a transfer (*f*).

SECT. 6.
Completion.

The transfer, in the case of a purchase on a Stock Exchange, contains the price payable by the ultimate purchaser (*g*). Where the transaction has passed through intermediate purchasers, this price may differ from that to be received by the transferor, and a note to this effect is to be found upon most forms of transfer used by stock-brokers. Where this form of transfer is used, the transferor is bound by custom to execute the transfer notwithstanding the difference in price (*h*).

Price to be inserted.

Transfers of stock (*i*), shares, marketable securities (*k*), and foreign or colonial stock certificates must be stamped *ad valorem* as conveyances on sale (*l*).

Stamp.

510. In the case of inscribed stock the transfer is effected by the holder or his attorney (*m*) attending at the Bank of England (*n*) and there signing a transfer.

Inscribed stock.

If the Bank acts upon a forged power of attorney, or is otherwise induced to permit an unauthorised transfer of stock, the Bank must make good the loss to the true owner of the stock, provided that it is not through his negligence that the fraud has succeeded (*o*).

Unauthorised transfer.

A person who puts forward a forged power of attorney upon

transferor, to whom the ticket issued by the transferee will have been passed, has all the necessary information.

(*f*) *Stephens v. De Medina* (1843), 4 Q. B. 422; *Bowlby v. Bell* (1846), 3 C. B. 284; *Bordenave v. Gregory* (1804), 5 East, 107.

(*g*) This is the price which governs the stamp duty payable (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (4)). For amount of duty, see Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 76; title REVENUE, Vol. XXIV., pp. 728 *et seq.*

(*h*) *Case v. McClellan* (1871), 25 L. T. 753; compare *Mewburn v. Eaton* (1869), 20 L. T. 449.

(*i*) Stock includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, corporation, company or society within the United Kingdom, or of any foreign or colonial corporation, company or society (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 122). Stock of the Bank of Ireland forms an exception; see Bank of Ireland Act, 1821 (1 & 2 Geo. 4, c. 72); Probate Duty (Ireland) Act, 1816 (56 Geo. 3, c. 56), Sched., title "Conveyance," "Exemptions."

(*k*) For definition, see Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 82, 122; and title REVENUE, Vol. XXIV., p. 728, note (*t*).

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 54—59. The duty on stocks and marketable securities has not been doubled (Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8), s. 73); see also title REVENUE, Vol. XXIV., p. 733, note (*e*).

(*m*) For form of power of attorney, see *Crossley v. Magniac*, [1893] 1 Ch. 594.

(*n*) British Government loans are also transferable at the Bank of Ireland. As to the transfer of Government stock, see title REVENUE, Vol. XXIV., pp. 757, 758.

(*o*) *Sloman v. Bank of England* (1845), 14 Sim. 475; *Coles v. Bank of England* (1839), 10 Ad. & El. 437; *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)* (1855), 5 H. L. Cas. 389; *Davis v. Bank of England* (1824), 2 Bing. 393; *Oliver v. Bank of England*, [1902] 1 Ch. 610, C. A.; affirmed, *sub nom. Starkey v. Bank of England*, [1903] A. C. 114.

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Completion.

which the Bank acts must indemnify the Bank for any loss incurred by reason of having to replace on the books as the holder of stock the person whose name has been forged (*p*). A person who, in the case of a proposed transfer, identifies to the officials of the Bank as the holder of stock a person who is not the holder, must similarly indemnify the Bank (*q*), but cannot get any indemnity from the person who introduced the forger to him (*r*).

Foreign
securities.

511. Whether the documents of title to bearer representing foreign government loans will be treated by the courts of this country as negotiable instruments depends upon the custom of English merchants and the law of England (*s*).

The rights of shareholders of a foreign corporation, as well as the effect of its stock certificates, are governed by the law of the country of domicile of the corporation (*t*). Indian and colonial loans are governed by the Acts of the legislatures which created them (*u*).

American
companies.

In the case of most American companies the shares are transferable in the books of the company. In order, however, to make them transferable by delivery, certificates are issued indorsed with blank transfers, and with powers of attorney also in blank as to the name of the attorney. These, when the power of attorney is signed by the registered holder, pass from hand to hand by delivery (*a*).

English
companies.

512. The shares and stock of a company to which the Companies Acts (*b*) apply are transferable as provided by the regulations of the company (*c*). These regulations may provide for the issue of share warrants to bearer for fully-paid stock or shares (*d*).

Negotiable
securities.

513. To what extent documents of title to securities which pass

(*p*) *Starkey v. Bank of England*, [1903] A. C. 114. As to the penalty for forging such a power, see Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 2 (2); as to the offence of uttering a forged power, see *ibid.*, s. 6.

(*q*) *Bank of England v. Outler*, [1908] 2 K. B. 208, C. A.

(*r*) *Bank of England v. Outler* (1909), 25 T. L. R. 509.

(*s*) *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, C. A.; *Colonial Bank v. Cady and Williams*, *London Chartered Bank of Australia v. Cady and Williams* (1890), 15 App. Cas. 267, affirming S. C., *sub nom. Williams v. Colonial Bank*, *Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 388, C. A.; see also titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 567; CUSTOM AND USAGES, Vol. X., pp. 259, 260.

(*t*) *Colonial Bank v. Cady and Williams*, *London Chartered Bank of Australia v. Cady and Williams*, *supra*; see also title COMPANIES, Vol. V., p. 761. As to domicile, see generally, title CONFLICT OF LAWS, Vol. VI., pp. 182 *et seq.*

(*u*) See Colonial Stock Acts, 1877 (40 & 41 Vict. c. 59) and 1892 (55 & 56 Vict. c. 35).

(*a*) *Colonial Bank v. Cady and Williams*, *London Chartered Bank of Australia v. Cady and Williams*, *supra*, at p. 285; see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 569.

(*b*) See title COMPANIES, Vol. V., pp. 1 *et seq.*

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22; see title COMPANIES, Vol. V., p. 186. As to the mode of transfer in the case of companies governed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), see title COMPANIES, Vol. V., p. 699.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37; see title COMPANIES, Vol. V., pp. 186 *et seq.*

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Completion.

from hand to hand by delivery are negotiable instruments depends, apart from statute (e), upon the form of the document and the custom prevailing in England as to dealings in them. The form must be such that the instrument can be sued upon by the possessor of it for the time being in his own name (f), and the instrument must, by the custom of trade in this country, be transferable like cash by delivery (g). If these two elements are present the instrument is a negotiable instrument (h).

If proof of a general usage to treat an instrument as negotiable is established, the fact that the usage did not form part of the ancient law merchant is not a sufficient ground for refusing to give effect to it (i).

Where a person whose honesty there is no reason to doubt offers negotiable securities, there is no obligation upon the person to whom they are offered to make any inquiry into the title of the person whom he finds in possession of them, unless there is anything to arouse suspicion, or lead to a doubt whether the latter is

Title of
transferor.

(e) For instances of instruments made negotiable by statute, see East India Company Bonds Act, 1811 (51 Geo. 3, c. 64) (East India bonds); Companies Act, 1867 (30 & 31 Vict. c. 131), s. 28, repealed and re-enacted by Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 62), s. 37 (2) (share warrants to bearer, as to which see also *Webb, Hale & Co. v. Alexandria Water Co., Ltd.* (1905), 93 L. T. 339).

(f) *Glyn v. Baker* (1811), 13 East, 509 (East India bonds); *London and County Banking Co. v. London and River Plate Bank* (1888), 21 Q. B. D. 535, C. A.; *Colonial Bank v. Cady and Williams, London Chartered Bank of Australia v. Cady and Williams* (1890), 15 App. Cas. 267; *Partidge v. Bank of England* (1846), 9 Q. B. 396, Ex. Ch. (American share certificates).

(g) *Lang v. Smyth* (1831), 7 Bing. 284; *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, C. A.; *Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 388, 404, C. A.; *Winans v. R.* (1907), 23 T. L. R. 705; see also title **BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS**, Vol. II., pp. 459, 564 *et seq.*

(h) The following securities have been held to be negotiable instruments Prussian bonds (*Gorgier v. Mieville* (1824), 3 B. & C. 45); Russian and Hungarian scrip (*Goodwin v. Roberts* (1875), 1 App. Cas. 476); Egyptian bonds and New South Wales bonds (*London and County Banking Co. v. London and River Plate Bank, supra*); French bonds (*Symons v. Mulckern* (1882), 30 W. R. 875); Argentine cedulas (*London Joint Stock Bank v. Simmons*, [1892] A. C. 201); bonds of the De Beers Consolidated Mines (*Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144); American railway bonds (*Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333; *Venables v. Baring Brothers & Co.*, [1892] 3 Ch. 527; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; *Edelstein v. Schuler & Co., supra*; *Baker v. Nottingham and Nottinghamshire Banking Co., Ltd.* (1891), 60 L. J. (Q. B.) 542); scrip certificates of an English company (*Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194); debenture bonds of English companies (*Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co., supra*); share warrants to bearer (*Webb, Hale & Co. v. Alexandria Water Co., supra*); see, further, title **BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS**, Vol. II., pp. 565 *et seq.*

(i) *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337, *per* COCKBURN, C.J., at p. 356, Ex. Ch. (affirmed (1876), 1 App. Cas. 476), overruling *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; compare the cases cited in note (h), *supra*; and see generally, title **CUSTOM AND USAGES**, Vol. X., pp. 256, 260.

SECT. 6. justified in entering into the contemplated transaction (*k*). If, however, there is such suspicion, or doubt, and no inquiry is made, or if, on inquiry, the doubt is not removed, good faith will be held to be lacking (*l*).

Broker holder
for value.

514. The undertaking of a personal liability amounts to a giving of value, and, therefore, the fact that a broker to whom negotiable instruments are handed for sale has entered into a contract upon the London Stock Exchange upon which he is personally liable constitutes him a holder for value thereof (*m*).

SUB-SECT. 7.—*Dividends and Rights.*

Purchaser's
rights.

515. Upon a sale of securities where nothing is said to the contrary all dividends, even though for a period anterior to the sale (*n*), and rights (*o*) attaching to the shares pass to the purchaser. On the London Stock Exchange, however, in the absence of a special bargain, sales are made "cum dividend" or "ex dividend" (*p*), "cum rights" or "ex rights" (*q*), according to the official list quotation.

Where a seller of shares, to which rights are attached, himself obtains the rights, he must account for them to the purchaser, although the latter had notice of the rights and has allowed the time to elapse without exercising them, provided that there has been nothing amounting to a definite renunciation on his part (*r*).

Prospective
dividends.

516. Bargains in prospective dividends, although not enforceable in the domestic forum of the London Stock Exchange, may be enforced in the courts by non-members (*s*).

SUB-SECT. 8.—*Registration.*

Obligations of
the parties.

517. A seller of shares does not guarantee that the purchaser will be able to get himself upon the register, the seller's only duty being to tender a duly executed and valid transfer and a certificate, and so to do all that is necessary to enable the transferee to insist with the company on his right to be registered as a member in respect of such shares (*t*).

(*k*) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120.

(*l*) *Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333.

(*m*) *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

(*n*) *Black v. Homersham* (1878), 4 Ex. D. 24.

(*o*) *Stewart v. Lupton* (1874), 22 W. R. 855; see also title COMPANIES, Vol. V., p. 278.

(*p*) The date at which any particular securities are to be quoted "ex dividend" depends upon the class of securities to which they belong, different dates being fixed according as the securities are inscribed, or transferable by deed, or are dealt with in the Mining Markets, or are bearer securities or registered debentures, or American shares (Stock Exchange Rules, 1911, r. 101).

(*q*) *Ibid.*, rr. 103, 105, 106.

(*r*) *Rooney v. Stanton* (1900), 17 T. L. R. 28, C. A.

(*s*) *Marten v. Gibbon* (1875), 33 L. T. 561, C. A.

(*t*) *Taylor v. Stray* (1857), 2 C. B. (N. S.) 175, 197, Ex. Ch.; *Stray v. Russell* (1860), 1 E. & E. 888, 916, Ex. Ch.; *Hunt v. Gunn* (1862), 13 C. B. (N. S.) 226; *Neilson v. James* (1882), 9 Q. B. D. 546, C. A.; *Remfry v. Butler* (1858), E. B. & E. 887; *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Paine v. Hutchinson* (1868),

The seller is, moreover, under an implied obligation to do nothing to prevent the purchaser getting himself registered, and is liable to an action for damages for a breach of this obligation (*u*).

SECT. 6.
Completion.

In transactions subject to the rules and regulations of the London Stock Exchange the duty of obtaining registration is, by custom, placed upon the purchaser (*x*). In transactions done off the Stock Exchange the result is still the same (*a*). If, however, a bargain is made with special reference to the articles of association of the company whose securities are being dealt in, and those articles place upon the seller the obligation of obtaining registration, the general rule does not apply (*b*).

518. Although the duty of obtaining registration is cast upon the purchaser, the seller is not entitled to rescission of the contract on the ground that the directors have refused to register the purchaser, but must rely upon his right to be indemnified by the purchaser against his liability to future calls (*c*).

Position of
seller.

Part IV.—Breach of Contract.

SECT. 1.—*Breach between Broker and Client.*

SUB-SECT. 1.—*Breach by Broker.*

519. A broker (*d*) who wrongfully closes his client's account is liable to the client in damages for so doing (*e*).

Closing
account.

If the client accepts the closing as putting an end to his bargain the measure of damages is the difference between the price or prices at which his account was wrongfully closed and those ruling in the market at a reasonable time after the client is informed of the closing (*f*). In fixing the date with reference to which the damages

Measure of
damages.

3 Ch. App. 388; *Sheppard v. Murphy* (1868), 2 I. R. Eq. 544, C. A.; *London Founders Association v. Clarke* (1888), 20 Q. B. D. 576, C. A.; *Casey v. Bentley*, [1902] 1 I. R. 376, C. A.; compare *Ward and Henry's Case* (1867), 2 Ch. App. 431. The decision of ROMILLY, M.R., to the contrary in *Re Waterloo Life etc. Assurance Co.* (No. 4), *Birmingham v. Sheridan* (1864), 33 Beav. 660, cannot, it is submitted, now be supported; see *Poole v. Middleton* (1861), 29 Beav. 646; Fry on Specific Performance, 4th ed., pp. 638, 639; and title SPECIFIC PERFORMANCE, p. 75, notes (*s*), (*d*), *ante*. As to the effect of a share certificate, see title COMPANIES, Vol. V., pp. 182 *et seq.* As to certification of transfers, see *ibid.*, pp. 193, 194. As to cases where registration is specifically guaranteed, see p. 240, *ante*.

(*u*) *London Founders Association v. Clarke*, *supra*, per Lord ESHER, M.R., at p. 582; *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.

(*x*) See the cases cited in note (*t*), p. 248, *ante*.

(*a*) *Skinner v. City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A.

(*b*) *Wilkinson v. Lloyd* (1845), 7 Q. B. 27.

(*c*) *Casey v. Bentley*, [1902] 1 I. R. 376, C. A.

(*d*) As to the duties of broker to client generally, see pp. 219 *et seq.*, *ante*.

(*e*) *Murray v. Hewitt* (1886), 2 T. L. R. 872; *Tempest v. Kilner* (1846), 3 C. B. 249; *Samuel and Escombe v. Rowe* (1892), 8 T. L. R. 488.

(*f*) See the cases cited in note (*e*), *supra*. In *Murray v. Hewitt* (1886),

SECT. 1.
Breach
between
Broker and
Client.

Position of
broker.

are to be assessed the client must be allowed what is a reasonable time in the circumstances within which to reopen the closed account (*g*). It is his duty to minimise his damages, and he is not allowed to inflame them by standing by and doing nothing (*h*), or by waiting to see whether the securities will appreciate in value (*i*).

520. A broker who has wrongfully closed his client's account is, where the closing is not accepted by the client, entitled to no indemnity for any loss arising upon the closing (*k*). The same result follows where the closing is not due to the voluntary act of the broker but to his being declared a defaulter on the Stock Exchange (*l*), unless his default is solely attributable to bargains entered into for a particular client, in which case he is entitled to an indemnity against that client notwithstanding the closing (*m*).

The fact, however, that a broker wrongfully closes his client's account does not deprive him of his right to recover against his client sums due in respect of previous transactions properly carried out (*n*).

SUB-SECT. 2.—*Breach by Client.*

Failure to
provide funds.

521. In the absence of any agreement by the broker not to require payment of differences by account day (*o*), the client must put his broker in funds in time to enable him to carry out the obligations undertaken by him for his client (*p*).

If the client fails to provide his broker with funds to pay differences which are not covered by collateral security appropriated to the liquidation thereof, the broker is permitted by the custom of the London Stock Exchange, provided that the client has had notice of the amount due from him, to close his client's account by selling what the client has bought and buying what the client has sold notwithstanding that the shares have already been carried over by him to the next account (*q*).

2 T. L. R. 872, the damages awarded were based on the difference between the price at which the account was closed and the price at the date of writ; but the action was brought shortly after discovery of the wrongful closing, and there was no evidence of any fluctuation in price between the discovery and the date of the writ.

(*g*) *Samuel and Escombe v. Rowe* (1892), 8 T. L. R. 488; *Tempest v. Kilner* (1846), 3 C. B. 249.

(*h*) *Samuel and Escombe v. Rowe*, *supra*; see title DAMAGES, Vol. X., p. 335; and compare title SALE OF GOODS, Vol. XXV., p. 271, note (*h*).

(*i*) *Tempest v. Kilner*, *supra*.

(*k*) *Ellis v. Pond*, [1898] 1 Q. B. 426, C. A.

(*l*) *Duncan v. Hill* (1873), L. R. 8 Exch. 242, Ex. Ch. Since the decisions (see p. 256, *post*) that a client's bargain is not closed by the default of his broker the positions which arose in this and the case cited in note (*m*), *infra*, are hardly likely to occur again.

(*m*) *Lacey v. Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182; see, further, p. 257, *post*.

(*n*) *Duncan v. Hill*, *supra*; *Lacey v. Hill, Scrimgeour's Claim* (1873), 8 Ch. App. 921; *Ellis v. Pond*, *supra*, per COLLINS, L.J., at p. 461.

(*o*) *Murray v. Hewitt* (1886), 2 T. L. R. 872.

(*p*) *Stock and Share Auction and Advance v. Galmoye* (1887), 3 T. L. R. 808, per Lord Esher, M.R., LINDLEY and LOPES, L.JJ., sitting as a Divisional Court: *Macoun v. Erskine, Oxenford & Co.*, [1901] 2 K. B. 493, C. A., per VAUGHAN WILLIAMS, L.J., at p. 501.

(*q*) *Davis & Co. v. Howard* (1890), 24 Q. B. D. 691; *Druce v. Levy*

522. Where the dealings are on the terms that cover is deposited and that the account may be closed as soon as it shows at the then market prices a loss equal to the cover, the broker has an option to close when the loss has reached the amount of the cover. But if, before he exercises that option, the prices of the securities rise, so that the loss again becomes smaller than the amount of the cover, his right to close ceases, and he may not close the account unless and until the loss again exhausts the cover (*r*).

SECT. 1.
Breach
between
Broker and
Client.

Exhaustion
of cover

523. A broker may, by custom, close his client's account forthwith upon either the death or the insolvency of his client (*s*). By insolvency is meant the client's inability to pay his debts in the ordinary commercial sense and in the ordinary way of business (*t*).

Death or
insolvency.

524. Where a broker is entitled to close his client's account it is not necessary that he should do so through the official broker of the Stock Exchange; he may do so by purchase or sale in the open market (*a*), or by passing the securities through a jobber's books at the proper market price (*b*). If an immediate sale on the market would be detrimental to the client, he may keep them himself, giving the client credit for the proper price (*c*). If, however, in closing the account, the broker sells the shares, and by the same transaction reacquires them on his own account at less than he could have got them for in open market, he must give his client credit for the profit so made (*d*).

Mode of
closing
account.

525. It is not necessary that a broker who closes his client's account should close the whole account, but he may close part and keep open the remainder (*e*).

Closing part
account.

& Co. (1891), 7 T. L. R. 259. As to the broker's right to close the account on the client's repudiation, see p. 252, *post*. As to the custom of the Stock Exchange, see note (*g*), p. 226. *ante*.

(*r*) *Hogan v. Shaw* (1885), 5 T. L. R. 613, C. A.

(*s*) *Re Overweg, Haas v. Durant*, [1900] 1 Ch. 209, *per* BYRNE, J., at p. 211; *Re Finlay, Wilson (C. S.) & Co. v. Finlay*, [1913] 1 Ch. 565, C. A.; *Lacey v. Hill, Scrimgeour's Claim* (1873), 8 Ch. App. 921 (where it was suggested that the sale might be held wrongful); as to this, see *Ellis v. Pond*, [1898] 1 Q. B. 426, C. A., *per* RIGBY, L.J., who dissented, but not upon this point, at p. 447.

(*t*) *Lacey v. Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182 (where the fact that the client committed suicide and that on the following day the bank in which he was a partner suspended payment was held to be sufficient evidence of insolvency to entitle the broker to close the account).

(*a*) *Scott and Horton v. Ernest* (1900), 16 T. L. R. 498.

(*b*) *Macoun v. Erskine, Oxenford & Co.*, [1901] 2 K. B. 493, C. A.

Erskine, Oxenford & Co. v. Sachs, [1901] 2 K. B. 504, C. A.

(*c*) *Walter and Gould v. King* (1897), 13 T. L. R. 270, C. A.; *Re Finlay, Wilson (C. S.) & Co. v. Finlay*, *supra*.

(*d*) *Erskine, Oxenford & Co. v. Sachs*, *supra* (where it appeared that the jobber through whose books the shares had been passed, on being informed that the broker was intending to sell and repurchase, charged less than the ordinary jobber's turn, and the broker was made to account to his client for the difference between the jobber's turn in fact charged and the ordinary jobber's turn).

(*e*) The decision to the contrary effect in *Samuel and Escombe v. Rowe* (1892), 8 T. L. R. 488, was overruled by *Hilton, Gibbes and Smith v. Morten*

SECT. 1.
Breach
between
Broker and
Client.

Option of
injured party.

SUB-SECT. 3.—*Anticipatory Breach.*

526. The general rules applicable to anticipatory breach of contract (*f*) are applicable also in the case of a contract relating to stocks and shares. An anticipatory breach of the contract which goes to the whole consideration gives to the other party to the contract an option either to treat the repudiation of the contract as a definitive breach of it, and, thereupon, to treat the contract as rescinded except for the purpose of his bringing an action for the breach of it, or to refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time fixed for performance arrives (*g*).

Thus, where a client commits an anticipatory breach of his contract with his broker, the broker may refuse to accept his repudiation, in which case he is entitled to an indemnity when the time for performance arrives, and he may, without waiting, bring an action for a declaration that he is so entitled (*h*). If he elects to accept the repudiation as putting an end to the contract he may sue at once for damages or an indemnity, and he can either close the account at once (*i*), and so fix the amount of his claim, or he may keep the bargain for himself and claim from the client as damages the difference between the contract price of the securities and the market price at or within a reasonable time from the date of the acceptance of the repudiation as a final breach (*j*).

Where the anticipatory breach is not accepted, the damages are not to be measured by the prices at the date of breach (*k*).

Date of
breach.

527. The date of the acceptance of a repudiation of the contract is a question of fact. Where there have been several refusals to accept or deliver and negotiations have taken place, it is a question for the jury when the breach finally took place (*l*).

The bringing of an action before the arrival of the date fixed for completion of the contract constitutes an election to treat the repudiation of the contract as a final breach (*m*).

(1908), 2nd July, H. L., unreported except in *Financial Times*, 3rd July, 1908. See also *Cullum v. Hodges* (1901), 18 T. L. R. 6, C. A.

(*f*) See title CONTRACT, Vol. VII., pp. 438 *et seq.*

(*g*) *Michael v. Hart & Co.*, [1902] 1 K. B. 482, C. A.

(*h*) *Lacey v. Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182; compare *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(*i*) *Cullum v. Hodges*, *supra*; as to closing the account, see pp. 250, 251, *ante*.

(*j*) *Walter and Gould v. King* (1897), 13 T. L. R. 270, C. A.; *Macoun v. Erskine, Oxenford & Co.*, [1901] 2 K. B. 493, C. A.

(*k*) *Michael v. Hart & Co.*, [1902] 1 K. B. 482, C. A.; affirmed on a question of fact, *sub nom. Hart & Co. v. Michael* (1903), 89 L. T. 422, H. L. *Quære*, whether the damages should be calculated with reference to the price at the proper date for completion or with reference to the highest price reached between that date and the date of the breach. The latter measure was adopted by WILLS, J., in *Michael v. Hart & Co.*, [1901] 2 K. B. 867, but the point was left open in the Court of Appeal, and the decision was doubted in *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 592; see also p. 254, *post*, and compare title SALE OF GOODS, Vol. XXV., p. 268.

(*l*) *Barned v. Hamilton* (1841), 2 Ry. & Can. Cas. 624.

(*m*) *Michael v. Hart & Co.*, [1902] 1 K. B. 482, C. A., *per* COLLINS,

SECT. 2.—*Breach between Purchaser and Seller.*SUB-SECT. 1.—*In General.*

528. On breach of contract between a purchaser and a seller of securities the party aggrieved may have one or more of the remedies of indemnity, specific performance, or damages, according to the nature of the securities dealt in and the circumstances of the case (*n*).

SUB-SECT. 2.—*Indemnity.*

529. The fact that a call has been made between the date of the contract and the time for completion (*o*), or even before the contract was made (*p*), affords no defence to an action by the seller for non-completion.

Similarly, the fact that the company has been wound up before account day (*q*) or has been ordered to be wound up at the date of the contract (*r*) affords no answer to the seller's claim for the purchase-money and for an indemnity, notwithstanding the fact that by statute all transfers without the consent of the liquidator are void (*s*) and the liquidator refuses his consent to the transfer. If, therefore, the seller of shares on a Stock Exchange is made a contributory in the winding up either as a present or a past member of the company, the purchaser from him will be ordered to indemnify him (*t*). If, however, the contract is made by both parties in ignorance that winding-up proceedings have already been commenced, the contract is not valid or enforceable so as to make the purchaser a contributory (*u*).

530. Where specific performance would be decreed but for the fact that it is impossible to enforce it (*a*), as, for instance, where the company has gone into liquidation (*b*), or the directors' consent to the transfer has been refused in such circumstances that the

SECT. 2.
Breach
between
Purchaser
and Seller.
—
Remedies.

Calls.

Winding up.

Where
specific
performance
impossible.

M.R., at p. 492, following *Roper v. Johnson* (1873), L. R. 8 C. P. 167.

(*n*) As to indemnity, see the text, *infra*; as to specific performance, see the text, *infra*; as to damages, see p. 254, *post*.

(*o*) *Hawkins v. Maltby* (1867), 3 Ch. App. 188.

(*p*) *Hawkins v. Maltby* (1869), 4 Ch. App. 200.

(*q*) *Chapman v. Shepherd* (1867), L. R. 2 C. P. 288; *Biederman v. Stone* (1867), L. R. 2 C. P. 504; *Neilson v. James* (1882), 9 Q. B. D. 546, C. A.; *Cruse v. Paine* (1869), 4 Ch. App. 441. As to account day, see p. 216, *ante*.

(*r*) *Rudge v. Bowman* (1868), L. R. 3 Q. B. 689; see title COMPANIES, Vol. V., p. 184.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (1); see title COMPANIES, Vol. V., p. 578.

(*t*) *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Paine v. Hutchinson* (1868), 3 Ch. App. 388. As to the lists of contributories in winding up, see title COMPANIES, Vol. V., pp. 494 *et seq.*; as to their liability, see *ibid.*, pp. 488, 489, 492 *et seq.*

(*u*) *Emmerson's Case* (1866), 1 Ch. App. 433.

(*a*) As to specific performance generally, see title SPECIFIC PERFORMANCE, pp. 1 *et seq.*, *ante*.

(*b*) *Coles v. Bristowe* (1868), 4 Ch. App. 3; *Cruse v. Paine*, *supra*; *Chapman v. Shepherd*, *supra*; *Biederman v. Stone*, *supra*; *Neilson v. James*, *supra*.

SECT. 2.
Breach
between
Purchaser
and Seller.
Public funds.

court cannot compel it (c), the court; in lieu of a decree for specific performance, will order the purchaser to indemnify the seller.

SUB-SECT. 3.—*Specific Performance.*

531. Specific performance will not as a rule be granted of a contract for the transfer of stock in the public funds (d). Where, however, a purchaser for some reason has no remedy at law, as, for instance, where he is an equitable assignee of a contract for the purchase of stock, specific performance may, perhaps, be granted (e).

Shares in
companies.

532. Shares in companies have been held to stand upon a different footing on the grounds that they are limited in number and not always available on the market (f). If, however, there is a free market in the shares in question, specific performance of a contract to purchase shares will not be granted, because damages are an adequate remedy (g).

Title
defective.

533. Specific performance will not be granted to a seller where, on inquiry as to title, he is found to have precluded himself from making a good title (h). The fact that he has only an equitable title to the shares which are registered in the name of a third person is no objection to a decree of specific performance (i).

SUB-SECT. 4.—*Damages.*

Measure of
damages.

534. The most ordinary remedy for breach of a contract to purchase or sell securities is an action for damages. The measure of damages is the difference between the contract price and the price of the securities at such time after the breach as the court may hold to be reasonable to allow for the making of a new contract to replace the old one (j).

SUB-SECT. 5.—*Warranty of Title and Genuineness of Securities.*

Title.

535. In the case of securities transferable by deed a warranty of title is implied by law (k). In the case of securities transferable by

(c) *Hawkins v. Maltby* (1869), 4 Ch. App. 200; *Casey v. Bentley*, [1902] 1 I. R. 376, C. A.

(d) *Cuddee v. Rutter* (1720), 5 Vin. Abr. 538; see White & Tud. L. C., 8th ed., Vol. II., 426; *Cappur v. Harris* (1723), Bunb. 135, Ex. Ch.; *Nutbrown v. Thornton* (1804), 10 Ves. 159; title SPECIFIC PERFORMANCE, p. 14, *ante*. As to specific performance generally, see *ibid.*, pp. 1 *et seq.*, *ante*.

(e) *Doloret v. Rothschild* (1824), 1 Sim. & St. 590. The comment on this case in *South African Territories v. Wallington*, [1898] A. C. 309, *per* Lord HALSBURY, L.C., at p. 311, has impaired its authority upon the present point; see also Fry on Specific Performance, 4th ed., ss. 59, 73—76.

(f) *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Cheale v. Kenward* (1858), 3 De G. & J. 27. For form of order, see *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Paine v. Hutchinson* (1868), 3 Ch. App. 388.

(g) *Re Schwabacher, Stern v. Schwabacher, Koritschoner's Claim* (1907), 98 L. T. 127.

(h) *Shaw v. Fisher* (1855), 5 De G. M. & G. 596.

(i) *Paine v. Hutchinson*, *supra*; *Loring v. Davis* (1886), 32 Ch. D. 625.

(j) *Stewart v. Cauty* (1841), 8 M. & W. 160; *Tempest v. Kilner* (1846), 3 C. B. 249; *Samuel and Escombe v. Rowe* (1892), 8 T. L. R. 488; see also title DAMAGES, Vol. X., p. 332.

(k) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (A).

delivery, being negotiable instruments, no warranty of title is required, since a transferee taking such securities in good faith and for value is not subject to the defects in title of his transferor (*l*).

SECT. 2.
Breach
between
Purchaser
and Seller.

Genuineness
of securities.

536. In the case of all Stock Exchange bargains the seller warrants the genuineness and regularity of the documents delivered by him (*m*). If, therefore, the documents are not genuine and the purchaser is, in consequence, unable to obtain registration or, having got himself registered, is removed from the register as the result of a legal decision, the committee will, as between the members who have participated in the transaction, compel each seller to make good delivery to his purchaser and so ultimately cast the loss upon that member who first sold the spurious securities; and he, if he has acted for a client, may recover in an action against his client for an indemnity (*n*).

537. A purchaser, who is unable to get registration owing to his vendor having no title to the shares which he purported to sell, may recover the money paid for the shares as on a total failure of consideration (*o*).

Remedy.

SECT. 3.—*Wrongful Detention of Securities.*

538. Where securities are wrongfully detained the person entitled to them may obtain an order for the return of the securities or their value at the date of trial, together with damages for their detention (*p*).

Remedies.

539. The assessment of damages for wrongful detention is for the jury, who may take into consideration any fluctuation in the price of the securities between the proper day for delivery and the actual date thereof (*q*). The plaintiff is not entitled, as of course, to have his damages measured by the highest price between the first wrongful detention and the delivery or the trial (*r*). If, however, he can show that he would have sold the securities at any

Measure of
damages.

(*l*) See title **BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS**, Vol. II., p. 461.

(*m*) Stock Exchange Rules, 1911, r. 112 (1).

(*n*) *Smith v. Reynolds* (1892), 66 L. T. 808, C. A.; affirmed, *sub nom. Reynolds v. Smith* (1893), 9 T. L. R. 494, H. L.; *Harker v. Edwards* (1887), 57 L. J. (Q. B.) 147, C. A.; compare *Waterhouse v. London and South Western Rail. Co.*, *Coates v. Same* (1879), 41 L. T. 553. The case of *Westropp v. Solomon* (1849), 8 C. B. 345, which seems to conflict with these cases, was decided upon its own facts and is distinguishable on the ground that no rule of the London Stock Exchange making the seller in effect warrant the genuineness of the documents was before the court.

(*o*) *Platt v. Rowe* (1909), 26 T. L. R. 49; compare title **CONTRACT**, Vol. VII., p. 481.

(*p*) *Shepherd v. Johnson* (1802), 2 East, 211; *Downes v. Back* (1816), 1 Stark. 318; *Owen v. Routh* (1854), 14 C. B. 327; *Harrison v. Harrison* (1824), 1 C. & P. 412. As to wrongful detention generally, see title **TROVER AND DETINUE**, pp. 887 *et seq.*, *post*.

(*q*) *Williams v. Archer* (1847), 5 C. B. 318, Ex. Ch. As to the assessment of damages generally, see title **DAMAGES**, Vol. X., pp. 348 *et seq.*; as to the measure of damages, see *ibid.*, pp. 331 *et seq.*

(*r*) *M'Arthur v. Seaforth* (Lord) (1810), 2 Taunt. 257.

SECT. 3.
Wrongful
Detention of
Securities.

given time, his damages are to be measured by the difference between the price at that time and the price at the date of the trial (s).

Fraud.

Where the time for replacement of securities is extended by agreement, the damages for failure to replace them are calculated with reference to the extended and not to the original date (t).

Where the wrongful detention takes place in circumstances amounting to fraud on the part of a broker, his client may recover damages calculated with reference to the highest price at which the securities could have been sold if properly delivered (u).

Part V.—Default.

SECT. 1.—*Default of Broker.*

Position of
client.

540. On the default of a broker, his bargains as between himself and the jobber are closed at hammer price (a). This closing does not affect the position of the broker's client; the client's bargains made through the broker with the jobber remain open (b), and must, in the absence of agreement to the contrary, be completed by the client with the jobber.

The client cannot compel the jobber to treat the bargains as closed at the hammer price (c), though the jobber may agree to do so if the client desires it (d); nor can the client compel the jobber to agree to the substitution of a third person as the party liable to him in place of the client (e).

The fact that the jobber may, in the Stock Exchange liquidation, have recovered an amount of money from the estate of the

(s) *Williams v. Peel River Land and Mineral Co., Ltd.* (1886), 55 L. T. 689, C. A. (where the price had risen and fallen again, and there was evidence of a desire to sell, and the Court of Appeal, exercising the functions of a jury, awarded as damages an amount based on the average price between the proper date of delivery and the trial).

(t) *Blyth v. Carpenter* (1866), L. R. 2 Eq. 501.

(u) *Stewart v. Lupton* (1874), 22 W. R. 855.

(a) Stock Exchange Rules, 1911, r. 164. As to "hammer price," see p. 217, *ante*. A request by an insolvent stockbroker to his creditors to close their account with him is not such a notice of suspension of payment as to constitute an act of bankruptcy; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 34.

(b) *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A.; *Scott and Horton v. Ernest* (1900), 16 T. L. R. 498; *Ponsolle v. Webber*, [1908] 1 Ch. 254; compare *Beckhusen and Gibbs v. Hamblet*, [1900] 2 Q. B. 18. These cases establish that the view of the custom applicable which formerly prevailed and was acted upon by the court (see *Duncan v. Hill* (1873), L. R. 8 Exch. 242, 243, note (3), Ex. Ch.; *Hartas v. Ribbons* (1889), 22 Q. B. D. 254, C. A.; *Anderson & Co. v. Beard*, [1900] 2 Q. B. 260, *per* MATHEW, J., at pp. 264, 265) that it was open to the client if he chose to accept the closing at hammer price and to bind the jobber by such acceptance, is not correct.

(c) *Levitt v. Hamblet*, *supra*.

(d) *Ibid.*, *per* COLLINS, L.J., at p. 66.

(e) *Currie v. Booth Brothers* (1902), 7 Com. Cas. 77, C. A.

defaulting broker in the hands of the official assignee affords no defence to the client in an action by the jobber for non-completion, and the jobber is entitled, nevertheless, to recover damages from the client if the latter fails to complete (*f*).

SECT. 1.
Default or
Broker.

541. A broker is not entitled to an indemnity from his client against losses arising from the closing of the broker's bargains under the hammer (*g*), unless the client, having been given the option, has elected to treat his bargain as closed by the hammer (*h*), or unless the client is himself in default to the broker so that the broker might properly have closed the account (*i*).

Rights of
broker.

SECT. 2.—*Default of Jobber.*

542. Where a jobber defaults, his bargains with other members are closed at hammer price (*j*); but bargains which he has made through a broker with a client are unaffected. The client whose jobber defaults has, apart from some special arrangement, no remedy against the broker in respect of the default of the jobber (*k*).

Effect of
jobber's
default.

SECT. 3.—*Liquidation of Defaulter's Estate.*

543. Upon the default of a member of the Stock Exchange all his assets, by the operation of the rules as to default, vest in the official assignee (*l*), whose duty it is to collect the assets (*m*), and who may maintain an action in his own name in respect thereof (*n*). The official assignee may also sue in the name of the defaulter; and, whether he sues in his own name or in that of the defaulter, he recovers in his own right, and the amount recovered by him cannot be attached by a judgment creditor of the defaulter (*o*).

*Cessio
bonorum.*

Where the official assignee sues in the name of the defaulter the latter cannot be compelled to give security for costs as nominal plaintiff (*p*).

(*f*) *Stoneham v. Wyman* (1901), 6 Com. Cas. 174. The jobber is not, in effect, allowed to receive damages twice over, for he is obliged under the rules of the London Stock Exchange to account for any excess to the official assignee as representing the estate of the defaulting broker. As to the Stock Exchange liquidation, see the text, *infra*.

(*g*) *Duncan v. Hill* (1873), L. R. 8 Exch. 242, Ex. Ch.; *Lacey v. Hill, Crowley's Claim* (1874), L. R. 18 Eq. 182; compare *Allen v. Wingrove* (1901), 17 T. L. R. 261, C. A.

(*h*) *Hartas v. Ribbons* (1889), 22 Q. B. D. 254, C. A.

(*i*) *Lacey v. Hill, Crowley's Claim*, *supra*; *Thacker v. Hardy* (1878), 4 Q. B. D. 685, C. A.; *Ellis v. Pond*, [1898] 1 Q. B. 426, C. A., *per* COLLINS, L.J., at p. 461; see p. 250, *ante*. The mere fact that the client owes money to the broker is not sufficient to entitle the broker to an indemnity against such losses (*Duncan v. Hill, supra*).

(*j*) Stock Exchange Rules, 1911, r. 164; see p. 217, *ante*.

(*k*) *Gill v. Shepherd & Co.* (1902), 8 Com. Cas. 48.

(*l*) *Tomkins v. Saffery* (1877), 3 App. Cas. 213. As to the official assignee, see p. 217, *ante*.

(*m*) Stock Exchange Rules, 1911, r. 165.

(*n*) *Richardson v. Stormont, Todd & Co.*, [1900] 1 Q. B. 701, C. A.; see title EXECUTION, Vol XIV., p. 105.

(*o*) *Lomas v. Graves & Co.*, [1904] 2 K. B. 557, C. A.

(*p*) *Hinde v. Haskew* (1884), 1 T. L. R. 94.

SECT. 3.
Liquidation
of
Defaulter's
Estate.

Differences.

The result of the *cessio bonorum* provided for by the rules is to constitute default on the London Stock Exchange an act of bankruptcy (*q*).

544. The differences which arise by reason of the closing at hammer price (*r*), or which become due to the defaulter on passing tickets (*s*), form an artificial fund which may be retained by the official assignee as against the trustee in bankruptcy of a defaulter. But if bankruptcy supervenes within three months of the default the trustee may recover from the official assignee all other assets which come into his hands as representing the defaulter (*t*).

Effect of
liquidation.

545. The liquidation of a defaulter's estate by the official assignee does not amount to an accord and satisfaction of the defaulter's debts or bar his creditors from suing him at law for the balance of their claims after deducting the amount received by them in the liquidation (*a*).

Part VI.—Illegality and Fraud.

SECT. 1.—*Gaming and Wagering in Securities.*

SUB-SECT. 1.—*In General.*

Principles
applicable.

546. With the exception of Leeman's Act (*b*), there is no statute in force which applies peculiarly to gaming and wagering contracts in stocks and shares. The general principles, therefore, which apply to such contracts are the same as are applicable to gaming and wagering contracts generally (*c*).

SUB-SECT. 2.—*Gaming Distinguished from Speculation.*

Distinction.

547. A contract for the purchase or sale of securities which is entered into in such circumstances as to give a right to the purchaser to call upon the seller to make delivery, and to the seller to

(*q*) *Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444, C. A.; compare title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 14, 15.

(*r*) *Re Plumbly, Ex parte Grant* (1880), 13 Ch. D. 667, C. A. As to "hammer price," see p. 217, *ante*.

(*s*) *Re Woodd, Ex parte King*, [1900] W. N. 84. As to passing tickets, see p. 217, *ante*.

(*t*) *Tomkins v. Saffery* (1877), 3 App. Cas. 213 (defaulter's bank balance); *Re Woodd, Ex parte King, supra*; *King v. Hutton*, [1900] 2 Q. B. 504, C. A. (ordinary differences). As to relation back, see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 181 *et seq.*

(*a*) *Mendelssohn v. Ratcliff*, [1904] A. C. 456. A creditor who has obtained judgment in such an action can maintain a petition in bankruptcy against the defaulter (*ibid.*; *Re Ward, Ex parte Ward* (1882), 22 Ch. D. 132, C. A.); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 40, note (*h*).

(*b*) Banking Companies' (Shares) Act, 1867 (30 & 31 Vict. c. 29); see, further, pp. 262, 263, *post*.

(*c*) See title GAMING AND WAGERING, Vol. XV., pp. 265 *et seq.*

call upon the purchaser to take delivery, is a legitimate commercial transaction notwithstanding that the parties when they enter into it do so with the intention of reselling or repurchasing the securities and so realising a profit from a fluctuation in the price (*d*). If, however, it appears that though the contract in form provides for a purchase and sale, it is not intended that there should be an actual purchaser and seller, but simply a bargain that, according to the price of the securities on a future day, the parties should either gain or lose, the contract is a gaming and wagering contract (*e*).

It is of the essence of gaming and wagering that the one party is to win and the other lose upon a future event which, at the time of the contract, is of an uncertain nature (*f*).

SECT. 1.
Gaming and
Wagering in
Securities.

SUB-SECT. 3.—*Stock Exchange Transactions.*

548. Transactions upon the London Stock Exchange are governed by the rules of that Stock Exchange and, under those rules, all bargains must be completed in the prescribed manner, and necessarily involve an obligation upon the parties to take or to make delivery, or to pass the name of someone who will do so. This obligation attaches as soon as the bargain is made, and the parties can only get rid of it by subsequently entering into a converse bargain with each other (*g*). It follows that, although it is possible to gamble or speculate on the London Stock Exchange, it is almost impossible to make a contract there which is void as a gaming and wagering contract (*h*).

Effect of
Stock
Exchange
rules.

As far as the public are concerned, who deal through a broker on the London Stock Exchange, the Gaming Acts (*i*), apart from some very special agreement between the parties, can have no application. In the first place, the broker himself does not wager at all, the client's gain or loss involving no loss or gain to him, and, in the second place, the broker must make a contract with a jobber which, under the rules of the London Stock Exchange, will involve an obligation upon the client to accept or deliver as the case may be (*j*).

549. If a broker or a non-member (*k*) were to make a special bargain with a jobber that, notwithstanding the rules of the London Stock Exchange, neither party should be compellable to take or deliver,

Time
bargains.

(*d*) *Forget v. Ostigny*, [1895] A. C. 318, P. C.

(*e*) *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; *Wood v. Fevez* (1898), 14 T. L. R. 492; see title GAMING AND WAGERING, Vol. XV., pp. 283, 284.

(*f*) *Thacker v. Hardy* (1878), 4 Q. B. D. 685, C. A.; *Hirst v. Williams and Perryman* (1895), 12 T. L. R. 128, C. A.

(*g*) *Re Morgan, Ex parte Phillips, Ex parte Marnham* (1860), 2 De G. F. & J. 634, C. A. It would no doubt be possible for members of the London Stock Exchange to agree to bet on prices instead of dealing according to the rules, but such a case has not arisen.

(*h*) See *Thacker v. Hardy*, *supra*; *Hirst v. Williams and Perryman*, *supra*.

(*i*) See, generally, title GAMING AND WAGERING, Vol. XV., pp. 265 *et seq.*

(*j*) *Thacker v. Hardy*, *supra*; *Forget v. Ostigny*, *supra*; *Franklin & Co. v. Dawson* (1913), 29 T. L. R. 479; see title GAMING AND WAGERING, Vol. XV. pp. 283, 284.

(*k*) *Grizewood v. Blane* (1851), 11 C. B. 526; compare *Thacker v. Hardy*, *supra*, per COTTON, L.J., at p. 696.

SECT. 1.
Gaming and
Wagering in
Securities.

Options.

the bargain would be void under the Gaming Act, 1845 (*l*), and in the case of a broker, the agreement to indemnify or remunerate the broker would be void under the Gaming Act, 1892 (*m*).

550. The same principles apply to options. Those made in the ordinary course upon the London Stock Exchange are legitimate dealings; but if it were found that there was a tacit understanding that the bargains should not be enforced and that differences only should be payable the contract would be void (*n*).

SUB-SECT. 4.—*Outside Dealers or Brokers.*

Gaming
contracts.

551. Though a broker who is not a member of any Stock Exchange may carry on a legitimate business, the term "outside dealer" (*o*) or "outside broker" (*p*) is, in common parlance, used to denote a person who carries on a gambling business (*q*). Many attempts have been made by outside dealers to frame contracts which would enable them to make bets with their customers on the price of securities and yet sue in a court of law for their winnings. For a time this was successfully accomplished by contracts purporting to be ordinary contracts of purchase and sale (*r*). It is now settled, however, that if, notwithstanding the ostensible terms of the contract, there is a secret understanding that differences only shall be payable, the form of contract is immaterial (*s*).

Test of
gaming
contracts.

552. Amongst the elements which have been considered to afford evidence of such a tacit understanding are the financial position of the speculator in relation to the magnitude of the dealings (*t*); the fact that no securities have at any time been taken up (*u*); the fact that the contract contains a stipulation that something additional must be done if delivery is to be made (*w*), or that a guarantee shall

(*l*) 8 & 9 Vict. c. 109; see title GAMING AND WAGERING, Vol. XV., p. 271.

(*m*) 55 & 56 Vict. c. 9; see title GAMING AND WAGERING, Vol. XV., pp. 275, 276. Such agreement would probably also be void apart from statute (*Cooper v. Neil*, [1878] W. N. 128).

(*n*) *Buitenlandsche Bankvereniging v. Hildesheim* (1903), 19 T. L. R. 641, C. A.

(*o*) *Re Gieve*, [1899] 1 Q. B. 794, C. A., per VAUGHAN WILLIAMS, L.J., at p. 804.

(*p*) See *Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A., per A. L. SMITH, L.J., at p. 393.

(*q*) Such businesses are frequently termed "bucket shops."

(*r*) *Universal Stock Exchange v. Stevens* (1892), 66 L. T. 612; *Shaw v. Bagley* (1893), *Times*, 24th January, C. A.; compare *Shaw v. Caledonian Rail. Co.* (1890), 17 R. (Ct. of Sess.) 466; *Lowenfeld v. Howat* (1891), 19 R. (Ct. of Sess.) 128; and see title GAMING AND WAGERING, Vol. XV., p. 270.

(*s*) *Universal Stock Exchange v. Strachan*, [1896] A. C. 166.

(*t*) *Re Gieve, supra*; *Miles v. Lowenfeld* (1900), *Times*, 21st December; (1901), *Times*, 28th May, C. A.; *Re Duncan* (1903), *Times*, 17th March.

(*u*) *Re Duncan, supra*. The fact that some securities have been taken up is not conclusive against the contract being a wager (*Miles v. Lowenfeld, supra*).

(*w*) *Re Gieve, supra*; see, *contra*, *Philp v. Bennett & Co.* (1901), 18 T. L. R. 129, distinguishing *Re Gieve, supra*, on the ground that the purchaser was bound, by the terms of his application, to accept the stock

be given for payment of the purchase-money (*x*); the fact that interest is charged by the dealer on the purchase price of securities which in fact he never purchases (*a*); and the fact that orders for undoing the bargain are regularly given contemporaneously with original orders (*b*).

SECT. 1.
Gaming and
Wagering in
Securities.

SUB-SECT. 5.—*Cover Deposited for Gaming Accounts.*

553. Moneys or securities deposited as security in gaming transactions are deposited as security for the payment of a debt which may become due on the happening of an uncertain event, but which if it becomes due will not be recoverable at law, and are not within the meaning of the words "money or any valuable thing deposited to abide the event of a wager" (*c*) in the Gaming Act, 1845 (*d*).

Not subject
to Gaming
Act, 1847.

The rights of a person who has deposited security in respect of a gaming transaction depend, therefore, upon the common law (*e*).

554. Anyone engaged in gaming can withdraw at any time by giving notice of his intention to do so (*f*); and commencing an action to get back a deposit is a sufficient notice of withdrawal (*g*).

Right to
withdraw.

Upon notice of withdrawal the gambler is entitled to recover his deposit unless it has been actually appropriated to meet a loss which has already occurred (*h*). Hence, if the gambler is a winner (*i*), or if the event on which the wager depends has not yet happened (*k*), he can recover his deposit; so also if he is a loser, but the loss is less than the deposit, he can recover the balance (*l*). Further, if he

that had been bought; *Shaw v. Bagley* (1893), *Times*, 24th January, C. A.

(*x*) *Re Duncan* (1903), *Times*, 17th March.

(*a*) *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; *Re Duncan, supra*; *Miles v. Lowenfeld* (1900), *Times*, 21st December; (1901), *Times*, 28th May, C. A.

(*b*) *Re Duncan, supra*; see, however, *Dutson v. Humbert, Nephew & Co.* (1909), *Times*, 1st February; see, further, title GAMING AND WAGERING, Vol. XV., p. 270.

(*c*) *Universal Stock Exchange v. Strachan, supra*. The contrary view was taken in *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A., per Lord ESHER, M.R., at p. 699, and per KAY, L.J., at p. 701, following *Manning v. Purcell* (1855), 7 De G. M. & G. 55, C. A.; see title GAMING AND WAGERING, Vol. XV., p. 275.

(*d*) 8 & 9 Vict. c. 109, s. 18.

(*e*) *Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A., per VAUGHAN WILLIAMS, L.J., at p. 396.

(*f*) *Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 329, C. A.; *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A.; *Varney v. Hickman* (1847), 5 C. B. 271; *Hampden v. Walsh* (1876), 1 Q. B. D. 189; *Trimble v. Hill* (1879), 5 App. Cas. 342, P. C.

(*g*) *Strachan v. Universal Stock Exchange, supra*, per A. L. SMITH, L.J., at p. 334; *Reggio v. Steven & Co.* (1888), 4 T. L. R. 326, Div. Ct.; *Re Cronmire, Ex parte Waud, supra*.

(*h*) *Strachan v. Universal Stock Exchange, supra*, and *Strachan v. Universal Stock Exchange* (No. 2), *supra*; *Re Cronmire, Ex parte Waud, supra*; compare title GAMING AND WAGERING, Vol. XV., pp. 273, 274.

(*i*) *Reggio v. Steven & Co., supra*; *Re Cronmire, Ex parte Waud, supra*; *Re Duncan, supra*.

(*k*) *Hampden v. Walsh, supra*.

(*l*) *Reggio v. Steven & Co., supra*; see S. C., sub nom. *Reggio v. Foskett & Co.* (1888), 4 T. L. R. 240.

SECT. 1. is a loser he can recover any part of the deposit which has not
 Gaming and been actually appropriated by the dealer to meet the loss (*m*).
 Wagering in The appropriation to be effective must be a real appropriation to
 Securities. meet a real loss (*n*).

SUB-SECT. 6.—*Purchase Out of Gaming Winnings.*

Not
 enforceable.

555. A contract for the purchase of securities, made upon the terms that they are to be paid for by the purchaser out of winnings on gaming transactions which have taken place between himself and the seller, cannot be enforced, and no action will lie for damages for non-delivery of the securities (*o*).

SECT. 2.—*Leeman's Act.*

Applicable
 to bank
 shares.

556. All contracts for sale or transfer of any shares, or stock, or other interest in any joint-stock banking company in the United Kingdom, other than the Banks of England and Ireland, are by statute bound to comply with certain requirements (*p*). The contract (*q*) must set forth in writing the numbers of the shares or stock on the register of the company, or, if they are not registered by distinguishing numbers, must set forth the names of the persons in whose names the shares or stock then stand in the books of the company (*r*); to insert in such a contract a false entry of names or numbers is a misdemeanour (*s*).

It is the custom of the London Stock Exchange to disregard this statute in dealings between members; this custom, however, is an unreasonable custom, and does not bind non-members who have no knowledge of it (*t*).

Position of
 broker.

557. A broker who makes a contract which is unenforceable by reason of this statute is guilty of negligence (*a*), but if his client, after discovering that the statute has not been complied with,

(*m*) *Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 329, C. A.; *Re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A.

(*n*) *Re Duncan* (1903), *Times*, 17th March.

(*o*) *Re Cronmire, Ex parte Waud, supra*.

(*p*) Banking Companies' (Shares) Act, 1867 (30 & 31 Vict. c. 29), commonly known as Leeman's Act; see title COMPANIES, Vol. V., p. 615.

(*q*) It has been decided in Scotland that where the Act applies it is not sufficient for the seller's broker to send to his own client a contract note containing the client's own name as seller, but that the contract between buyer and seller or their agents must be in writing, and contain the name of the registered holder (*Nelson Mitchell v. City of Glasgow Bank* (1878), 6 R. (Ct. of Sess.) 420; affirmed on other grounds (1879), 4 App. Cas. 624, where Lord CAIRNS, L.C., at p. 630, expressly stated that he was not satisfied that the decision of the Scottish courts on this point was erroneous).

(*r*) Banking Companies' (Shares) Act, 1867 (30 & 31 Vict. c. 29), s. 1.

(*s*) *Ibid*.

(*t*) *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A.; *Coates, Son & Co. v. Pacey* (1892), 8 T. L. R. 351. *Quære*, whether the custom is illegal in the sense of being a violation of the law, and so rendering every contract made with reference to it unenforceable; see *Perry v. Barnett, supra*, per BOWEN, L.J., at p. 397, and per BAGGALLAY, L.J., at p. 396; *Neilson v. James* (1882), 9 Q. B. D. 546, per Lord ESHER, M.R., at p. 550, and COTTON, L.J., at p. 554; title CUSTOM AND USAGES, Vol. X., pp. 255, 268.

(*a*) *Neilson v. James, supra*.

either himself completes or authorises his broker to complete the contract, he can no longer rely on the statute as a defence to any action brought against him in respect of the bargain (b).

SECT. 2.
Leeman's
Act.

SECT. 3.—*Rigging the Market.*

SUB-SECT. 1.—*Criminal Aspect.*

558. A conspiracy to give a fictitious price to securities by means of false rumours (c); by obtaining a quotation in the official list from the Committee of the London Stock Exchange by false statements (d); or by making sham purchases of shares in the market at a premium (e) is a criminal conspiracy. Conspiracy.

SUB-SECT. 2.—*Civil Aspect.*

559. All persons engaged in rigging the market by such false representations may be made liable in an action for damages for deceit by any purchaser who can show that the representations were made for the purpose of inducing him to buy (f). Where the false representation was not made to the plaintiff directly, but he has acted upon a representation made to a third person, he must show that the false representation was made with the intent that he should act upon it in the manner which occasioned his loss (g). In the case of false representations made to the public, with the intention of inducing persons to purchase in the market, the makers of the false representations are liable to anyone so acting upon them (h). But the purchaser must have acted upon the representation, for if he was not induced thereby but acted upon his own judgment no action will lie (i). Deceit.

Suits between conspirators to rig the market will not be entertained by the court (k).

SUB-SECT. 3.—*Legitimate Market Making.*

560. A market may be made legitimately provided that no fraud or false representation is used. Shares may be pooled and a broker or Pooling of
shares.

(b) *Loring v. Davis* (1886), 32 Ch. D. 625; see, further, title COMPANIES, Vol. V., pp. 615, 616.

(c) *R. v. De Berenger* (1814), 3 M. & S. 67; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 673, note (b).

(d) *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.

(e) *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 562, 563, 708 *et seq.*

(f) *Ibid.*, per A. L. SMITH, L.J., at p. 734.

(g) *Peck v. Gurney* (1873), L. R. 6 H. L. 377, overruling *Bedford v. Bagshaw* (1859), 4 H. & N. 538; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 695 *et seq.*

(h) *Stewart v. Weber* (1903), *Times*, 8th December, C. A., per COZENS-HARDY, L.J.; compare title MISREPRESENTATION AND FRAUD, Vol. XX., p. 716.

(i) *Salaman v. Warner*, [1891] 1 Q. B. 734, C. A.

(k) *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, *supra*, following *Taylor v. Chester* (1869), L. R. 4 Q. B. 309, Ex. Ch., and *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491.

SECT. 3. **Rigging the Market.** jobber instructed to offer them at a certain price and to buy all that are offered at less than that price; the broker or jobber may have the shares quoted on the tape at the price at which he is willing to deal; and his employers may agree with him to take off his hands all or any part of such shares as may be bought by him to support the market (*l*).

SECT. 4.—*Corners.*

How far
legitimate.

561. Corners are legitimate in the absence of fraudulent representations made with the object of inducing and in fact inducing persons to sell; for the court will not assist persons to escape the results of having made unwise bargains (*m*).

Where, however, fraudulent devices are resorted to, the persons engaged are indictable for conspiracy (*n*) and liable to an action for deceit (*o*).

(*l*) *Sanderson and Levi v. British Mercantile Marine and Share Co., Ltd.* (1899), *Times*, 19th July.

(*m*) *Salaman v. Warner*, [1891] 1 Q. B. 734, C. A.

(*n*) *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 708 *et seq.*

(*o*) *Stewart v. Weber* (1903), *Times*, 27th May, 19th June, 8th December, C. A.; *Barry v. Croskey* (1861), 2 John. & H. 1; *Gray v. Lewis, Parker v. Lewis* (1873), 8 Ch. App. 1035; *British and American Telegraph Co. v. Albion Bank* (1872), L. R. 7 Exch. 119; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 707, 718.

STOCK MORTGAGES.

See MORTGAGE.

STOCKS AND SHARES.

See BANKERS AND BANKING; CHUSES IN ACTION; COMPANIES; EXECUTION; EXECUTORS AND ADMINISTRATORS; LOCAL GOVERNMENT; METROPOLIS; MONEY AND MONEY-LENDING; PERSONAL PROPERTY; RAILWAYS AND CANALS; REVENUE; STOCK EXCHANGE.

STOLEN GOODS.

See CRIMINAL LAW AND PROCEDURE ; MARKETS AND FAIRS ; SALE
OF GOODS ; TROVER AND DETINUE.

STONE.

See HIGHWAYS, STREETS, AND BRIDGES ; MINES, MINERALS, AND
QUARRIES.

STOP ORDER.

See EXECUTION.

STOPPAGE IN TRANSIT.

See SALE OF GOODS ; SHIPPING AND NAVIGATION.

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Part I.—Regulation of Traffic.

SECT. 1.—Introductory.

Common law
rule.

562. Apart from some statute or statutory regulation (a) confining certain classes of traffic to certain parts of the highway (b), directing

(a) [It may be pointed out that the introduction of mechanically-driven vehicles has rendered the legislation regulating street traffic to some extent inapplicable, since some of the statutes either in express terms or by necessary implication are limited to vehicles drawn by animal power; see, for instance, Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 77; Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 26; see pp. 271, 272, *post*.—EDS.]

(b) As to the meaning of regulations requiring traffic to keep "on the near side" of a road, see *Bolton v. Everett* (1911), 75 J. P. 534.

observance of the rule of the road, or otherwise restricting common law rights, a person is entitled to use any highway which has been dedicated for such traffic as he desires to conduct on it, and to use any part thereof, although his failure to observe the rule of the road may be evidence of negligence on his part, should an accident occur (*c*).

SECT. 1.
Introductory.

SECT. 2.—*Diversion and General Regulation of Traffic.*

563. An urban authority, or a rural authority possessing the necessary urban powers (*d*), may from time to time make orders for the route to be observed by carts, carriages, horses, and persons, and for preventing obstruction of the streets within its district at times of public processions, rejoicings, or illuminations, or when streets are crowded and liable to be obstructed (*e*); it may also give directions to the police for keeping order and preventing obstruction in the neighbourhood of theatres and other places of public resort (*f*). The Commissioner of Metropolitan Police and the Commissioner of City Police have practically identical powers in the Metropolitan Police District and the City of London (*g*).

Urban districts and the Metropolis.

564. Upon application by the minister or wardens of any place of public worship within the district, an urban authority, or a rural authority possessing the necessary urban powers (*h*), may make orders regulating the route by which, or the manner in which,

Sunday traffic.

(*c*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 412 *et seq.* As to the *jus spatiandi*, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 579, 580. As to rule of the road, see title NEGLIGENCE, Vol. XXI., pp. 412, 413; and pp. 276, 277, *post*.

(*d*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, applies the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 21—23, to urban districts. The provisions may be put in force in a rural district or part thereof by order of the Local Government Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276; see title LOCAL GOVERNMENT, Vol. XIX., p. 332. A provision against “driving or conducting cattle” by a certain route is not infringed by carrying calves in a cart (*Triggs v. Lester* (1866), L. R. 1 Q. B. 259 (local Act)).

(*e*) As to the diversion of traffic by barriers or hoardings when a street is being repaired or broken open, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 198 *et seq.*

(*f*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 21, 23; the penalty for wilful breach of any order is a sum not exceeding 40s. (*ibid.*, s. 21). For a conviction for disregarding a constable’s direction to stop, see *Dudderidge v. Rawlings* (1912), 77 J. P. 167. As to theatre queues, see *Lyons, Son & Co. v. Gulliver* (1913), 29 T. L. R. 428; and title THEATRES AND OTHER PLACES OF ENTERTAINMENT, p. 408, *post*. As to open spaces, see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 601 *et seq.*; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 577 *et seq.*

(*g*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 52, 53, 59; Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 11, 24; *R. v. Lushington, Ex parte Keen* (1899), 15 T. L. R. 388. As to the Metropolitan and City of London Police, see title POLICE, Vol. XXII., pp. 466 *et seq.*, 478 *et seq.*

(*h*) See note (*d*), *supra*.

SECT. 2.

Diversion
and General
Regulation
of Traffic.Police
regulations
in London.City of
London.Regulating
traffic in case
of fire.Regulating
traffic in
crowded
streets.

persons may drive carts, carriages, and cattle near such places during service hours on Sundays and certain other days (*i*).

The Commissioner of Metropolitan Police has similar powers within the Metropolitan Police District (*j*).

565. Police regulations may be made as to certain streets within six miles from Charing Cross, but outside the City of London, with respect to the line to be kept by persons riding or driving, and to the route to be taken by vehicles, and such regulations may prohibit any vehicle from entering a street for the purpose only of passing to its destination in some other street. No such regulation, however, may limit the number of metropolitan stage carriages that may pass down any street in pursuance of their ordinary trade (*k*). Police notices as to traffic generally, and as to hackney and stage carriages, may in the Metropolis be affixed to lamp-posts (*l*).

Within the City of London the Common Council has similar but rather more extensive powers of making regulations (*m*).

566. In places where the Public Health Acts Amendment Act, 1907, s. 88 (*n*), is in force, the officer in charge of the police at any fire has power to stop and regulate the traffic in any street if he considers it necessary or desirable to do so for the purpose of extinguishing the fire or for the protection of life or property (*o*).

567. In places where the Public Health Acts Amendment Act, 1907, s. 78 (*p*), is in force, the local authority, whether urban or rural, may from time to time make regulations (*q*), to be approved by the Home Secretary, with respect to particular streets specially liable to be obstructed owing to the amount and nature of the traffic, prescribing the line to be kept at any street crossing by riders and

(*i*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 22, 23. The order is to be printed and affixed as required by *ibid.*, s. 22; the penalty for wilful breach of an order is a sum not exceeding 40s. (*ibid.*).

(*j*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 51, 54.

(*k*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 3, 4, 10—13; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2. As to the procedure in selecting streets and making regulations, as to the publication and proof of regulations, and as to penalties and power to arrest offenders, see Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 10—13.

(*l*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 22; Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 14.

(*m*) City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxxvii.), s. 2. As to courts of common council, see title METROPOLIS, Vol. XX., pp. 426 *et seq.*

(*n*) 7 Edw. 7, c. 53. This provision may be put in force in any district or contributory place by order of the Home Secretary (*ibid.*, s. 3 (1), (4)); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*o*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 88. The penalty for wilful disobedience to the officer's order is a sum not exceeding £5 (*ibid.*). As to the powers of the police and firemen at fires in the Metropolis, see title METROPOLIS, Vol. XX., pp. 417, 418.

(*p*) 7 Edw. 7, c. 53. This provision may be put in force in any district or contributory place by order of the Home Secretary (*ibid.*, s. 3 (1), (4)); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*q*) The penalty for breach of any regulation after warning by word or signal from a constable directing the traffic is a sum not exceeding 40s. (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 78). No offence is committed until after a warning (*Chorlton v. Liggett* (1910), 74 J. P. 458).

drivers, and requiring heavy and slow vehicles to keep to a particular portion of the street (*r*).

SECT. 3.—*Restrictions as to Traffic.*

568. No cart, wagon, or similar (*s*) vehicle may be used on a highway unless the owner's name and address is painted in the prescribed manner on the off side (*t*).

569. No one person may drive more than two carts, wagons, or other such carriages on any highway; he may only drive two if each is drawn by a single horse, and if the horse of the hinder one is fastened to the foremost one by a rein not exceeding 4 feet in length (*u*).

570. In places where the Public Health Acts Amendment Act, 1907, s. 80 (*w*), is in force, the local authority may by order (*x*) prescribe the streets in which, and the manner according to which, the leading or driving (*y*) of animals shall be permitted within the district. Such an order may operate only between 9 a.m. and 9 p.m., and is not to prevent animals being driven to or from their owner's premises, or to any licensed slaughter-house. A reasonably short route is to be allowed at all times for cattle passing direct between a market and a station, or wharf, or place outside the district.

571. Within six miles from Charing Cross, London, no person may drive or conduct any cattle (*a*) through any street (*b*) between certain hours (*c*), except with the permission of the Commissioner of Metropolitan or City Police, as the case may be (*d*).

SECT. 2.
Diversion
and General
Regulation
of Traffic.

Name to be
painted on
carts.

Driving two
or more
vehicles etc.

Driving
animals.

Driving
animals in
Metropolis.

(*r*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 78.

(*s*) *Danby v. Hunter* (1879), 5 Q. B. D. 20.

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 76. Large legible letters in white upon black, or *vice versa*, not less than an inch in height must be used; the name and address of one partner suffice (*ibid.*); and see p. 276, *post*. As to similar provisions applicable within five miles of the London General Post Office, see London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), ss. 59, 60; London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 4. As to the provisions relating to locomotives and motor cars, see pp. 309, 317 *et seq*.

(*u*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 77; *Robertson v. Birkett* (1858), 32 L. T. (o. s.) 105. As to the number of wagons that may be drawn by a locomotive on a highway, see p. 311, *post*; as to trailers, see pp. 323, 331, *post*.

(*w*) 7 Edw. 7, c. 53. This provision may be put in force in any district or contributory place by order of the Home Secretary (*ibid.*, s. 3 (1), (4)); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*x*) No summary penalty is provided for breach of such an order.

(*y*) As to the meaning of the phrase "driving or conducting" cattle, see note (*d*), p. 269, *ante*.

(*a*) "Cattle" is defined as including bull, ox, cow, heifer, calf, sheep, goats, and swine, also horses, mules, and asses, when led in a string or loose (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 3).

(*b*) "Street" is defined as including "any highway or public place, whether a thoroughfare or not"; the royal parks, gardens, and possessions managed by the Commissioners of Public Works are for the purposes of the Act to be deemed public places (*ibid.*).

(*c*) The prohibited period is in the City between 8 a.m. and 8 p.m. (City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxxvii.), s. 2), and outside the City between 10 a.m. and 7 p.m. (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 7).

(*d*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 3, 4, 7;

SECT. 3.

Restrictions
as to
Traffic.Projecting
loads.Vehicles
drawn by
more than
four horses.Bye-laws as
to construc-
tion and use
of vehicles.Gates on
highways.Tramcars and
traffic where
tram lines are
laid.

572. In certain streets within six miles from Charing Cross no person may between 10 a.m. and 7 p.m., except with the permission of the Commissioner of Metropolitan or City Police, as the case may be, or except in cases of emergency, drive or conduct any vehicle laden with any article exceeding 35 feet in length, or protruding more than $8\frac{1}{2}$ feet behind the vehicle or more than 1 foot from the sides thereof; or carry any ladder, pole, or other article exceeding 35 feet in length or $8\frac{1}{2}$ feet in breadth; or drive or conduct any vehicle used for conveying goods and drawn by more than four horses (*e*).

573. A county council (*f*) may make bye-laws as to any highway in the county (1) for prohibiting or regulating the use of any wagon, wain, cart, or carriage drawn by animal power and having wheels of which the felloes or tires are not of such width in proportion to the weight carried by, or to the size of, or to the number of wheels of such wagon, wain, cart, or carriage, as may be specified in such bye-laws; (2) for prohibiting or regulating the use of any wagon, cart, or other carriage drawn by animal power not having the nails on its wheels countersunk in such manner as may be specified in such bye-laws, or having on its wheels bars or other projections forbidden by such bye-laws; (3) for prohibiting or regulating the locking of any wheel of any wagon, wain, cart, or carriage drawn by animal power when descending a hill, unless there is placed at the bottom of such wheel during the whole time of its being locked a skidpan, slipper, or shoe in such manner as to prevent the road from being destroyed or injured by the locking of such wheel; and (4) for prohibiting or regulating the erection of gates across highways, and prohibiting gates opening outwards on highways.

574. A local authority in whose district a street tramway is laid may make regulations as to the speed of tramcars, the distances to be maintained between cars (*g*), the stopping of cars, and the traffic

Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2. The penalty is a sum not exceeding 10s. per beast (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 7). As to the meaning of "drive or conduct," see note (*d*), p. 269, *ante*. As to the Commissioners of Metropolitan and City Police, see title POLICE, Vol. XXII., pp. 469 *et seq.*, 478, 479.

(*e*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 4, 10, 16; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2. The penalty is a sum not exceeding 40s. (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 16).

(*f*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 26, 38; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (viii.). Such bye-laws may apply to any non-county borough within the county, although a quarter sessions borough (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 35, 37, 38); compare title LOCAL GOVERNMENT, Vol. XIX., pp. 300, 301. As to the City of London, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41; as to confirmation of such bye-laws, see Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 35; as to offences and penalties, see *ibid.*, ss. 26, 36; and as to appeals from convictions, see *ibid.*, s. 37. As to the powers of county councils generally, see title LOCAL GOVERNMENT Vol. XIX., pp. 340 *et seq.*

(*g*) See *R. v. Manchester Corporation* (1910), 75 J. P. 73.

on any road in which the tramway is laid (*h*). Nothing in the Tramways Act, 1870 (*i*), is to limit the powers of a local authority or of the police to regulate street traffic, including tramcars, on or off any tramway (*j*); and nothing in that Act, or any bye-law made thereunder, is to abridge the right of the public to use every part of a road along which a tramway is laid with carriages not having flange wheels or wheels suitable only to run on the tram rails (*k*); but the public must not use on the tramway carriages having such wheels (*l*), and must act reasonably in moving off the rails to make room for cars (*m*).

SECT. 3.
Restrictions
as to
Traffic.

575. In places where the necessary provisions of the Public Health Acts Amendment Act, 1907 (*n*), are in force, the local authority may make and enforce bye-laws, to be approved by the Home Secretary (*o*), prescribing the nature of the traffic for which esplanades or promenades may be used, regulating selling and hawking thereon, and for preserving order and good conduct (*p*), and may also make and enforce bye-laws for the prevention of danger, obstruction or annoyance to persons using the seashore (*q*).

Bye-laws as
to esplanades,
promenades
and the
seashore.

576. In places where the Public Health Acts Amendment Act, 1907 (*r*), s. 84, is in force, the local authority may grant to any person a licence to carry on the calling of a luggage porter, light porter, public messenger, or commissionaire, and may include therein conditions as to the badge which the holder shall wear (*s*). An unlicensed person who represents himself to be licensed or who wears any badge for such a purpose is liable to a penalty not exceeding 20s. (*t*). A licence expires on the 31st March next following its issue; it may, however, be granted for a less period and may be suspended, revoked or indorsed by the local authority for a breach of the bye-laws, or whenever the authority deems necessary in the public interest, but the existence of the power to suspend, revoke or indorse a licence must be plainly set forth in the licence (*u*).

Street porters
and messen-
gers.

Licensing.

The authority may make bye-laws for regulating the conduct of licensed persons and for fixing the charges to be made by them (*a*).

Bye-laws.

(*h*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 61; as to tramways and tramcars, see title TRAMWAYS AND LIGHT RAILWAYS, pp. 779 *et seq.*, *post*.

(*i*) 33 & 34 Vict. c. 78.

(*j*) *Ibid.*, s. 61.

(*k*) *Ibid.*, s. 62.

(*l*) *Ibid.*, ss. 34, 54.

(*m*) *Hartley v. Chadwick* (1904), 68 J. P. 512.

(*n*) 7 Edw. 7, c. 53. This provision may be put in force in any district or contributory place by order of the Home Secretary (*ibid.*, s. 3 (1), (4)); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*o*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 9.

(*p*) *Ibid.*, s. 83.

(*q*) *Ibid.*, s. 82. No bye-laws affecting the foreshore below high-water mark can come into operation until the consent of the Board of Trade has been obtained (*ibid.*); see, generally, title WATERS AND WATERCOURSES.

(*r*) 7 Edw. 7, c. 53; see note (*n*), *supra*.

(*s*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 84 (1), (4). A fee of 1s. may be charged for a licence (*ibid.*, s. 84 (1)).

(*t*) *Ibid.*, s. 84 (5).

(*u*) *Ibid.*, s. 84 (3).

(*a*) *Ibid.*, s. 84 (2).

SECT. 3.
Restrictions
as to
Traffic.

London
shoeblacks,
commission-
aires and
messengers.

Animals
standing for
hire.

Carriage of
noxious
matters.

Use of dogs
for purposes
of draught.

577. The Commissioner of Metropolitan or City Police, as the case may be, may license street shoeblacks and commissionaires or messengers to exercise their calling, and appoint standings for them, and fix the numbers of each class who may stand there (*b*). A penalty not exceeding 40s. is incurred by any unauthorised person who occupies a standing, or by any person who fraudulently puts on or imitates the dress or takes the name, designation or character of any authorised shoeblack or commissionaire, or who molests or obstructs any authorised shoeblack, commissionaire or messenger in the exercise of his calling (*c*).

578. An urban authority (*d*) may license the proprietors, drivers and conductors of horses, ponies, mules or asses standing for hire within the district, in like manner and with the like incidents and consequences as in the case of proprietors and drivers of hackney carriages (*e*), and may make bye-laws for regulating stands and fixing rates of hire, and as to the qualification of such drivers and conductors, and for securing their good and orderly conduct whilst in charge.

579. An urban authority which has adopted the Public Health Acts Amendment Act, 1890 (*f*), Part III., may make bye-laws prescribing the times for the carriage through the streets of any faecal or offensive or noxious matter or liquid; for providing for proper carts or receptacles being used; and for compelling the cleansing of any place on which such matter or liquid may be dropped or spilt (*g*).

In London the County Council must make, and every sanitary authority (*h*) must observe and enforce, bye-laws for prescribing the times for the removal or carriage by road or water of any faecal or offensive matter or liquid in or through London, and providing that the carriage or vessel used therefor shall be properly constructed and covered so as to prevent the escape of any such matter or liquid, and so as to prevent any nuisance arising therefrom (*i*).

580. No dog may be used for the purpose of drawing or helping to draw any cart, carriage, truck or barrow on any highway (*j*).

(*b*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 2, 3, 19.

(*c*) *Ibid.*, s. 20.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 172; or a rural authority receiving urban powers under *ibid.*, s. 276.

(*e*) As to licences in the case of hackney carriages, see pp. 296 *et seq.*, *post*.

(*f*) 53 & 54 Vict. c. 59.

(*g*) *Ibid.*, s. 26 (1). This provision may be put in force in a rural place by order of the Local Government Board (*ibid.*, s. 5); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*h*) As to the London County Council, see title METROPOLIS, Vol. XX., pp. 393 *et seq.*; as to metropolitan sanitary authorities, see *ibid.*, p. 408.

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (2), (3). As to the power to arrest offenders, see *ibid.*, s. 16 (4). As to nuisances, generally, see title NUISANCE, Vol. XXI., pp. 503 *et seq.*

(*j*) Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 9; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 56, which apparently applies to all places (whether highways or not) within the Metropolitan Police District; see title ANIMALS, Vol. I., p. 400.

Part II.—Traffic Nuisances and Offences.

SECT. 1.—*Shafts, Machines, Engines, and Kilns near Highways.*

581. It is unlawful to sink any pit or shaft, or to erect or cause to be erected any steam engine, gin or other like machine, or any machinery attached thereto, within twenty-five yards, or any windmill within fifty yards of any part of a public carriageway or cartway, unless the same is within a building or sufficiently screened by a wall or fence; or to make or cause to be made any fire for calcining or burning ironstone, limestone, bricks, clay or coke within fifteen yards of any part of a public carriageway or cartway, unless such fire is within a building or sufficiently screened by a wall or fence (*k*). The foregoing provisions do not, however, prevent the use, repair or enlarging of windmills, engines, machines, kilns or other erections existing on the 31st August, 1835 (*l*). Portable steam threshing machines and engines (*m*), and locomotives used for ploughing (*n*), are also exempt from such provisions, if certain precautions are observed in using them.

SECT. 2.—*Miscellaneous Offences under the Highway Acts.*

582. It is an offence (*o*) wilfully (*p*) to ride, or wilfully to lead or drive, any horse, ass, sheep, mule, swine, cattle, carriage (*q*), truck or sledge upon any footpath or causeway by the side of any road (*r*) made or set apart for the use or accommodation of foot passengers; to tether any horse, ass, mule, swine, or cattle on any highway; to play at football or any other game on any part of a highway to the annoyance of any passenger (*s*); being a hawker,

SECT. 1.

Shafts,
Machines,
Engines,
and Kilns
near
Highways.

Shafts,
machines,
engines, fires,
to be screened
from view.

Riding
or leading
animals
on footpath.

Tethering
animals.

Games on
highway.

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70. A penalty may be imposed not exceeding £5 a day (*ibid.*). *Mens rea* is essential (*Harrison v. Leaper* (1862), 26 J. P. 373). The screen need not be a substantial fence if it is effective as a screen (*Blakeley v. Baker* (1878), 39 L. T. 359). As to the duty of fencing, see, further, titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 169. For forms of notice to fence a shaft or entrance to a mine or quarry, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 122 *et seq.*

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70.

(*m*) Locomotive Threshing Engines Act, 1894 (57 & 58 Vict. c. 37). As to the position prior to this Act, see *Smith v. Stokes* (1863), 4 B. & S. 84.

(*n*) Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 6; and see p. 315, *post*.

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72. Under this provision, which applies throughout England, anyone may prosecute (*Back v. Holmes* (1887), 56 L. T. 713). It is for the justices to say whether the *locus in quo* is a highway or not (*Williams v. Adams* (1862), 2 B. & S. 312; *R. v. Bradley* (1894), 58 J. P. 199); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 168. As to other offences as regards highways, see *ibid.*, pp. 166 *et seq.*

(*p*) As to the meaning of the word "wilfully," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 167, note (*d*).

(*q*) Including a cycle; see p. 335, *post*.

(*r*) This provision does not apply to other footpaths (*R. v. Pratt* (1867), L. R. 3 Q. B. 64).

(*s*) For convictions for playing games, see *Woolley v. Corbishley* (1860), 24 J. P. 773; *Pappin v. Maynard* (1863), 9 L. T. 327.

SECT. 2.
Miscellaneous Offences under the Highway Acts.

Camping on highway.

Fires, fire-arms, fire-works, bull-baiting, or nuisance on highway.

Driver riding on cart and not holding reins.

Driver causing injury by negligence.

Driving cart without name and refusing owner's name.

Non-observance of rules of road and hindering passage.

gipsy, or other traveller, to pitch any tent, booth, stall, or stand, or encamp on any part of any highway; or to make or assist in making any fire, or wantonly to fire any gun or pistol, or set fire to or wantonly to let off any firework within fifty feet of the centre of any public carriageway or cartway; or to bait, or run for the purpose of baiting, any bull upon or near any highway; or to suffer any filth, dirt, lime, or other offensive matter or thing whatsoever (*t*) to run into any highway from any adjacent building, lands or premises, to the injury of the highway or to the injury, interruption or danger of any passenger thereon (*u*).

583. It is an offence (*w*) for the driver (*a*) of any wagon, cart or other carriage (*b*) of any kind to ride on it (*c*), or on a horse drawing it on any highway, unless he has some other person on foot or on horseback to guide it, or unless all the horses drawing it are being guided by reins; for the driver of any carriage whatsoever on any part of any highway by negligence or wilful misbehaviour to cause any hurt to any person, horse, cattle or goods conveyed in any carriage, passing or being on such highway, or to quit the highway and go to the other side of the hedge or fence, or negligently or wilfully to be at such a distance from the carriage, or in such a situation whilst it is passing upon the highway (*d*), that he cannot have control of his horse or horses, or to leave any cart or carriage on a highway so as to obstruct the passage thereof (*e*); for any person to drive any wagon, cart, or similar carriage not bearing the owner's name (*f*), and to refuse to disclose such name (*g*); for the driver of any wagon, cart or other carriage whatsoever, or of any

(*t*) The *ejusdem generis* rule of construction has been applied to these words (*Crosdill v. Ratcliff* (1862), 26 J. P. 165); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 168, note (*i*); compare title STATUTES, pp. 145, 146, *ante*. For a form of notice by a highway authority to remove nuisances on a highway, see Encyclopædia of Forms and Precedents, Vol. VI., p. 413.

(*u*) In the case of these offences injury, interruption or danger must be proved (*Stinson v. Browning* (1866), L. R. 1 C. P. 321; *Brotherton v. Tittensor* (1896), 60 J. P. 72; *Hill v. Somerset* (1887), 51 J. P. 742). The words create only two offences, namely, injury to the highway and injury, interruption or danger to a passenger (*Smith v. Perry* (1905), 70 J. P. 93); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 168, note (*l*); and compare title CRIMINAL LAW AND PROCEDURE, Vol. V., pp. 775 *et seq.*

(*w*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78. As to these offences, see also title NEGLIGENCE, Vol. XXI., p. 412.

(*a*) The word "driver" has been held to extend to a person riding on horseback (*Williams v. Evans* (1876), 1 Ex. D. 277).

(*b*) Including a cycle; see p. 335, *post*.

(*c*) It has been said that if a cart was standing still a driver sitting on the cart could not be regarded as "riding" on it (*Parton v. Williams* (1820), 3 B. & Ald. 330, *per* BAYLEY, J., at pp. 336, 337).

(*d*) A carriage is still "passing upon" the highway if the driver stops it temporarily and leaves it (*Phythian v. Barendale*, [1895] 1 Q. B. 768).

(*e*) The fact that a boy is left in charge does not necessarily preclude justices from convicting under this clause (*Hinde v. Evans* (1906), 70 J. P. 548).

(*f*) See p. 271, *ante*.

(*g*) Compare *Jones v. Owen* (1823), 2 Dow. & Ry. (K. B.) 600, decided under the corresponding provision in stat. (1773) 13 Geo. 3, c. 78, s. 60 (now repealed).

horse or other beast of draught or burden, when meeting any other carriage, horse or beast of burden, not to keep to the near side of the road; for any person in any manner wilfully to prevent any other person from passing him or any carriage, horse, or beast of burden under his care upon a highway, or by negligence or misbehaviour to hinder the free passage of any person, carriage, horse, or beast of burden on any highway, or not to keep his own carriage, horse or beast of burden on the near side of the road for the purpose of allowing such passage (*h*).

Drivers committing any of the above offences may be arrested without warrant by an eye-witness (*i*).

SECT. 3.—*Furious or Dangerous Riding and Driving.*

584. Any person who on any highway rides any horse or beast furiously, so as to endanger the life or limb of any passenger, is liable to a penalty not exceeding £5 (*k*).

Any person who on any highway drives any sort of carriage (*l*) furiously, so as to endanger the life or limb of any passenger, is liable, if he be the owner, to a penalty not exceeding £10, and, if he be not, to one not exceeding £5, and may be arrested without warrant by any eye-witness (*m*).

A person in charge of a vehicle who by wanton or furious driving or racing or other wilful misconduct or wilful neglect does, or causes to be done, bodily harm to any person, is liable to imprisonment with hard labour for two years (*n*).

In an urban (*o*) district any person, who in any street, to the obstruction, annoyance, or danger of the residents or passengers, rides or drives furiously any horse or carriage, or drives furiously any cattle, is liable to a penalty not exceeding 40s., or to imprisonment for a term not exceeding fourteen days, and may be arrested without warrant by any constable witnessing the offence (*p*).

SECT. 2.
Miscellaneous Offences
under the
Highway
Acts.

Furious
riding and
driving.

Doing bodily
harm by furi-
ous driving.

In urban
streets.

(*h*) No offence is committed under this provision by a driver who keeps to the off side of the road if the driver of the only other vehicle on the road consents to overtake him on the near side (*Nuttall v. Pickering*, [1913] 1 K. B. 14).

(*i*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78; as to the procedure if an offender refuses to disclose his name, see *ibid.*; as to the general power to arrest unknown persons, see *ibid.*, s. 79; as to proceedings for penalties, see *ibid.*, ss. 103, 105—108, 110. As to the rule of the road and the exceptions thereto, see title NEGLIGENCE, Vol. XXI., pp. 412, 413.

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78; see also title NEGLIGENCE, Vol. XXI., p. 413; *Williams v. Evans* (1876), 1 Ex. D. 277. The power to arrest and the provisions (see note (*i*), *supra*) as to proceedings against drivers whose names are unknown apparently do not extend to "riders."

(*l*) Including a cycle (*Taylor v. Goodwin* (1879), 4 Q. B. D. 228); see p. 335, *post*.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78; see note (*i*), *supra*.

(*n*) Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 35; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 605, 606.

(*o*) Or rural district where this provision has been put in force by order of the Local Government Board; see note (*d*), p. 269, *ante*.

(*p*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28. As to London, see Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54 (5). As to arrest without warrant, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296 *et seq.*; POLICE, Vol. XXII., pp. 497, 498; TRESPASS, pp. 879, 880, *post*.

SECT. 3.
Furious or
Dangerous
Riding and
Driving.

Public Health
Acts Amend-
ment Act,
1907, s. 79.

Cattle on
highway.

In districts where the Public Health Acts Amendment Act, 1907 (*q*), s. 79, is in force, any person riding or driving so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare, is liable to a penalty not exceeding 40s., and may be arrested without warrant by any constable witnessing the offence (*r*).

SECT. 4.—*Cattle Straying on Highways and Streets.*

585. If any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine is found straying on or lying about (*s*) any highway, or across any part thereof, or by the sides thereof, except on such parts of any highway as pass over any common or waste or uninclosed ground (*t*), the owner is liable to a penalty, not exceeding 5s. for each animal or 30s. in all, together with the reasonable expense of removing the animals to his field or stable, or to the parish pound or other place provided, and any proper charges of the pound-keeper (*u*). This provision is not to be deemed to take away any right of pasturage which may exist on the sides of any highway (*u*); but an owner exercising his right must keep his animals from straying, except temporarily, or lying on the actual road (*v*).

Cattle in
streets.

586. Cattle (*w*) found at large in any street (*a*) in an urban district (*b*), without any person having the charge thereof, may be

(*q*) 7 Edw. 7, c. 53.

(*r*) *Ibid.*, s. 79; see note (*n*), p. 273, *ante*.

(*s*) The offences of allowing to "stray" and allowing to "lie about" are distinct (*Lawrence v. King* (1868), L. R. 3 Q. B. 345). Animals are not "straying" if they are under the control of an attendant (*Lawrence v. King, supra*; *Morris v. Jeffries* (1866), L. R. 1 Q. B. 261; *Sherborn v. Wells* (1863), 3 B. & S. 784; *Golding v. Stocking* (1869), L. R. 4 Q. B. 516; *Horwood v. Goodall, Horwood v. Hill* (1872), 36 J. P. 486). If they are "lying about," the presence of a keeper is not in itself an excuse (*Lawrence v. King, supra*); but, apparently, animals on a journey may be allowed to rest for a reasonable time (*ibid.*, *per* BLACKBURN, J.; compare *Horwood v. Goodall, Horwood v. Hill, supra*). As to the civil liability for animals straying, see *Ellis v. Banyard* (1911), 106 L. T. 51, C. A.; *Higgins v. Searle* (1909), 73 J. P. 185, C. A.; *Hadwell v. Righton*, [1907] 2 K. B. 345; *Cox v. Burbidge* (1863), 13 C. B. (N. S.) 430; *Jones v. Lee* (1911), 76 J. P. 137. As to cattle trespassing from a highway, see titles ANIMALS, Vol. I., pp. 377, 378; NEGLIGENCE, Vol. XXI., p. 410.

(*t*) As to this exception, which only applies to pieces of land of some considerable size, see *Bothamley v. Danby* (1871), 24 L. T. 656; *Golding v. Stocking, supra*; *Plumbley v. Lock* (1903), 67 J. P. 237.

(*u*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25. As to the penalties or pound-breach, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 75; as to the care of impounded animals, see Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 7; and title ANIMALS, Vol. I., p. 382. As to grazing on roadside wastes, see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 507; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 56; as to common of pasturage generally, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 447 *et seq.*

(*v*) *Bothamley v. Danby, supra*; *Golding v. Stocking, supra*.

(*w*) Including horses, asses, mules, sheep, goats, and swine (Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 3).

(*a*) For a definition of "street," see *ibid.*, s. 3; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 16.

(*b*) The provisions here referred to (the Town Police Clauses Act, 1847

impounded (*c*), by any constable or resident, in any common pound within the district, or in such other place as the authority may appoint for the purpose; they may be detained until the owner pays to the authority a penalty not exceeding 40s. and the reasonable expenses of impounding and keeping them (*d*). Provision is made for the sale of impounded cattle, if the money is not paid within three days (*e*), and for punishing persons guilty of pound-breach (*f*). The authority may provide and maintain a pound (*g*).

SECT. 4.
Cattle
Straying on
Highways
and Streets.

587. In London a person may not permit any swine to stray or go about in any street or public place (*h*). Swine found so doing may be removed by a constable, and may be ordered to be forfeited (*i*). Pigs straying.

SECT. 5.—*Bye-laws as to Behaviour in Streets.*

588. Bye-laws for good rule and government may be made (1) outside London, for a borough by the borough council (*k*), and for any portion of a county not within a borough by the county council (*l*); (2) in London, by the London County Council (*l*), and for any particular metropolitan borough by the council thereof (*m*).

Bye-laws as
to behaviour
in streets.

Under these provisions bye-laws have been made as to such matters as lights upon vehicles (*n*); noisy instruments and singing in streets (*o*); offensive or indecent language or behaviour in

(10 & 11 Vict. c. 89), ss. 24—27) are applied to urban districts by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, but may be put in force in rural places by order of the Local Government Board, under *ibid.*, s. 276.

(*c*) As to the general law relating to pounds, see title ANIMALS, Vol. I., pp. 382 *et seq.*; and *Coaker v. Willcocks*, [1911] 2 K. B. 124, C. A.

(*d*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 24.

(*e*) *Ibid.*, s. 25.

(*f*) *Ibid.*, s. 26.

(*g*) *Ibid.*, s. 27.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 17 (1) (b). The penalty is a sum not exceeding 40s., and a further 10s. for every day during which the offence is continued after notice (*ibid.*, s. 17 (2)). As to keeping swine in London, see title NUISANCE, Vol. XXI., p. 514. As to the district comprised in the term "London," see titles METROPOLIS, Vol. XX., pp. 393 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363, note (*u*).

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 17 (2), (3).

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23; see title LOCAL GOVERNMENT, Vol. XIX., pp. 311, 328. As to making and construction of bye-laws, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16.

(*m*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II., Part II. Such borough bye-laws must not conflict with any county council bye-law (*ibid.*, Sched. II., Part. II.).

(*n*) *Walker v. Stretton* (1896), 60 J. P. 313; *William v. Groves* (1896), 12 T. L. R. 450; *Heiton & Co. v. M'Sweeney*, [1905] 2 I. R. 47; *Adamson v. Miller* (1900), 16 T. L. R. 185. This matter is now dealt with by the Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45); see p. 290, *post*.

(*o*) *Brownscombe v. Johnson* (1898), 62 J. P. 326; *Southend-on-Sea Corporation v. Davis* (1900), 16 T. L. R. 167; *Kruse v. Johnson*, [1898] 2 Q. B. 91; *Johnson v. Croydon Corporation* (1886), 16 Q. B. D. 708; *Munro v. Watson* (1887), 51 J. P. 660; *E. v. Powell* (1884), 48 J. P. 740; *Booth v. Howell* (1889), 53 J. P. 678.

SECT. 5.
Bye-laws
as to
Behaviour
in Streets.

Cleansing of
footways.

Bye-laws as
to nuisances
in streets
in London.

streets (*p*), or on tramcars (*q*); roundabouts, swings, and shooting galleries in or near streets (*r*); street betting (*s*); street shouting and hawking (*t*); and strewing paper, refuse, or glass in streets (*u*). A bye-law prohibiting the distribution of betting newspapers has been held to be invalid (*w*).

A local authority which does not itself undertake or contract for the cleansing of footways and pavements adjoining any premises may make bye-laws imposing the duty of such cleansing at such intervals as it thinks fit on the occupier of any such premises (*x*). An urban authority may also make bye-laws for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish (*a*).

589. In London it is the duty of every sanitary authority to make, observe, and enforce bye-laws for the prevention of nuisances arising from any snow, ice, salt, dust, ashes, rubbish, offal, carrion, fish, or filth, or other matter or thing in any street (*b*). Such bye-laws are not, however, to prohibit the laying of sand or other material in time of frost, or of litter or other matter to prevent the freezing of water in pipes, or in case of sickness to prevent noise, if the same is laid, and when the occasion ceases removed, in accordance with the bye-laws (*c*).

SECT. 6.—*Street Processions and Public Meetings.*

Processions.

590. To organise, or take part in, a procession along a highway is not necessarily an improper use of such highway. Apart from any statute or authorised regulations, the test is, apparently, whether in all the circumstances such procession is a reasonable use of the highway, and not merely whether it is likely to lead to an obstruction (*d*).

(*p*) *Mantle v. Jordan*, [1897] 1 Q. B. 248; *Nash v. Finlay* (1901), 66 J. P. 183; *Strickland v. Hayes*, [1896] 1 Q. B. 290; explained in *Thomas v. Sutters*, [1900] 1 Ch. 10, C. A.; *Brabham v. Wookey* (1901), 18 T. L. R. 99; *Russon v. Dutton* (No. 2) (1911), 75 J. P. 209.

(*q*) *Gentel v. Rapps*, [1902] 1 K. B. 160. As to indecent behaviour in public generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537.

(*r*) *Teale v. Harris* (1896), 60 J. P. 744; *Enniscorthy Urban District Council v. Field*, [1904] 2 I. R. 518.

(*s*) *White v. Morley*, [1899] 2 Q. B. 34; *Burnett v. Berry*, [1896] 1 Q. B. 641; *Thomas v. Sutters*, *supra*; *Jones v. Walters* (1898), 62 J. P. 374; *Godwin v. Walker* (1896), 60 J. P. 308; *Hickey v. Hay* (1900), 17 T. L. R. 52. This matter is now dealt with by the Street Betting Act, 1906 (6 Edw. 7, c. 43); see title GAMING AND WAGERING, Vol. XV., p. 293.

(*t*) *Innes v. Newman*, [1894] 2 Q. B. 292.

(*u*) *Batchelor v. Sturley* (1905), 69 J. P. 398.

(*w*) *Scott v. Pilliner*, [1904] 2 K. B. 855.

(*x*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44.

(*a*) *Ibid.*; compare p. 285, *post*.

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 16 (1), (3). As to the power to arrest offenders, see *ibid.*, s. 16 (4). As to metropolitan sanitary authorities, see title METROPOLIS, Vol. XX., p. 408; as to their duties, compare titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 114; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 609, 610.

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (5).

(*d*) *Beatty v. Gillbanks* (1882), 9 Q. B. D. 308; *Lowdens v. Keaveney*, [1903] 2 I. R. 82.

The law recognises no right to hold a meeting upon a highway, and apparently the owner of the soil may by legal process interfere to prevent the holding of such a meeting (*e*); as against other members of the public, however, such a meeting if held is not illegal, unless prohibited by some statute or authorised regulations (*f*), or unless an obstruction is caused (*g*).

SECT. 6.
Street
Processions
and Public
Meetings.
Meetings.

SECT. 7.—*Miscellaneous Street Offences (h).*

SUB-SECT. 1.—*Outside the Metropolis.*

591. Every person who in any street (*i*) in an urban district (*k*), to the obstruction, annoyance or danger of the residents or streets.

(*e*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49, 50; TRESPASS, p. 859, *post*.

(*f*) As, for instance, certain meetings in Westminster at certain periods; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 470.

(*g*) *R. v. Graham (Cunninghame) and Burns* (1888), 16 Cox, C. C. 420; *Ex parte Lewis* (1888), 21 Q. B. D. 191; *Burden v. Rigler*, [1911] 1 K. B. 337; see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49, 50, 157, 167, note (*d*).

(*h*) As to betting in streets, see p. 280, *ante*; title GAMING AND WAGERING, Vol. XV., pp. 291 *et seq.*; as to drunkenness in streets, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 140, 141; as to offences with regard to use and carriage of fireworks and explosives, see p. 276, *ante*; title EXPLOSIVES, Vol. XIV., pp. 383, 394; as to begging and indecent behaviour, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537; POOR LAW, Vol. XXII., pp. 609, 611; as to hawking and carriage of petroleum, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 575 *et seq.*; as to dangerous and stray dogs in streets, see title ANIMALS, Vol. I., pp. 398, 399; as to the meaning of "streets," see Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 3; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 81; see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 16 *et seq.*

(*i*) As to what is, or is to be deemed, a street for this purpose, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 402, note (*h*). A shallow embayment between bow-windows is not necessarily part of the street (*Piggott v. Goldstraw* (1901), 65 J. P. 259; compare *Hitchman v. Watt* (1894), 58 J. P. 720; *Openshaw v. Pickering* (1913), 77 J. P. 27).

(*k*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. If there is a permanent physical obstacle, a magistrate ought apparently to find that it is an obstruction within this provision, although it is small and leaves ample room for all who desire to pass (*Read v. Perrett* (1876), 1 Ex. D. 349; *Gabriel v. St. James, Westminster, Vestry* (1859), 23 J. P. 372). At the same time he may in some cases treat the offence as a "trifling" one (*Dunning v. Trainer* (1909), 73 J. P. 400). Even in the case of non-permanent or moving obstacles, where there is wilful obstruction, there may be an offence although no one is in fact obstructed (*Dunn v. Holt* (1904), 68 J. P. 271; *Hinde v. Evans* (1906), 70 J. P. 548; *M'Kee v. M'Grath* (1892), 30 L. R. Ir. 41). It is for the justices to find whether the *locus* is a street or not (*Williams v. Adams* (1862), 2 B. & S. 312; *R. v. Young* (1883), 47 J. P. 519; *Hitchman v. Watt*, *supra*); or, if a defendant claims a right to obstruct it by reason of a conditional or limited dedication, to decide whether the claim is made out (*Whittaker v. Rhodes* (1881), 46 J. P. 182; *Leicester Urban Authority v. Holland* (1888), 52 J. P. 788; *Jones v. Matthews* (1885), 1 T. L. R. 482; *Spice v. Peacock* (1875), 39 J. P. 581; but see *R. (Christie) v. Londonderry Justices, R. (Ballantine) v. Same*, [1902] 2 I. R. 266); see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 167, note (*d*), 168, note (*l*).

SECT. 7.
Miscellaneous Street
Offences.

Sale etc. of
animals.

passengers, commits any of the following offences is liable to a penalty (*l*) not exceeding 40s., or to imprisonment for a period not exceeding fourteen days, and may be arrested by any constable (*m*) witnessing the offence:—

Every person who exposes for show, hire, or sale, except in a market or market-place or fair lawfully appointed for that purpose (*n*), any horse or other animal, or exhibits in a caravan (*o*) or otherwise any show or public entertainment, or shoes, bleeds, or farries any horse or animal, except in cases of accident, or cleans, dresses, exercises, trains or breaks, or turns loose any horse or animal, or makes or repairs any part of any cart or carriage, except in cases of accident where repair on the spot is necessary (*p*);

Slaughtering
of cattle.

Every person who slaughters or dresses any cattle, or any part thereof, except in the case of any cattle over-driven or which may have met with any accident, and which for the public safety or other reasonable cause ought to be killed on the spot (*q*);

Riding on
shafts or
animal;

Every person having the care of any wagon, cart, or carriage who rides on the shafts thereof, or who without having reins, and holding the same, rides upon such wagon, cart, or carriage, or on any animal drawing the same, or who is at such a distance from such wagon, cart, or carriage, as not to have due control over every animal drawing the same, or who does not, in meeting any other carriage, keep his wagon, cart, or carriage to the left or near side, or who in passing any other carriage does not keep his wagon, cart, or carriage on the right or off side of the road, (except in cases of actual necessity, or some sufficient reason for deviation), or who, by obstructing the street, wilfully prevents any person or carriage from passing him, or any wagon, cart, or carriage under his care (*r*);

lack of
control;

driving or
passing on
wrong side;
obstruction.

Every person who at one time drives more than two carts or wagons, and every person driving two carts or wagons who has not the halter of the horse in the last cart or wagon securely fastened to the back of the first cart or wagon, or has such halter of a greater length from such fastening to the horse's head than 4 feet (*r*);

Driving
two or more
carts or
wagons.

(*l*) As to the recovery of penalties, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 316.

(*m*) As to who is a constable for this purpose, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. He requires no authority from the local authority to prosecute (*Jobson v. Henderson* (1900), 64 J. P. 115).

(*n*) As to markets and fairs generally, see title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*; as to shows generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT, pp. 401 *et seq.*, *post*.

(*o*) *Ball v. Ward* (1875), 40 J. P. 213.

(*p*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(*q*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. As to slaughtering injured animals, see Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 11; title ANIMALS, Vol. I., p. 419. As to the statutory provisions as to slaughter-houses, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 553 *et seq.*

(*r*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; compare pp. 271, 276, 277, *ante*; and see title NEGLIGENCE, Vol. XXI., p. 412, note (*c*).

SECT. 7.
Miscellaneous Street
Offences.

Every person who rides or drives furiously any horse or carriage (s), or drives furiously any cattle (t);

Every person who causes any public carriage, sledge, truck, or barrow, with or without horses, or any beast of burden, to stand longer than is necessary for loading or unloading goods, or for taking up or setting down passengers, except hackney carriages, and horses and other beasts of draught or burden, standing for hire in any place appointed for that purpose by lawful authority, and every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means (u) wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare (v);

Every person who causes any tree or timber, or iron beam, to be drawn in or upon any carriage, without having sufficient means of safely guiding the same (w);

Every person who leads or rides any horse or other animal, or draws or drives any cart or carriage, sledge, truck, or barrow, upon any footway of any street, or fastens any horse or other animal so that it stands across or upon any footway (x);

Every person who places or leaves any furniture, goods, wares, or merchandise, or any cask, tub, basket, pail, or bucket, or places or uses any standing-place, stool, bench, stall, or showboard, on any footway, or who places any blind, shade, covering, awning, or other projection over or along any such footway, unless such blind, shade, covering, awning, or other projection is 8 feet in height at least in every part thereof from the ground (a);

Every person who places, hangs up, or otherwise exposes to sale any goods, wares, merchandise, matter, or thing whatsoever (b), so that the same project into or over any footway, or beyond the line of any house, shop, or building at which the same are so exposed, so as to obstruct or incommode the passage of any person over or along such footway (c);

Every person who rolls or carries any cask, tub, hoop, or wheel, or any ladder, plank, pole, timber, or log of wood, upon any footway,

Furious riding or driving.
Carriages etc. standing still.

Timber.

Riding on footways etc.

Obstructing footways.

Projections over footways.

Casks etc. on footway.

(s) Including a cycle (*Taylor v. Goodwin* (1879), 4 Q. B. D. 228); compare p. 277, *ante*, p. 335, *post*.

(t) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(u) The *ejusdem generis* rule of construction applies to these words (*R. v. Long* (1888), 52 J. P. 630; *R. v. Williams* (1891), 55 J. P. 406 (cases of obstruction by "congregating"); but see *Wemyss v. Black* (1881), 8 Rettie (Justiciary Cases), 25; see also title STATUTES, pp. 145, 146, *ante*).

(v) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(w) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. As to the lighting of carts with projecting loads at night, see pp. 290, 291, *post*.

(x) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(a) As to a claim of right to obstruct a street by virtue of a conditional or limited dedication, see note (k), p. 281, *ante*; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 46. For a form of notice to remove a projection, see Encyclopædia of Forms and Precedents, Vol. XI., p. 95.

(b) *Winsborrow v. London Joint Stock Bank, Ltd.* (1903), 67 J. P. 289.

(c) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; see note (a), *supra*.

SECT. 7.	except for the purpose of loading or unloading any cart or carriage, or of crossing the footway (<i>d</i>) ;
Miscellaneous Street Offences.	Every person who places any line, cord, or pole across any street, or hangs or places any clothes thereon (<i>d</i>) ;
Lines over streets.	Every common prostitute or nightwalker loitering and importuning passengers for the purpose of prostitution (<i>e</i>) ;
Prostitutes.	Every person who wilfully and indecently exposes his person (<i>f</i>) :
Indecent exposure.	Every person who publicly offers for sale or distribution, or exhibits to public view, any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sings any profane or obscene song or ballad, or uses any profane or obscene language (<i>g</i>) ;
Obscene books etc.	Every person who wantonly discharges any firearm, or throws or discharges any stone or other missile, or makes any bonfire, or throws or sets fire to any firework (<i>h</i>) ;
Discharge of firearms.	Every person who wilfully and wantonly disturbs any inhabitant, by pulling or ringing any door-bell, or knocking at any door (<i>i</i>), or who wilfully and unlawfully extinguishes the light of any lamp (<i>k</i>) ;
Ringling door-bells etc.	Every person who flies any kite, or who makes or uses any slide upon ice or snow (<i>l</i>) ;
Flying kites ; making slides.	Every person who cleanses, hoops, fires, washes or scalds any cask or tub, or hews, saws, bores, or cuts any timber or stone, or slacks, sifts, or screens any lime (<i>m</i>) ;
Cleansing tubs etc.	Every person who throws or lays down any stones, coals, slate, shells, lime, bricks, timber, iron, or other materials, except building materials so inclosed as to prevent mischief to passengers (<i>n</i>) ;
Laying down coals etc.	

(*d*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(*e*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. A woman accosting men from a window is not, apparently, within this provision (*Ford v. Linton* (1879), 6 Rettie (Justiciary Cases), 49) ; see also title POOR LAW, Vol. XXII., p. 609.

(*f*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171 ; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537 ; POOR LAW, Vol. XXII., p. 611 ; NUISANCE, Vol. XXI., p. 541.

(*g*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171 ; see also Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18) ; Obscene Publications Act, 1857 (20 & 21 Vict. c. 83) ; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 538, 539 ; NUISANCE, Vol. XXI., p. 541.

(*h*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171 ; compare p. 276, *ante*. For a common law indictment for discharging firearms in a street, see *R. v. Meade* (1903), 19 T. L. R. 540.

(*i*) It is no excuse for knocking in a violent manner, or at unreasonable times, that the offence was delivering newspapers or goods (*Clarke v. Hoggins* (1862), 11 C. B. (N. S.) 545 ; compare also the Chimney Sweepers Act, 1894 (57 & 58 Vict. c. 51), s. 1.

(*k*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(*l*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(*m*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(*n*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28 ; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

Every person who beats or shakes any carpet, rug, or mat, except door mats beaten or shaken before the hour of eight in the morning (o);

Every person who fixes or places any flower-pot or box, or other heavy article, in any upper window, without sufficiently guarding the same against being blown down (p);

Every person who throws from the roof or any part of any house or other building any slate, brick, wood, rubbish, or other thing, except snow thrown so as not to fall on any passenger (q);

Every occupier of any house or other building, or other person, who orders or permits any person in his service to stand on the sill of any window, in order to clean, paint, or perform any other operation upon the outside of such window, or upon any house or other building, unless such window be in the sunk or basement story (r);

Every person who leaves open any vault or cellar, or the entrance from any street to any cellar or room underground, without a sufficient fence or handrail, or leaves defective the door, window, or other covering of any vault or cellar, or who does not sufficiently fence any area, pit, or sewer left open, or who leaves such open area, pit, or sewer without a sufficient light after sunset to warn and prevent persons from falling thereinto (s);

Every person who throws or lays any dirt, litter (t), ashes, or nightsoil, or any carrion, fish offal, or rubbish, on any street, or causes any offensive matter to run from any manufactory, brewery, slaughter-house, butcher's shop, or dunghill, into any street: provided that it shall not be an offence to lay sand or other materials in any street in time of frost, to prevent accidents, or litter or other suitable materials to prevent the freezing of water in pipes, or in case of sickness to prevent noise, if the party laying any such things causes them to be removed as soon as the occasion for them ceases (a);

Every person who keeps any pigstye to the front of any street, not being shut out therefrom by a sufficient wall or fence, or who keeps any swine in or near any street, so as to be a common nuisance (b).

SECT. 7.
Miscellaneous Street
Offences.

Beating
carpets.
Flower boxes.
Throwing
rubbish from
roof.
Standing on
window-sills.

Cellars left
open.

Throwing
litter.

Pigstyes.

(o) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(p) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(q) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(r) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

(s) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; compare titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128 *et seq.*; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 114, 115, 205, 253 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 397, 398.

(t) Handbills scattered broadcast may be "litter" (*Hills v. Davies* (1903), 67 J. P. 198).

(a) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; compare p. 280, *ante*.

(b) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171. As to the keeping of swine in London, see title NUISANCE, Vol. XXI., p. 514.

SECT. 7.

Miscellaneous Street Offences.

Street
offences
in the
Metropolis.

SUB-SECT. 2.—*Within the Metropolis.*

592. In the Metropolis (*c*) it is an offence to sweep or throw any dirt or rubbish over any sewer grating or into any public drain or sewer (*d*); to beat or dust carpets in streets; to break, exercise, try or show for sale horses in streets; to throw or cause to be thrown any dirt, filth or annoyance, or any matter or thing upon the carriageway or footway of any street; to kill or cut up any beast in or so near to a street that any blood or filth runs on to the carriageway or footway; to place or draw, or suffer to be placed or drawn, upon the footway of any street any sledge, wagon, cart, or carriage, or any wheel, truck or barrow, or any barrel; wilfully to ride, lead or drive any horse, ass, mule, or other beast upon the footway of any street (*e*); to place, or permit any servant to place, any stall board (*f*), chopping block, show board, basket, goods, or casks on the carriageway or footway of any street; to hoop, place, wash, or cleanse, or cause to be hooped, washed, or cleansed, any pipe, barrel or vessel on the footway or carriageway of any street; to set out, lay or place, or suffer to be set out, laid or placed, any coach, cart, wagon, barrow, sledge, truck, or other carriage upon the carriageway of any street, except coaches, chariots and chairs duly licensed to stand for hire, except for the necessary time of loading or unloading, taking up or setting down fares, or waiting for passengers when actually hired, or harnessing or unharnessing; to place, or cause to be placed, on the carriageway or footway of any street any timber, stone, bricks, lime, or other building materials, unless fenced or inclosed in accordance with some statute, or any other matters or things whatsoever; to hang out or expose, or cause to be hung out or exposed, any meat or offal or other matter or thing whatsoever (*g*) from any house, building, or premises over any part of the carriageway or footway of any street or over any area; or to place or put out, or permit to be placed or put out, any garden or other pots, not safely secured from falling, or any other matter or thing on or from any part of a house, building or premises next to any street (*h*).

(*c*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73; *Fulham Board of Works v. Smith* (1884), 48 J. P. 375; see, further, title METROPOLIS, Vol. XX., pp. 393 *et seq.* Many of the matters dealt with in the text, *supra*, and on pp. 287 *et seq.*, *post*, are also regulated by the bye-laws of the London County Council; see p. 279, *ante*.

(*d*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 62. As to sewers and drains generally, see title SEWERS AND DRAINS, Vol. XXV., pp. 717 *et seq.*

(*e*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. cxxix.), s. 64.

(*f*) As to costermongers and hawkers, see p. 288, *post*. As to hawkers, see, further, title MARKETS AND FAIRS, Vol. XX., pp. 55 *et seq.*

(*g*) See *Winsborrow v. London Joint Stock Bank, Ltd.* (1903), 67 J. P. 289.

(*h*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 65; *Wyatt v. Gems*, [1893] 2 Q. B. 225; in the case of most of the offences named a warning is necessary (Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 65); as to repeated warnings not being required, see *ibid.*, s. 66. The person making the complaint need not be authorised in writing to do so (*Keep v. Alexander* (1909), 73 J. P. 423). Obstructing articles may be seized, although there has been no conviction (*Brackley v. St. Mary, Battersea, Vestry* (1889), 23 Q. B. D. 486, C. A.). As to removing projections, see Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 72; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 119;

593. Within the Metropolitan Police District⁽ⁱ⁾ there are statutory provisions in respect of the following matters^(k):—Exposing for sale, foddering, farrying, grooming, exercising or breaking horses or animals; showing caravans; washing or repairing carriages^(l); turning loose horses or cattle; turning loose or inciting to fight ferocious dogs; negligence or misbehaviour in connexion with the driving of cattle; pelting or hunting driven cattle; drivers not having control of their carts; obstruction by causing vehicles to stand^(m); riding or driving on footways; rolling casks, hoops or wheels, or carrying ladders, poles etc. on footways; damaging or defacing walls, fences, public trees or shrubs or public seats⁽ⁿ⁾; bill-posting without consent on walls or fences; solicitation by prostitutes^(o); selling, distributing or exhibiting indecent books or prints^(p); singing profane or indecent songs; using profane or indecent language; writing or drawing indecent words or pictures^(q); threatening or insulting language and behaviour; blowing or playing noisy instruments to call persons together or for the purposes of hawking; letting off firearms or fireworks; lighting bonfires; ringing bells or knocking at doors; flying kites, playing games or making slides; washing or firing casks; sawing timber; screening or slacking lime; depositing dirt, litter^(r), offal, or rubbish; shaking or beating carpets or mats, except door mats before 8 a.m.; exposing anything for sale in parks or public gardens without the owner's consent, or upon, or so as to hang over, any carriageway or footway or on the outside of any house or shop^(s); causing obstruction by poles, blinds, awnings, lines or other projections^(t); leaving cellars or areas open or unfenced^(a).

SECT. 7.
Miscellaneous Street Offences.

Street offences in the Metropolitan Police District.

594. Within six miles from Charing Cross no goods or other articles may be allowed to rest on any footway or other part of a street, or be otherwise allowed to cause obstruction or inconvenience Deposit of goods.

Bouverie v. Miles (1830), 1 B. & Ad. 38. As to the removal of refuse, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 606 *et seq.*

(i) As to the Metropolitan Police District, see title POLICE, Vol. XXII., pp. 466, 467.

(k) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 54, 60, 62, 63, 68—74. Most of these offences are described in language similar to that of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; see pp. 281 *et seq.*, *ante*. Any person may prosecute (*Allman v. Hardcastle* (1903), 67 J. P. 440). As to any form of "wilful obstruction" within the City, see the City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxxvii.), s. 4.

(l) Compare the City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 35 (1); *Chapman v. Rawlings* (1909), 73 J. P. 512.

(m) *Dunn v. Holt* (1904), 68 J. P. 271.

(n) Compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 768 *et seq.*

(o) Compare p. 284, *ante*.

(p) Compare *ibid.*; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 538, 539; NUISANCE, Vol. XXI., p. 541.

(q) Compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 539, note (j).

(r) *Hills v. Davies* (1903), 67 J. P. 198.

(s) *Wandsworth Board of Works v. Pretty*, [1899] 1 Q. B. 1; *R. v. Francis, Ex parte Walton* (1899), 63 J. P. 469.

(t) Compare pp. 283, 284, *ante*.

(a) Compare p. 285, *ante*; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128 *et seq.*; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 114, 115, 205, 253 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 397, 398.

SECT. 7.
Miscellaneous Street
Offences.

Costermongers and
hawkers.

Loading or
unloading
coal or casks.

Riding on
carriages.

Advertisements.

Placards etc.

to the passage of the public for a longer time than may be absolutely necessary for loading or unloading them; but this prohibition does not apply to costermongers, street hawkers or itinerant traders, so long as they carry on their business in accordance with the police regulations (*b*). The Common Council of the City of London may make regulations as to costermongers, street hawkers, and itinerant traders: such regulations, whilst in force, supersede within the City of London the statutory provisions and police regulations on the subject (*c*).

595. In certain streets within six miles from Charing Cross between 10 a.m. and 6 p.m. no coal (*d*) may be loaded or unloaded on or across any footway, and no cask, whether empty or full, wine or spirits in cask excepted, may be lowered or drawn up by means of ropes, chains or other machinery passing across any part of the footway (*e*). Within the City of London the Common Council may also make regulations as to the loading and unloading of coal, coke, and beer casks (*f*).

596. In the Metropolitan Police District (*g*) it is an offence for any person to ride upon or cause himself to be carried or drawn by any carriage without the consent of the owner or driver (*h*).

597. Within six miles from Charing Cross no picture, print, board, placard or notice, except in such form and manner as may be approved of by the Commissioner of Metropolitan or City Police, as the case may be, may be carried or distributed by way of advertisement in any street by any person on foot or riding in any vehicle or on horseback; but this provision does not apply to the sale of newspapers (*i*).

598. Within the City of London (*k*) and the Metropolitan Police District (*l*) no person may carry on foot or on horseback or on any

(*b*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 3, 4, 6; Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2; *Summers v. Holborn District Board of Works*, [1893] 1 Q. B. 612; *Keep v. St. Mary's, Newington, Vestry*, *Austin v. St. Mary's, Newington, Vestry*, [1894] 2 Q. B. 524, C. A.; *Baker v. Bradley* (1910), 74 J. P. 341; and see *Drapers' Co. v. Hadder* (1892), 57 J. P. 200. The penalty is a sum not exceeding 40s. (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6); for the definition of a street, see *ibid.*, s. 3; and p. 271, *ante*.

(*c*) City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxxvii.), ss. 2, 3. As to the Common Council, see title METROPOLIS, Vol. XX., pp. 426 *et seq.*

(*d*) Coke is not within the provision (*Fletcher v. Fields*, [1891] 1 Q. B. 790).

(*e*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 3, 4, 10, 15; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2. The penalty is a sum not exceeding 40s. (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 15).

(*f*) City of London (Street Traffic) Act, 1909 (9 Edw. 7, c. lxxvii.), s. 2.

(*g*) See title POLICE, Vol. XXII., pp. 466, 467.

(*h*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 59, 62, 63.

(*i*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 3, 4, 9; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2; *Gage v. Brealey* (1898), 67 L. J. (Q. B.) 457; *Fulton v. Kelly* (1889), 5 T. L. R. 325. The penalty is a sum not exceeding 10s. (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 9); for the definition of a street, see *ibid.*, s. 3; and p. 271, *ante*.

(*k*) See title METROPOLIS, Vol. XX., p. 400.

(*l*) See title POLICE, Vol. XXII., pp. 466, 467.

carriage in any thoroughfare or public place to the obstruction or annoyance of the inhabitants or passengers any picture, placard, notice or advertisement, whether written, printed, painted or posted on or attached to any part of such carriage or on any board or otherwise (*m*).

SECT. 7.
Miscellaneous Street
Offences.

599. Any householder within the Metropolitan Police District may personally, or by a servant, or constable, require any street musician or singer to leave the neighbourhood of his house on account of (*n*) the illness of any inmate or of the interruption of the ordinary occupations or pursuits of inmates, or for other reasonable or sufficient cause. A person playing or singing in defiance of such a request may be given into custody, and is liable to a fine not exceeding 40s. or to imprisonment for a period not exceeding three days (*o*).

Street
musicians.

600. Police regulations may prescribe the places where and the conditions under which persons may collect money for charitable or other purposes in any street within six miles from Charing Cross (*a*).

Street
collections.

601. A metropolitan police constable may arrest without warrant (*b*) persons found between sunset and 8 a.m. loitering in any high-way, yard, or other place, and not giving a satisfactory account of themselves (*c*). He may also detain vehicles removing furniture at night, or for the purpose of evading payment of rent (*d*).

Loitering.

602. In the Metropolis no person may between 10 a.m. and 7 p.m. in such streets (*e*) as may be named by the Commissioner of Metropolitan or City Police, as the case may be, remove any ashes, dust, or refuse from any house in any street (*f*).

Hours for
dust removal.

Inhabitants of the City of London may before 8 a.m. deposit dustbins on the curbstone of certain streets (*g*).

Dustbins in
City.

(*m*) London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), s. 16. A bicycle is within the statutory prohibition; compare *Ellis v. Nott-Bower* (1896), 60 J. P. 760; and see p. 335, *post*.

(*n*) A reason must be assigned (*Shields v. Howard*, [1897] 1 Q. B. 84).

(*o*) Metropolitan Police Act, 1864 (27 & 28 Vict. c. 55), ss. 1, 2; *R. v. Hopkins*, [1893] 1 Q. B. 621. As to the Metropolitan Police District, see title POLICE, Vol. XXII., pp. 466, 467.

(*a*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), ss. 4, 11; Metropolitan Streets Act, 1885 (48 & 49 Vict. c. 18), s. 2; Metropolitan Streets Act, 1903 (3 Edw. 7, c. 17), s. 1. As to meetings in Trafalgar Square, see *R. v. Graham (Cunninghame) and Burns* (1888), 16 Cox, C. C. 420; and title METROPOLIS, Vol. XX., p. 416, note (*p*).

(*b*) As to arrest without warrant, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296 *et seq.*; POLICE, Vol. XXII., pp. 497, 498; TRESPASS, pp. 879, 880, *post*.

(*c*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 64. As to persons loitering in front of the General Post Office, see title POST OFFICE, Vol. XXII., p. 667, note (*f*).

(*d*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 67.

(*e*) For the meaning of "street," see note (*b*), p. 271, *ante*.

(*f*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 5; the penalty is a sum not exceeding 40s. (*ibid.*).

(*g*) *Ibid.*, s. 25.

Part III.—Lights on Vehicles.

SECT. 1

Obligation to Carry Lights.

Statutory
enactment.
Vehicles
subject to the
statute.

SECT. 1.—*Obligation to Carry Lights.*

603. Throughout England and Wales the Lights on Vehicles Act, 1907 (*h*), provides for the carrying of lights at night by vehicles to which it applies.

Subject to certain exemptions (*i*) the statute applies to vehicles of every kind, including those in the public service of the Crown, except:—(1) Cycles or velocipedes required to carry lamps by the Local Government Act, 1888 (*k*); (2) light locomotives or motor cars required to do so by the Locomotives on Highways Act, 1896 (*l*), or regulations thereunder (*m*); (3) other locomotives required to do so by the Locomotives Act, 1865 (*n*), as amended by the Locomotives Act, 1898 (*o*); (4) wagons drawn by such last-mentioned locomotives; and (5) vehicles drawn or propelled by hand (*p*). It also applies to machines and implements of every kind drawn by animal traction (*q*).

Nature of
obligation :
(1) liability of
master ;
head lights ;

tail lights ;

604. Every person who causes or permits (*r*) any vehicle (*s*) to be in any street, highway, or road to which the public have access during the period between one hour after sunset and one hour before sunrise (*t*) must provide the same with a lamp or lamps in proper working order, and so constructed and capable of being so attached as when lighted to display to the front a white light visible for a reasonable distance; if only one lamp is provided, it must be placed on the off-side (*u*). If the lamp or lamps are so constructed as to permit a light to be seen from the rear, such light must be red (*w*); moreover, if the vehicle is used for the purpose of carrying any load projecting more than 6 feet to the rear, the provision of

(*h*) 7 Edw. 7, c. 45.

(*i*) See pp. 291, 292, *post*.

(*k*) 51 & 52 Vict. c. 41, s. 85 (1); see p. 335, *post*.

(*l*) 59 & 60 Vict. c. 36, s. 2.

(*m*) See pp. 322, 323, *post*.

(*n*) 28 & 29 Vict. c. 83, s. 3.

(*o*) 61 & 62 Vict. c. 29, s. 5; see p. 312, *post*.

(*p*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 5 (1), (4).

(*q*) *Ibid.*, s. 5 (2). The term "vehicle" is not defined in the Act, but it may be taken as comprising every carriage, cart, wagon, truck, conveyance, machine, and implement drawn by animal traction, and propelled or drawn by mechanical power, except such as fall within the exceptions and exemptions mentioned in the text, *supra*.

(*r*) In the case of a vehicle in the public service of the Crown, the person whom the department using such vehicle names as actually responsible is to be treated as the person causing or permitting the vehicle to be used (*ibid.*, s. 5 (4)).

(*s*) That is, any vehicle or implement to which the Act applies, as to which see the text, *supra*.

(*t*) Sunset and sunrise must be determined according to local, and not Greenwich, time (*Gordon v. Cann* (1899), 68 L. J. (Q. B.) 434); see title TIME, p. 441, *post*.

(*u*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 1 (1).

(*w*) *Ibid.*

a proper lamp or lamps to display a red light to the rear is obligatory (x).

Every person driving or being in charge of any vehicle in any street, highway, or road to which the public have access during the period above mentioned must keep such lamp or lamps properly trimmed, lighted and attached (y).

SECT. 1.
Obligation
to Carry
Lights.

(2) liability
of driver.

605. On the 31st December, 1907, existing statutory bye-laws and provisions in local and personal Acts with respect to the carrying of lights on vehicles ceased to apply to vehicles within the Lights on Vehicles Act, 1907 (a); but this provision did not affect any statutory power to make fresh bye-laws or regulations imposing obligations additional to those imposed by that Act (b).

Additional
obligations
under
bye-laws.

SECT. 2.—*Offences and Penalties.*

606. A person offending against any provision of the Lights on Vehicles Act, 1907 (c), is liable upon summary conviction for each offence to a penalty not exceeding 40s., and in the case of a second or subsequent conviction to a penalty not exceeding £5 (d).

Fine.

607. A person driving or in charge of a vehicle is not to be convicted of an offence under the Act, if he satisfies the court that such offence arose through the neglect or default of some other person whose duty it was to provide the vehicle with a lamp or lamps (e).

Driver
excused
where owner
in default.

SECT. 3.—*Exemptions.*

608. Vehicles in the public service of the Crown may, in the interests of the naval or military service, be excepted by Order in Council from the provisions of the Lights on Vehicles Act, 1907 (f).

Vehicles in
public service.

609. The council of a county may by order exempt from the operation of the Act vehicles carrying any farm produce to stack or barn in the course of harvesting operations, during such months or periods of the year as may be specified in the order. Such an order may apply to the whole or to a part only of the county. A copy of it must be sent as soon as may be to the Home Secretary, and it must be published in such manner as the council thinks best adapted for giving public notice thereof (g).

Harvesting
operations.

(x) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 1 (2).

(y) *Ibid.*, s. 1 (3).

(a) *Ibid.*

(b) Thus, a county or borough council can make a "good rule and government" bye-law (see p. 279, *ante*) requiring a tail lamp in the case of all vehicles, or requiring head lamps on both "off" and "near" side. As to bye-laws generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*

(c) 7 Edw. 7, c. 45.

(d) *Ibid.*, s. 2.

(e) *Ibid.*

(f) *Ibid.*, s. 5 (4); see also note (s), p. 290, *ante*.

(g) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 4.

SECT. 3.

Exemptions.

Vehicles carrying inflammable goods or within dangerous areas.

610. The London County Council, the Common Council of the City of London (*h*), and the council of any extra-metropolitan borough (*i*) may, by order approved by the Home Secretary, exempt from the operation of the Act, subject to any conditions mentioned in the order, (1) any vehicle carrying any inflammable goods of a kind specified in the order, or (2) any vehicle being within any place specified in the order in which the council considers that it would be dangerous to enforce the provisions of the Act owing to inflammable goods being usually stored or dealt with in or near such place (*j*). Within the area under the control of the Mersey Docks and Harbour Board the power of making such an exemption order is vested in the Board to the exclusion of the borough council (*k*). Notice of any proposed order and of the mode of lodging objections thereto, and also of any order when made and approved, must be given by the authority in such manner as the Home Secretary directs; before approving any proposed order the Home Secretary must consider any objections, and may cause a local inquiry to be held (*l*).

Part IV.—Hackney and Stage Carriages.

SECT. 1.—Statutory Enactments.

Stage carriages.

611. Throughout England “stage carriages” (*m*) are subject to the provisions of the Stage Carriages Act, 1832 (*n*), as amended by later enactments (*o*). There is no general enactment regulating the ordinary use of “hackney carriages”; but there are provisions restricting the use of public carriages at parliamentary and municipal elections (*p*), and also certain sanitary provisions intended to prevent infectious diseases being spread by the use of such carriages (*q*).

Hackney carriages and omnibuses.

In boroughs and other urban and some rural districts (*r*) outside the Metropolitan Police District (*s*) “hackney carriages” and

(*h*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 3 (5). As to the London County Council, see title METROPOLIS, Vol. XX., pp. 393 *et seq.*; as to the Common Council, see *ibid.*, pp. 426 *et seq.*

(*i*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 3 (1).

(*j*) *Ibid.*

(*k*) *Ibid.*, s. 3 (6). As to the Mersey Docks and Harbour Board, see title WATERS AND WATERCOURSES.

(*l*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 3 (2)—(4).

(*m*) For the definition, see p. 293, *post*.

(*n*) 2 & 3 Will. 4, c. 120.

(*o*) London Hackney Carriages Act, 1833 (3 & 4 Will. 4, c. 48); Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79); Revenue Act, 1869 (32 & 33 Vict. c. 14).

(*p*) See title ELECTIONS, Vol. XII., pp. 303, 348.

(*q*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 452.

(*r*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, applies the provisions in question to all urban districts; they may be put in force in rural districts by an order of the Local Government Board under *ibid.*, s. 276.

(*s*) As to the Metropolitan Police District, see title POLICE, Vol. XXII., pp. 466, 467.

“omnibuses” (t) (a term which includes “stage carriages”) are subject to the provisions of the Town Police Clauses Acts, 1847 (u) and 1889 (w).

SECT. 1.
Statutory
Enact-
ments.

Within the Metropolitan Police District (a) “hackney carriages” and “stage carriages” (b) are subject to the provisions of special enactments (c).

Metropolitan
hackney
and stage
carriages.

The fuller and wider provisions of the special enactments practically render obsolete in districts where they are in force those of the general enactments as to “stage carriages”; but in theory, at any rate, such carriages are in all urban and some rural districts still subject to both sets of provisions.

A local authority has the like power of making rules and regulations and granting licences with respect to tramcars, their drivers and conductors, passengers, and standing places, as it has with respect to hackney carriages (d).

Tramcars.

A light railway car is not a tramcar (e), but within the Metropolitan Police District light railway cars used on streets or roads are subject to the last-mentioned provisions, and to enactments relating to stage carriages, as if they were tramcars (f).

Light railway
cars.

SECT. 2.—*Stage Carriages.*

612. The term “stage carriage” appears to include any vehicle, other than a railway carriage, used for the conveyance of passengers who are charged separate and distinct fares, or at the rate of separate and distinct fares, for their respective seats (g).

Stage
carriage.

(t) For the definitions, see pp. 294, 295, *post*.

(u) 10 & 11 Vict. c. 89, ss. 37—68.

(w) 52 & 53 Vict. c. 14.

(a) As to the Metropolitan Police District, see title POLICE, Vol. XXII., pp. 466, 467.

(b) For the definitions, see p. 303, *post*.

(c) The principal metropolitan statutes are the following:—London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22); London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86); London Hackney Carriage Act, 1850 (13 & 14 Vict. c. 7); London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33); London Hackney Carriage (No. 2) Act, 1853 (16 & 17 Vict. c. 127); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115); London Cab Act, 1896 (59 & 60 Vict. c. 27); London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55); see p. 303, *post*.

(d) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 48; and, as to such bye-laws, see, further, title TRAMWAYS AND LIGHT RAILWAYS, pp. 796, 797, *post*.

(e) *Yorkshire (Woollen District) Electric Tramways v. Ellis*, [1905] 1 K. B. 396.

(f) London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 5; see, further, title TRAMWAYS AND LIGHT RAILWAYS, pp. 781, note (a), 818, note (f), *post*.

(g) The definition contained in the Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), s. 5, excluded railway carriages and carriages not drawn by animal power; the first exception does not extend to tramcars (*Brian v. Aylward* (1902), 18 T. L. R. 371); the second was abrogated as regards light locomotives by the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1) (b). The definition in question was repealed by the Revenue Act, 1869 (32 & 33 Vict. c. 14), which abolished the licence duty on such carriages. For the definitions in the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 38, see pp. 294 *et seq.*, *post*; for the definitions in the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 4, 5, see

SECT. 2.

Stage
Carriages.

General
provisions as
to stage
carriages.

613. Every stage carriage must bear painted upon it in the prescribed manner the christian name and surname of the proprietor, or of one of the proprietors (*h*), and the number of passengers which it is constructed to carry, whether inside or outside (*i*). Stage carriages of certain dimensions are not allowed to carry luggage on the roof (*j*); in any case luggage loaded on the roof is not to exceed a certain height from the ground (*k*), and no person may be allowed to sit upon such luggage (*l*). An average of 16 inches is to be allowed for each passenger's seat; and, in the case of carriages of a certain build, the number of outside passengers is limited by provisions intended to secure stability (*m*). No carriage is to be allowed to carry, either in the whole or inside or outside, more passengers than the number which it is constructed to carry (*n*). Only one passenger may be allowed to sit beside the driver on the box seat (*o*). Provision is made for the counting of passengers and the measuring of carriages and luggage (*p*). Drivers and conductors may be punished for reckless conduct and misbehaviour (*q*), and in some cases the proprietor is made responsible for their conduct (*r*). There is an appeal against a conviction (*s*).

SECT. 3.—*Hackney Carriages and Omnibuses Outside the Metropolis.*

SUB-SECT. 1.—*Definitions.*

Hackney
carriage.

614. For the purposes of the Town Police Clauses Acts (*t*) the term "hackney carriage" (*u*) does not include a tramcar or light

p. 303, *post*. As to railways generally, see title RAILWAYS AND CANALS, Vol. XXIII., pp. 619 *et seq*.

(*h*) Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), ss. 6, 7, 8, 36.

(*i*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 14.

(*j*) Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), s. 37.

(*k*) *Ibid.*, s. 43.

(*l*) London Hackney Carriages Act, 1833 (3 & 4 Will. 4, c. 48), s. 4.

(*m*) Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 17.

(*n*) *Ibid.*, ss. 13, 15; *Black v. Neilson* (1898), 25 *Rettie* (Justiciary Cases), 98. A child under five upon a passenger's knee is not to be counted (Railway Passenger Duty Act, 1847 (5 & 6 Vict. c. 79), s. 13).

(*o*) London Hackney Carriages Act, 1833 (3 & 4 Will. 4, c. 48), s. 4.

(*p*) Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), s. 45; Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 16.

(*q*) Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), ss. 47, 48.

(*r*) *Ibid.*, s. 49. As to the common law liability of a master for the acts of his servant, see pp. 302, 303, *post*.

(*s*) Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), s. 103. For the provisions as to prosecutions, see *ibid.*, ss. 101 *et seq*.; London Hackney Carriages Act, 1833 (3 & 4 Will. 4, c. 48), ss. 5, 6; Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), ss. 18, 19.

(*t*) These Acts are the Town Police Clauses Acts, 1847 (10 & 11 Vict. c. 89), and 1889 (52 & 53 Vict. c. 14), which in urban districts are deemed to be incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), as to the application of which see titles LOCAL GOVERNMENT, Vol. XIX., p. 332; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363.

(*u*) For excise duty purposes under the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 4 (1), "any carriage standing or plying for hire" is a "hackney carriage." As to the duty payable, see title REVENUE, Vol. XXIV., p. 689. As to motor "hackney carriages," see

railway car (*w*), or an omnibus (*x*) or other stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares (*y*); but with these exceptions it includes any wheeled carriage, of whatever form or construction (*a*), used in standing or plying for hire (*b*) in any street (*c*) within the particular urban district, and any carriage standing upon such a street and bearing any numbered plate required to be fixed upon a hackney carriage or any plate resembling or intended to resemble such a plate (*d*).

SECT. 3.
Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.

615. The term “omnibus” (*e*) includes any (*f*) omnibus, char-à-banc, wagonette, brake, stage coach and other carriage plying or standing (*g*) for hire by, or used to carry, passengers at Omnibus.

p. 334, *post*. An owner need not pay duty on “spare” cabs until they are brought into use (*London County Council v. Fairbank*, [1911] 2 K. B. 32). Apart from any statutory definition, a hackney carriage means a carriage exposed for hire to the public, whether standing in the public street or in a private yard (*Bateson v. Oddy* (1874), 38 J. P. 598).

(*w*) *Yorkshire (Woollen District) Electric Tramways v. Ellis*, [1905] 1 K. B. 396. As to tramcars and light railway cars, see p. 293, *ante*; and, generally, title TRAMWAYS AND LIGHT RAILWAYS, pp. 795, 796, 818, note (*f*), *post*.

(*x*) *Cousins v. Stockbridge* (1866), 30 J. P. 166. But an omnibus is a hackney carriage for excise duty purposes; see note (*e*), *infra*.

(*y*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 38.

(*a*) Including motor cabs, for by the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1) (b), a “light locomotive,” if used as a carriage of any particular class, is to be deemed to be a carriage of that class, and the law relating to carriages of that class is to apply to it. A motor cab must, of course, be registered as a motor car, as to which see p. 316, *post*. As to the duty payable on a motor hackney carriage, see title REVENUE, Vol. XXIV., p. 692.

(*b*) A licensed hackney carriage is none the less “used in standing or plying for hire” because at the moment it is employed otherwise (*Hawkins v. Edwards*, [1901] 2 K. B. 169). A carriage “plies for hire” even though the driver only asks for voluntary contributions from passengers (*Cocks v. Mayner* (1893), 58 J. P. 104). A specially engaged carriage does not ply for hire (*Cavill v. Amos* (1900), 64 J. P. 309).

(*c*) The word “street” does not include a railway company’s roadway to their station or other private property (*Curtis v. Embery* (1872), L. R. 7 Exch. 369; *Jones v. Short* (1900), 64 J. P. 247; *Case v. Storey* (1869), L. R. 4 Exch. 319; *Skinner v. Usher* (1872), L. R. 7 Q. B. 423; but see *Marks v. Ford* (1880), 45 J. P. 157). For other definitions, compare titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 16 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 402, note (*h*). Apart from the qualifying words “in any street” a carriage may be said to be “plying for hire” if standing ready to take up passengers on private property (*Clarke v. Stanford* (1871), L. R. 6 Q. B. 357; *Allen v. Tunbridge* (1871), L. R. 6 C. P. 481; *Bateson v. Oddy*, *supra*; *Foinett v. Clark* (1877), 41 J. P. 359).

(*d*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 38.

(*e*) An omnibus is a “hackney carriage” for excise duty purposes (*Hickman v. Birch* (1890), 24 Q. B. D. 172); see title REVENUE, Vol. XXIV., pp. 691, 692.

(*f*) Including a motor omnibus, if a “light locomotive”; see note (*a*), *supra*. Such an omnibus must, of course, also be registered as a motor car, as to which see p. 316, *post*.

(*g*) As to the omission of the words “in any street” found in the definition of a hackney carriage, see note (*c*), *supra*. Apparently, “plying or standing” means licensed to ply or stand, even though at the moment otherwise employed; see note (*b*), *supra*.

SECT. 3.
Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.

separate fares to, from, or in any part of the particular district (*h*); except (1) light railway carriages (*i*); (2) duly licensed tramcars (*j*); (3) any carriage starting from, and previously hired for the particular passengers thereby carried, at any livery stable yard within the district whereat horses are stabled and carriages let for hire, such carriage starting from such yard, and being *bond fide* the property of the occupiers thereof, and not standing or plying for hire within the district; (4) any omnibus belonging to or hired or used by a railway company to convey passengers and their luggage to or from a station of the company, and not standing or plying for hire within the district; (5) any omnibus starting from outside the district and bringing passengers within it, and not standing or plying for hire within it (*k*).

SUB-SECT. 2.—*Licensing and Control of Vehicles, Drivers, and Conductors.*

Licences
which may
be granted.

616. An urban authority (*l*), or rural authority with the necessary urban powers (*m*), may license (1) such number of hackney carriages and omnibuses to ply for hire within its district as it thinks fit (*n*); and (2) persons to act as drivers of licensed hackney carriages and as drivers and conductors of licensed omnibuses (*o*). In granting or refusing such licences it may exercise a just and reasonable discretion (*p*); and in the case of drivers and conductors may require an applicant to attend in person (*q*). A licence enures normally for a year from its date, or until the next annual licensing day, where one is fixed (*r*), but it may be granted for any less period

(*h*) Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 3.

(*i*) *Yorkshire (Woollen District) Electric Tramways v. Ellis*, [1905] 1 K. B. 396.

(*j*) As to the licensing of tramcars, their drivers and conductors, see p. 293, *ante*.

(*k*) Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 3. An omnibus which, after bringing in passengers from outside, stands within the district waiting for passengers for the return journey is not within the exception (*Dewhurst v. Eddles* (1893), 57 J. P. 373), and the proprietor cannot escape the necessity for a licence by purporting to make no charge on the return journey for the distance as far as the boundary (*R. v. Fletcher, Ex parte Ansonia* (1908), 72 J. P. 249).

(*l*) That is, the council of a borough or urban district.

(*m*) See note (*r*), p. 292, *ante*.

(*n*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 37; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 4 (1); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 171, 316. The holding of such a licence and the payment of excise duty (see note (*u*), p. 294, *ante*) are independent requirements (*Buckle v. Wrightson* (1864), 5 B. & S. 854). As to the legal position of the parties to a hiring contract, see title BAILMENT, Vol. I., pp. 543 *et seq.* As to hackney carriage licences, see, further, title REVENUE, Vol. XXIV., pp. 691, 692.

(*o*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 46; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 4 (2); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 171, 316. As to the similar powers of licensing tramcar drivers and conductors, see p. 293, *ante*; and, as to tramway bye-laws generally, see title TRAMWAYS AND LIGHT RAILWAYS, pp. 796, 797, *post*.

(*p*) *R. v. Barry District Council, Ex parte Jones* (1900), 16 T. L. R. 565; *R. v. Blackpool Corporation* (1899), *Times*, 7th December; *Ex parte Mitcham* (1864), 5 B. & S. 585.

(*q*) *Banton v. Davies* (1891), 56 J. P. 294.

(*r*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 43; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

specified in it (*s*), and it may, in certain circumstances, be suspended or revoked (*t*).

617. Each vehicle requires a separate licence, which must be under the seal of the council (*a*), and must specify the name, surname, and place of abode of every proprietor or part proprietor of the vehicle, or person concerned in the keeping or hiring thereof (*b*); it must also specify a number, to correspond with that to be affixed to the vehicle, and such other particulars as the council thinks fit (*b*). For each licence the council may demand a fee not exceeding 5*s*. (*c*). A requisition for a licence, in such form as the council provides, must be made and signed by the proprietor or one of the proprietors, as the case may be, and must give the details required to be recorded on the licence (*d*). The licence must be made out by the clerk to the council and entered in a register, which is to be open to inspection by anyone, without fee, at all reasonable times, and is to contain spaces for recording any offence by the proprietor, driver, or conductor of, or any person attending, the vehicle (*e*). Notice of any change of abode must be given within seven days, and the licence must be produced for the necessary alterations to be indorsed thereon (*f*).

618. A driver's or conductor's licence, for which 1*s*. must be paid, must be registered by the clerk to the council (*g*). It must be delivered to the proprietor of the vehicle, and be retained by him whilst the licensee remains in his employ; and it must be produced by him if he is summoned to answer a complaint or to produce the licensee (*h*). It must be returned forthwith to the latter if he leaves his employment without having been guilty of any misconduct. If he has been so guilty, the proprietor must retain the licence, and forthwith issue a summons to have his cause of complaint determined (*i*). The driver of a motor hackney carriage or motor omnibus will require also the ordinary motor car driver's licence (*k*). The proprietor of a licensed public stage or hackney carriage need not pay duty as for male servants in respect of

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Carriages
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Metropolis.

Licences for
vehicles.

Licences for
drivers and
conductors.

(*s*) Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 5.

(*t*) See p. 302, *post*.

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 43.

(*b*) *Ibid.*, s. 41. The authority may by bye-laws regulate the manner in which the number is to be displayed on the vehicle (*ibid.*, s. 68; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6).

(*c*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 39.

(*d*) *Ibid.*, s. 40.

(*e*) *Ibid.*, s. 42.

(*f*) *Ibid.*, s. 43. A licensee has a right to have his name removed on retirement (*Hodges v. London Trams Co.* (1883), 12 Q. B. D. 105, where the licence was in the name of the manager).

(*g*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 46.

(*h*) *Ibid.*, s. 48. The licence is the property of the licensee, and the proprietor must not make indorsements on it (*Rogers v. Macnamara* (1853), 14 C. B. 27; *Hurrell v. Ellis* (1845), 2 C. B. 295; *Heath v. Brewer* (1864), 15 C. B. (N. S.) 803; *Norris v. Birch*, [1895] 1 Q. B. 639).

(*i*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 49. If the justices find the licence to have been improperly retained they may order its return and award compensation (*ibid.*).

(*k*) See p. 320, *post*.

SECT. 3.
Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.
Bye-laws.

persons necessarily employed to drive the same, or in the care of it (*l*).

619. An urban authority (*m*) may make bye-laws—(1) for regulating the conduct of the proprietors, drivers, and conductors of hackney carriages and omnibuses in their several employments, and for determining whether drivers and conductors shall wear any and what badges, and, in the case of hackney carriages, for regulating the hours within which proprietors and drivers may exercise their calling (*n*); and (2) for securing the safe custody and redelivery of any property accidentally left in hackney carriages and fixing the charges to be made in respect thereof (*o*).

It may also make bye-laws—(1) as to hackney carriages, to regulate the number of horses or other animals to draw the same, the provision of check strings, and furnishing of carriages (*p*); (2) as to omnibuses, to regulate the number and secure the fitness of the animals to be allowed to draw an omnibus, and the removal therefrom of unfit animals; to secure the fitness of omnibus and harness; to provide for the carrying and lighting of proper lamps (*q*) for denoting direction, and promoting the safety and convenience of passengers; and to prevent noisy touting by drivers and conductors, and the blowing of horns and similar noises (*r*).

620. An urban authority may by bye-laws fix the stands for hackney carriages and omnibuses, and the points at which omnibuses may stop for any longer time than is necessary for the taking up and setting down of passengers (*s*).

Stands and
stopping
places.

(*l*) Customs and Inland Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 19 (5); see *London County Council v. Allen*, [1913] 1 K. B. 9; and title REVENUE, Vol. XXIV., pp. 693 *et seq.*

(*m*) See note (*r*), p. 292, *ante*. As to bye-laws generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*

(*n*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6.

(*o*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6.

(*p*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68. A bye-law requiring the dial of a taximeter cab to be illuminated is valid (*Dunning v. Maher* (1912), 106 L. T. 846).

(*q*) As to lights on vehicles, see, generally, pp. 290, 291, *ante*.

(*r*) Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6.

(*s*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6. The latter provision prohibits the fixing of an omnibus stand in a railway station or station yard without the company's consent. Under an old statute a power to "direct and regulate" stands was held to give power to remove them (*R. v. Rawlinson* (1836), 6 B. & C. 23). A bye-law need not define the position of stands otherwise than as such stands as may from time to time be indicated by notice boards (*Blackpool Local Board of Health v. Bennett* (1859), 4 H. & N. 127); as to evidence of "plying" off the stands, see *ibid.* A bye-law may prohibit loitering (*Murphy v. Neilson* (1901), 3 Fraser (Justiciary Cases), 77; *Mackenzie v. Somerville* (1900), 3 Fraser (Justiciary Cases), 4). A driver, directed by a hotel-keeper to wait outside the hotel for any visitor who might want a cab may be convicted under such a bye-law (*ibid.*). As to a bye-law against "touting" for hackney carriages in a public thoroughfare, see *Derham v. Strickland* (1911), 75 J. P. 300.

SUB-SECT. 3.—*Number of Passengers: Duty to Carry Passengers.*

SECT. 3.
Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.

Number of
passengers.

Duty to
carry.

621. No hackney carriage or omnibus may be used or let for hire or stand or ply for hire within an urban district unless the number of persons to be carried is shown upon it in the manner required by the statute; and a driver or conductor cannot be required to carry a greater number of passengers (*t*). The authority may make bye-laws for regulating the number of persons to be carried (*a*).

622. The driver of a hackney carriage standing at an appointed stand or in any street must, unless he has a reasonable excuse (*b*), drive to any place, including private property with access for carriages (*c*), within the district, or within any less distance duly fixed by bye-law (*d*), to which he is directed to drive by a hirer or intending hirer (*e*). The driver or conductor of a hackney carriage or omnibus may not refuse to carry the full complement of passengers if required to do so (*f*). Without the express consent of the hirer the proprietor or driver of a hackney carriage must not suffer any person to be carried in, on, or about the carriage during the period of hire (*g*).

SUB-SECT. 4.—*Fares.*

623. The fares to be charged to hirers of hackney carriages are, unless fixed by a special Act (*h*), determined by the urban authority, which may make bye-laws for fixing the fares, both by time and distance, to be paid within its district, and for securing due publication thereof (*i*). An agreement to pay more than the authorised fare is invalid, and any excess overpaid may be recovered (*k*); but there is no objection to an agreement to accept less than the authorised fare (*l*). In the case of an agreement to

Hackney
carriages.

(*t*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 51. As to the carriage of passengers generally, see title CARRIERS, Vol. IV., pp. 44 *et seq.*

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68; Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6. The power to make a bye-law as to the manner of indicating such number seems to be superfluous in view of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 51.

(*b*) As to the use of public conveyances for carrying persons suffering from a dangerous infectious disease, or corpses of persons who have died from an infectious disease, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 126, 127; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 63, 64; Infectious Disease (Prevention) Act, 1890 (53 & 54 Vict. c. 34), s. 11; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 452.

(*c*) *Ex parte Kippins*, [1897] 1 Q. B. 1.

(*d*) This means a bye-law made under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68.

(*e*) *Ibid.*, s. 53.

(*f*) *Ibid.*, s. 52.

(*g*) *Ibid.*, s. 59.

(*h*) That is, a local Act incorporating the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89).

(*i*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 68. As to the construction of a provision that two children are to be paid for as one adult, see note (*s*), p. 304, *post*.

(*k*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 55.

(*l*) *Ibid.*, s. 54.

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take a person for a drive of unstated length for a fixed sum, the hirer must be driven at least such a distance as that sum would entitle him to be driven according to the scale of fares in force (*m*). If a carriage is hired and taken to any place and there required to wait, the driver may demand his fare and also a deposit, calculated according to the time he is required to wait (*n*). If a person refuses to pay the legal fare it may be recovered summarily as a civil debt, together with costs (*o*).

Omnibuses.

624. The fares to be charged to passengers in omnibuses are fixed by the proprietors; but the urban authority may provide by bye-laws for the exhibition on some conspicuous part of every omnibus of a statement in legible letters and figures of the fares to be demanded (*p*). The fare so exhibited may be recovered as in the case of a hackney carriage fare, and no greater fare may be taken, but a less one may be agreed upon (*q*).

SUB-SECT. 5.—*Offences and Proceedings.*

Offences.

625. It is an offence, punishable summarily (*r*), when applying for a hackney carriage or omnibus licence to include in the requisition the name of any person who is not a proprietor or concerned in the keeping of the vehicle, or wilfully to omit to specify truly therein the name of any person who is (*s*); for a licensed proprietor of a hackney carriage or omnibus on changing his abode to fail duly to give notice thereof and produce the licence for indorsement (*t*); to permit a vehicle to be used as a hackney carriage or omnibus plying for hire within the district without having obtained a licence for it, or whilst such licence is suspended (*u*); to drive or stand or ply for hire with any hackney carriage or omnibus for which a licence has not been obtained, or without having the number of the vehicle, corresponding to the licence number, openly displayed (*w*); to act as driver or conductor of a licensed hackney carriage or omnibus without obtaining a licence, or whilst it is suspended (*x*); for a driver or conductor to lend his

(*m*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 56.

(*n*) *Ibid.*, s. 57.

(*o*) *Ibid.*, s. 66. The amount is recoverable under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6 (*R. v. Kerswill*, [1895] 1 Q. B. 1); see title MAGISTRATES, Vol. XIX., p. 609.

(*p*) Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 6.

(*q*) *Ibid.*, s. 4; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 54, 58, 66.

(*r*) As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*s*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 40. The penalty is a sum not exceeding £10 (*ibid.*).

(*t*) *Ibid.*, s. 44. The penalty is a sum not exceeding 40s. (*ibid.*).

(*u*) *Ibid.*, s. 45. The penalty is a sum not exceeding 40s. (*ibid.*); it is not an offence to ply with an unlicensed cab in a place which is not "a street" (*Jones v. Short* (1900), 64 J. P. 247; and see the cases cited in note (*c*), p. 295, *ante*); nor whilst plying with a licensed carriage to accept an order for an unlicensed one in the stables (*Cavill v. Amos* (1900), 64 J. P. 309).

(*w*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 45. As to "displaying" a number, see note (*b*), p. 297, *ante*.

(*x*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 47. The penalty is a sum not exceeding 20s. (*ibid.*).

licence or part with it, except to his employer(*a*); for a proprietor to employ a driver or conductor who has no licence or whose licence has been suspended(*a*); for a proprietor to neglect to obtain delivery of and to retain the licence of each driver and conductor or to neglect to produce it when required to do so(*b*); for a proprietor to allow a hackney carriage or omnibus to be used, or for any person to stand or ply for hire with it, without having the number of persons to be carried by it properly exhibited, or for a driver or conductor to refuse to carry a full complement of passengers(*c*); for a driver of a hackney carriage standing at an appointed stand, or in any street, to refuse without reasonable excuse to drive to any place within the district or within any less distance fixed by a bye-law(*d*); for the proprietor, driver or conductor of a hackney carriage or omnibus to demand more than any sum agreed on for a particular job(*e*); for the proprietor or driver of a hackney carriage hired for a drive of unspecified length at an agreed sum not to take passengers a sufficient distance(*f*); for the driver of a hackney carriage who has received a proper deposit to refuse to wait, or to go away, or permit his carriage to be taken away, without the hirer's consent, before the expiration of the time covered by the deposit, or to refuse to account for such deposit when finally discharged(*g*); for the proprietor, driver or conductor of a hackney carriage or omnibus to take a greater fare than is authorised(*h*); for the proprietor or driver of a hackney carriage to suffer any person to ride in, on, or about the same without the hirer's consent(*i*); for the authorised driver or conductor of a hackney carriage or omnibus to allow any person to act as driver or conductor without the proprietor's consent, and for any person, whether licensed or not, so to act without such consent(*k*); for the driver, conductor or any other person having or pretending to have charge of any hackney carriage or omnibus to be intoxicated whilst driving, or by wanton and furious driving or by any other wilful misconduct to injure or endanger any person in life, limb, or property(*l*); for the driver or conductor of a hackney carriage or omnibus to leave it, whether hired or not, in any street or at any place of public resort or entertainment without a proper

(*a*) See p. 297, *ante*.

(*b*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 48. The penalty is a sum not exceeding 40s. (*ibid.*).

(*c*) *Ibid.*, s. 52. The penalty is a sum not exceeding 40s. (*ibid.*).

(*d*) *Ibid.*, s. 53. The penalty is a sum not exceeding 40s. (*ibid.*); and see p. 299, *ante*.

(*e*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 54. The penalty is a sum not exceeding 40s. (*ibid.*).

(*f*) *Ibid.*, s. 56. The penalty is a sum not exceeding 40s. (*ibid.*); and see pp. 299, 300, *ante*.

(*g*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 57. The penalty is a sum not exceeding 40s. (*ibid.*).

(*h*) *Ibid.*, ss. 55, 58. The penalty is a sum not exceeding 40s., and an order for repayment of overcharge, and in certain cases one month's imprisonment in default (*ibid.*).

(*i*) *Ibid.*, s. 59. The penalty is a sum not exceeding 20s. (*ibid.*).

(*k*) *Ibid.*, s. 60. The penalty is a sum not exceeding 40s. (*ibid.*).

(*l*) *Ibid.*, s. 61. The penalty is a sum not exceeding £5, and in default imprisonment not exceeding two months (*ibid.*).

SECT. 3.

Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.Indorsement
of licence.Compensation
where charge
withdrawn or
dismissed.Liability of
omnibus or
cab pro-
prietor.Damage to
persons or
property.

caretaker (*m*); for the driver or conductor of a hackney carriage or omnibus to obstruct other vehicles in various ways (*n*); or for any person using a hackney carriage to wilfully injure the same (*o*).

626. Any offence by a driver or conductor must be indorsed upon his licence (*p*); and upon a second offence the authority may suspend or revoke the licence of a proprietor, driver, or conductor (*q*).

627. If a charge against a driver or conductor is withdrawn or dismissed, the court may order the complainant to compensate him for loss of time, and may commit him for a month in default of payment (*r*).

SUB-SECT. 6.—*Rights and Liabilities of Owners of Vehicles.*

628. In the case of an omnibus or of a cab driven by a servant, the proprietor's common law liability for the acts of drivers and conductors is regulated by the ordinary law of master and servant (*s*); and it seems that, having regard to the nature of the legislation as to such vehicles, the same principles must be applied even where the relation between proprietor and driver is strictly that of bailor and bailee (*t*).

By statute, whenever any damage to person or property has been caused by a driver or conductor of a hackney carriage or omnibus, any justices convicting him may order a sum not exceeding £5 to be paid as compensation by the proprietor, who may recover it

(*m*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 62. The penalty is a sum not exceeding 20s. (*ibid.*). A constable may remove the carriage, and the expense of taking care of it, if not repaid, may be raised by sale (*ibid.*).

(*n*) *Ibid.*, s. 64.

(*o*) *Ibid.*, s. 67. The penalty is a sum not exceeding £5, and compensation (*ibid.*).

(*p*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 48.

(*q*) *Ibid.*, s. 50.

(*r*) *Ibid.*, s. 65.

(*s*) See title MASTER AND SERVANT, Vol. XX., pp. 244 *et seq.* The proprietor is not responsible for the negligence of a volunteer driver taking charge upon an emergency (*Gwilliam v. Twist*, [1895] 2 Q. B. 84, C. A.); or, in the absence of evidence that he was acting within the scope of his authority, of a conductor driving an omnibus between journeys (*Beard v. London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.).

(*t*) Such, at any rate, is the effect of the legislation in London (*Morley v. Duncombe* (1848), 11 L. T. (o. s.) 199; *Powles v. Hider* (1856), 6 E. & B. 207; *Fowler v. Lock* (1872), L. R. 7 C. P. 272; *Venables v. Smith* (1877), 2 Q. B. D. 279; *Playle v. Kew* (1886), 2 T. L. R. 849; *King v. London Improved Cab Co.* (1889), 23 Q. B. D. 281, C. A.; *Keen v. Henry*, [1894] 1 Q. B. 292, C. A., overruling *King v. Spurr* (1882), 8 Q. B. D. 104; *Gates v. Bill (R.) & Son*, [1902] 2 K. B. 38, C. A.). For a conviction of a cabdriver as a "servant" for falsifying accounts and for "larceny" of takings, see *R. v. Solomons*, [1909] 2 K. B. 980, C. A.; *R. v. Messer* (1911), 76 J. P. 124, C. C. A. For purposes of compensation in case of accident his relation to the proprietor is that of bailee and not of servant; see *Doggett v. Waterloo Taxi-Cab Co., Ltd.*, [1910] 2 K. B. 336, C. A.; *Smith v. General Motor Cab Co., Ltd.*, [1911] A. C. 188; and title MASTER AND SERVANT, Vol. XX., pp. 67, note (*r*), 248 *et seq.* The proprietor is responsible to a cabdriver to whom he lets out a horse which is not reasonably safe (*Gibbons v. Standon* (1867), 16 L. T. 497); see, generally, title BAILMENT, Vol. I., pp. 550 *et seq.*; and compare *White v. Steadman*, [1913] 3 K. B. 340.

from the guilty person (*u*). Consent by an injured person to the exercise of this power bars his ordinary right of action (*a*).

Any person using a hackney carriage or omnibus who wilfully injures the same may, in addition to a fine, be ordered by convicting justices to pay to the proprietor such sum as they consider reasonable by way of satisfaction (*b*).

SECT. 3.
Hackney
Carriages
and
Omnibuses
Outside the
Metropolis.

SECT. 4.—Metropolitan Hackney and Stage Carriages.

629. Within the Metropolitan Police District (*c*) and the City of London (*d*) hackney and stage carriages and their drivers and conductors are licensed (*e*) by the Commissioner of Metropolitan Police, acting as deputy for the Home Secretary (*f*). For the purposes of the relevant statutes the term "hackney carriage" or "cab" (*g*) means any carriage for the conveyance of passengers which plies for hire within the Metropolis (*h*) and is not a "stage carriage" (*i*). A "stage carriage" means any carriage for the conveyance of passengers which plies for hire in any street, road, or place within the Metropolis, and in which the passengers or any of them pay separate and distinct, or at the rate of separate and distinct, fares for their respective places (*j*). Although stage carriages which on every journey go to or from some place beyond the Metropolis are not to be deemed carriages plying within the Metropolis (*k*), the Home Secretary may by order apply to such carriages, or to any class thereof, any of the statutory provisions relating to metropolitan stage carriages (*l*). Trams and

Injuring
hackney
carriage or
omnibus.
Licences in
Metropolis.
Hackney
carriage :
cab ;
Stage
carriage.

(*u*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 63.

(*a*) *Wright v. London Omnibus Co.* (1877), 2 Q. B. D. 271.

(*b*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 67.

(*c*) See title POLICE, Vol. XXII., pp. 466, 467.

(*d*) See title METROPOLIS, Vol. XX., pp. 400, 401.

(*e*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 2 ; London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 6(3). As to the penalties incurred by proprietors, drivers and conductors if the necessary licences are not held, see Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 7, 8 ; London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 10 ; the latter provision deals also with the employment of unlicensed drivers and conductors in case of necessity. A manager of an omnibus company on ceasing to be employed is entitled to have his name removed from the number plates affixed to the omnibuses (*Hodges v. London Trams Co.* (1883), 12 Q. B. D. 105).

(*f*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 6, 11. As to the Commissioner of Metropolitan Police, see title POLICE, Vol. XXII., pp. 469 *et seq.* ; as to the powers and duties of the Home Secretary generally, see title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.*

(*g*) London Cab Act, 1896 (59 & 60 Vict. c. 27), s. 3 ; London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 6(1).

(*h*) As to the meaning of "Metropolis," see title METROPOLIS, Vol. XX., p. 392.

(*i*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 4 ; compare London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), s. 4 ; London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 2. It is immaterial whether the carriage is propelled by animal or mechanical power (London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 6(2)).

(*j*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 4.

(*k*) *Ibid.*, s. 5.

(*l*) London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 3. Such an order is now in force (Order of 30th December, 1907, s. 14 ; Stat. R. & O., 1907, p. 714).

SECT. 4.
Metropolitan
Hackney
and Stage
Carriages.

Form of
licence.

Marking of
licensed
carriages.

Regulations
affecting
hackney or
stage
carriages.

light railway cars are subject to the same provisions as stage carriages (*m*).

Subject to certain statutory provisions as to duration, maximum fees, and transfers on death or marriage of an owner, any licence in respect of a hackney or stage carriage, or to a driver or conductor, may be granted at such price, on such conditions, be in such form, be subject to revision or suspension in such events, and generally be dealt with in such manner, as the Home Secretary may prescribe (*n*). The discretion of the Commissioner of Metropolitan Police, acting as the Home Secretary's deputy, in granting licences, is not a general discretion, but is limited by the terms of the order under which he acts (*o*).

Licensed carriages must bear such distinguishing mark as the Home Secretary may prescribe (*p*).

630. The Home Secretary may, subject to certain restrictions, make regulations (*q*) as to the number of persons to be carried in a hackney or stage carriage, the manner in which such number is to be indicated on the carriage, and the fitting of hackney carriages; for fixing the stands for hackney carriages, the distances to which they may be required to drive, and the persons to attend at such stands (*r*); for fixing the rates or fares, for time or distance, to be paid for hackney carriages, whether ordinary or fitted with taximeters (*s*), and for securing the publication of such fares; for forming a table or book of distances (*t*); and as to the method of

(*m*) London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 5: Order of 30th December, 1907 (Stat. R. & O. 1907, p. 714), s. 14.

(*n*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 6, 8, 15.

(*o*) *R. v. Metropolitan Police Commissioner, Ex parte Holloway*, [1911] 2 K. B. 1131, C. A., overruling *R. v. Metropolitan Police Commissioner, Ex parte Pearre* (1910), 80 L. J. (K. B.) 223; see also *R. v. Police Commissioner, Ex parte Randall, Same v. Same, Ex parte Humphreys* (1911), 27 T. L. R. 505.

(*p*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), ss. 6, 7, 15; Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 17.

(*q*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 9. As to the penalties for breach, see *ibid.*, s. 10. As to the effect of such regulations on existing statutory provisions, see *ibid.*, s. 15.

(*r*) As to the duties of attendants at stands and stopping places for hackney and stage carriages, their appointment and wages, and the laying on of water at such stands, see the London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 12, 13.

(*s*) London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 1, which provides that for horse cabs fitted with taximeters the fare must not be less than 6d. per mile or per period of twelve minutes, and no fare is to be less than 6d.; for definitions of "fare" and "taximeter," see *ibid.*, s. 6 (1). In the case of other cabs a minimum fare of 1s. appears to be still fixed by statute (Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 26). Subject to regulations as to fares, the London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 4, 7, appear to still apply (Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 15). Two children under ten years of age are to be paid for as one adult (London Hackney Carriage (No. 2) Act, 1853 (16 & 17 Vict. c. 127), s. 14), but if only one such child is carried, he is to be paid for as if he were an adult (*Norton v. Jones* (1863), 8 L. T. 241).

(*t*) As to the duty of drivers to carry such book, and its admissibility in evidence, see London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 5, 6, 19.

dealing with property accidentally left in hackney or stage carriages (*u*).

Regulations so made override earlier statutory enactments inconsistent with them; but such enactments, if not expressly repealed, continue in force so far as they are not impliedly varied by the regulations (*w*).

Special regulations have been made as to the conduct of motor cab drivers upon stands (*x*).

SECT. 4.
Metropolitan
Hackney
and Stage
Carriages.

Part V.—Locomotives and Motor Cars.

SECT. 1.—Definitions and Statutes.

631. The term “locomotive” means a locomotive propelled by steam or by other than animal power (*a*); it includes a steam roller (*b*). “Locomotive.”

632. Road locomotives fall into two main classes—heavy locomotives and light locomotives. The term “heavy locomotive” (*c*), though not recognised by statute, is almost universally used to denote any locomotive not within the statutory definition of a “light locomotive” or “motor car” (*d*). “Heavy locomotive.”

(*u*) As to the statutory provisions on this point applicable unless overridden by regulations, see London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 11, 19.

(*w*) Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 15. As to the relevant statutory enactments, see note (*c*), p. 293, *ante*.

(*x*) See the Order of the Commissioner of Metropolitan Police of the 8th April, 1908 (*London Gazette*, 10th April, 1908); see *Willingale v. Norris*, [1909] 1 K. B. 57.

(*a*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38; Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 17 (1).

(*b*) *Allman v. Grist* (1891), 55 J. P. 724; *London County Council v. Wood*, [1897] 2 Q. B. 482; *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Worcester Corporation*, *A.-G. v. Sharpness New Docks and Gloucester and Birmingham Navigation Co.*, [1913] 1 K. B. 422.

(*c*) The chief enactments regulating the use of heavy locomotives are (i.) the Locomotive Act, 1861 (24 & 25 Vict. c. 70), of which ss. 5 (prohibition of dangerous or destructive locomotives), 9 (persons in charge and lamps), 11 (speed limit), and 15 (extent of Act), and the orders made under them, were repealed by the Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 2, but would revive if that Act ceased to be continued; these provisions are ignored in this title; (ii.) the Locomotives Act, 1865 (28 & 29 Vict. c. 83), an annual Act (see *ibid.*, s. 1), which, by *ibid.*, s. 13, is to be construed as one with the Locomotive Act, 1861 (24 & 25 Vict. c. 70); (iii.) the Locomotives Act, 1898 (61 & 62 Vict. c. 29); (iv.) the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), Part II. of which is only in force so long as the Locomotives Act, 1865 (28 & 29 Vict. c. 83), is in force: the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28 (4), is varied by certain orders made by the Local Government Board dated respectively the 21st November, 1903, and the 7th August, 1905. There are also bye-laws made under the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6, by the councils of counties and large boroughs.

(*d*) As to this definition, see the text, p. 306, *post*.

SECT. 1.
Definitions
and
Statutes.

"Light
locomotive."

Weight limits
for motor
cars.

633. The terms "light locomotive" (e) and "motor car" (f) are practically (g) synonymous (h). They include, subject to certain limitations as to weight, any vehicle propelled by mechanical power, which is not used for the purpose of drawing more than one vehicle, and which is so constructed that no smoke or visible vapour is emitted therefrom except from some temporary or accidental cause (i).

634. The general weight limits for a motor car are as follows:— If the car is used without a trailer, its weight unladen must not exceed 5 tons; if it draws a trailer, the unladen weights of the car and trailer must not in the aggregate exceed $6\frac{1}{2}$ tons (k). To this rule there are two exceptions, namely:—(1) in the case of military motor cars the limits without and with a trailer are 6 tons and 8 tons respectively (l); (2) a motor car first registered before the 1st Septem-

(e) This term is used in the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36).

(f) This term is used in the Motor Car Act, 1903 (3 Edw. 7, c. 36); the Motor Car (International Circulation) Act, 1909 (9 Edw. 7, c. 37); and the Orders of the Local Government Board and Privy Council.

(g) In the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), the term "light locomotive" includes any vehicle drawn by it; in the Motor Car Act, 1903 (3 Edw. 7, c. 36), the term "motor car" includes any vehicle drawn by it, except for the purposes of the provisions as to registration of cars; in the Motor Car Orders, the term "motor car" does not include a vehicle drawn by it. In the following pages the term "motor car" is used throughout instead of the term "light locomotive," and is used as denoting only the actual motor car, or cycle.

(h) Light locomotives (or motor cars) are, in general, exempt from the operation of the enactments mentioned in note (c), p. 305, *ante*, the only provisions applying being the Locomotive Act, 1861 (24 & 25 Vict. c. 70), ss. 1 (see p. 314, *post*), 7 (see p. 314, *post*), and 13 (see p. 315, *post*); see Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, Sched.; Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 17 (2). They are also exempt from the provisions of any other public or local Act passed prior to the 14th August, 1896, and restricting the use of locomotives on highways. Their use is regulated by the Motor Car Acts, 1896 and 1903 (namely, the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), and the Motor Car Act, 1903 (3 Edw. 7, c. 36), an annual Act; see *ibid.*, s. 20 (3)); the Motor Car (International Circulation) Act, 1909 (9 Edw. 7, c. 37); and the Motor Car (Registration and Licensing) Order, 1903; the Motor Cars (Use and Construction) Orders, 1904, 1909, 1911, and 1912; the Heavy Motor Car Orders, 1904, 1907, and 1911; and the Motor Car (International Circulation) Orders, 1910 and 1912, made thereunder by the Local Government Board and Privy Council. As to the excise duty on motor cars, see title REVENUE, Vol. XXIV., pp. 689 *et seq.*; as to the duty on motor bicycles and motor tricycles, see *ibid.*, p. 689, note (f).

(i) If smoke is emitted owing to improper construction, the vehicle is not a motor car and is subject to the Acts regulating the use of heavy locomotives (*Hindle and Palmer v. Noblett* (1908), 72 J. P. 373); if it is emitted simply owing to careless driving, the vehicle does not on that account cease to be a motor car and lose its exemption (*Star Omnibus Co. (London), Ltd. v. Tagg* (1907), 71 J. P. 352; *R. v. Wilbraham, Ex parte Rowcliffe* (1907), 71 J. P. 336).

(k) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1); Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 12 (1); Heavy Motor Car Order, 1904 (Stat. R. & O., 1904, p. 522), art. 3; *Evans v. Nicholl*, [1909] 1 K. B. 778.

(l) Heavy Motor Car Order, 1904, art. 17 (a); Heavy Motor Car (Amendment) Order, 1911 (Stat. R. & O., 1911, p. 209), art. 1.

ber, 1904, may, if properly re-registered, be still used notwithstanding that its weight unladen exceeds 5 tons, so long as it does not exceed 7 tons (*m*). In the case of a motor car within this exception the weight of any trailer drawn by it is apparently immaterial so long as the axle weight of any axle thereof does not exceed 4 tons (*n*).

A "heavy motor car" is one which exceeds 2 tons in weight unladen (*o*). Such cars are subject to the Heavy Motor Car Order, 1904; but, as regards matters not expressly mentioned in that Order, the other Orders apply so far as they are not inconsistent with its provisions (*p*).

The term "trailer" is commonly used to denote any vehicle drawn by a locomotive, and is recognised by the Heavy Motor Car Order, 1904 (*q*). The term "wagon," when used in connexion with heavy locomotives, includes trucks, carts, carriages and other vehicles (*r*).

In calculating the weight of a vehicle unladen, the weight of any water, fuel or accumulators used for the purpose of propulsion is not to be included (*s*).

635. The term "highway" in the statutes and orders relating to motor cars includes a roadway to which the public are granted access (*t*).

SECT. 1.
Definitions
and
Statutes.

"Heavy
motor car."

"Trailer."

"Wagon."

Weight
unladen.

Highway.

SECT. 2.—*Heavy Locomotives.*

SUB-SECT. 1.—*Registration and Licensing.*

636. A heavy locomotive, not being a steam roller belonging to a road authority and used by it within its district, may not be used on any highway unless it is either licensed or registered in accordance with the following provisions (*a*), which do not, however,

Necessity for
registration
or licensing.

(*m*) Heavy Motor Car Order, 1904, arts. 4 (5), 15 (2); see *Pilgrim v. Simmonds* (1911), 75 J. P. 427.

(*n*) *Pilgrim v. Simmonds*, *supra*.

(*o*) Heavy Motor Car Order, 1904, art. 2.

(*p*) *Ibid.*, art. 16.

(*q*) *Ibid.*, art. 2. The term is so used throughout the portion of this title dealing with light locomotives or motor cars.

(*r*) It is so defined for the purposes of the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 17 (1), and is so used throughout the portion of this title dealing with heavy locomotives.

(*s*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (2); Motor Car (Registration and Licensing) Order, 1903, art. 21 (Stat. R. & O. Rev., Vol. VIII., Locomotive, p. 23); Motor Cars (Use and Construction) Order, 1904, art. 1 (Stat. R. & O., 1904, p. 516); Heavy Motor Car Order, 1904, art. 2.

(*t*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1); Motor Car (Registration and Licensing) Order, 1903, art. 21; Motor Cars (Use and Construction) Order, 1904, art. 1. The Heavy Motor Car Order, 1904, does not contain an express provision to this effect, but this appears to be immaterial; see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31.

(*a*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), ss. 9 (10), 10 (4), (6). The following penalties may be imposed:—for a locomotive which ought to be licensed but is not, not exceeding £10; for one which ought to be registered but is not, not exceeding £5 (*ibid.*). A locomotive working on a tramway laid along a highway is, apparently, not being used on the highway so as to require licensing or registration under these provisions (*Bell v. Stockton etc. Tramway Co.* (1887), 51 J. P. 804).

SECT. 2.
Heavy
Locomotives.

Licensed
locomotives.

affect the provisions of any local Act dealing with the licensing of locomotives (*b*).

637. A heavy locomotive, other than an agricultural locomotive (*c*), a locomotive not used for haulage purposes, a steam roller, or a locomotive belonging to a road authority when used by it within its district, must be licensed by the council of the county or county borough in which it is at the time ordinarily used or to be used (*d*). The licence enures for one year from its date; and the maximum fee therefor is £10, if the weight of the locomotive, exclusive of water and coal, does not exceed 10 tons, with an addition not exceeding £2 for every ton or fraction of a ton beyond that weight (*e*). On the grant of a licence the council must provide the grantee with a licence plate bearing the date, the number of the licence and the council's name (*f*). Such plate must be fixed to the locomotive in a conspicuous position, and must not be removed without the council's consent while the licence is in force; with such consent, however, it may be transferred to another locomotive belonging to the same owner (*g*).

Additional
licence for
other area.

If a locomotive is duly licensed in accordance with the foregoing provisions in some county or county borough, an additional licence therefor may be taken out at a reduced fee in any other county or county borough, in the same manner and subject to the same provisions as in the case of the original licence, except that it will expire on the same date as the original licence (*h*).

Daily fee in
other area.

A locomotive may not be used on any highway in a county or county borough in which it is not licensed, except on payment to the council of that county or county borough of a fee not exceeding 2s. 6d. for each day on which it is so used (*i*).

(*b*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 18 (3).

(*c*) The term "agricultural locomotive" includes any locomotive used solely for threshing, ploughing, or any other agricultural purpose, and any locomotive the property of one or more owners or occupiers of agricultural land employed solely for the purposes of their farms, and not let out on hire (*ibid.*, s. 17 (1)). As to what is an "agricultural purpose," see *Ellis & Co. v. Hulse* (1889), 23 Q. B. D. 24; *Murch v. Baker* (1891), 55 J. P. 583; *Hoddell v. Parker*, [1910] 2 K. B. 323; compare *R. v. Freke* (1856), 5 E. & B. 944; *Foster v. Tucker* (1870), L. R. 5 Q. B. 224.

(*d*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), ss. 9 (1), (2), 17 (1). The Common Council of the City of London is a licensing authority (*ibid.*, s. 17 (3)). As to deciding any dispute as to where the licence should be taken out, see *ibid.*, s. 9 (2). A licence cannot be refused if the locomotive complies with the statutory requirements and bye-laws (*R. v. Middlesex County Council* (1898), 15 T. L. R. 14).

(*e*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 9 (2), (3).

(*f*) *Ibid.*, s. 9 (4).

(*g*) *Ibid.*, s. 9 (5), (6); the penalty for failing to affix, or for removing the plate, is a sum not exceeding £10 (*ibid.*, s. 9 (10)).

(*h*) *Ibid.*, s. 9 (7), (8).

(*i*) *Ibid.*, s. 9 (9); the penalty is a sum not exceeding £10 (*ibid.*, s. 9 (10)). The effect of the foregoing provisions is that the locomotive must be licensed in its own area; if used in another area, it must either have an additional licence for that area or must pay a daily fee. A steam roller merely passing through an area is being "used" there (*London County Council v. Wood*, [1897] 2 Q. B. 482).

638. A heavy locomotive not requiring to be licensed under the foregoing provisions must, unless it be a steam roller belonging to a road authority and used by the authority within its district, be registered in the county or county borough in which it is ordinarily used or to be used in such manner as the council of that county or county borough may direct (*k*). A fee not exceeding 2s. 6d. may be charged for registration, and the council must provide the applicant with a plate bearing the registered number of the locomotive (*l*). Such plate must be fixed in a conspicuous position on the locomotive, and must not be removed without the council's consent (*m*).

SECT. 2.

Heavy
Locomotives.Registered
locomotives.

639. Fees for licences and registration go to the county fund, or, in a county borough, to the borough fund (*n*). Application of fees.

640. It is an offence to counterfeit or tamper with a licence plate or registration place, to cause anyone else to do so, or knowingly to use a plate which has been counterfeited or tampered with (*o*). Tampering with plates.

SUB-SECT. 2.—*Construction and Weight of Locomotives.*

641. Every heavy locomotive, even though exempt from licensing or registration, must bear in a conspicuous manner the owner's name and residence (*p*), and a statement as to its weight (*q*). Name and weight plate.

642. A heavy locomotive may not be used on any highway unless it complies with the following provisions (*r*): (1) A locomotive not drawing any wagon and not exceeding 3 tons in weight must have the tires of its wheels not less than 3 inches in width, with an additional inch for every ton or fraction thereof above the first 3 tons (*s*); (2) a locomotive drawing any wagon Width of tires.

(*k*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 10 (1), (6). The Common Council of the City of London is a registration authority (*ibid.*, s. 17 (3)). Steam engines authorised by statute to be used on tramways do not require to be licensed (*Bell v. Stockton etc. Tramway Co.* (1887), 51 J. P. 804).

(*l*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 10 (2).

(*m*) *Ibid.*, s. 10 (3); the penalty for failing to affix or for removing is a sum not exceeding £5 (*ibid.*, s. 10 (4)).

(*n*) *Ibid.*, ss. 9 (11), 10 (5), 17 (1). As to the City of London, see *ibid.*, s. 17 (3); as to the county fund, see title LOCAL GOVERNMENT, Vol. XIX., pp. 358, 359.

(*o*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 11.

(*p*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 12; Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 7. For failure to affix name the penalty is apparently one not exceeding £5; for failure to affix residence, not exceeding £2 (*ibid.*). The mere fact that an engine bears the owner's name does not render him liable for negligent use of it by a hirer (*Smith v. Bailey* (1892), 56 J. P. 116, disapproving *Stables v. Eley* (1825), 1 C. & P. 614).

(*q*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 12. The penalty for failure to affix is a sum not exceeding £5; for fraudulently affixing an incorrect weight, a sum not exceeding £10 (*ibid.*).

(*r*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28; the penalty for using a locomotive contrary to such provisions is a sum not exceeding £5 (*ibid.*). As to excessive weights on highways, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 173, 174. As to the requirements as to smoke consumption and as to nuisances arising from the smoke of locomotives on highways, see title NUISANCE, Vol. XXI., p. 546.

(*s*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28 (1).

SECT. 2.

Heavy
Locomotives.Maximum
width and
weight.

must, if constructed since the 16th August, 1878, have the tires of its driving wheels not less than 2 inches in width for every ton of its weight, unless the diameter of such wheels exceeds 5 feet, when the width of the tires may be reduced in the same proportion as the diameter is increased, but in such case the width of the tires must not be less than 14 inches (a); (3) a locomotive may not without special sanction exceed 9 feet in width or 14 tons in weight (b); (4) the driving wheels of a locomotive must be cylindrical, and either (i.) smooth-soled, or (ii.) shod with diagonal crossbars of not less than 3 inches in width nor more than $\frac{3}{4}$ inch in thickness, extending the full breadth of the tire, the space intervening between each such crossbar not to exceed 3 inches, or (iii.) shod with wooden blocks satisfying certain requirements, or (iv.) provided with a single row of movable feet satisfying certain requirements (c).

SUB-SECT. 3.—Construction, Weight, and Loads of Wagons.

Weight of
load and
width of tires.

643. No wagon drawn or propelled by a heavy locomotive may, unless it has cylindrical wheels (d), carry any greater weight than is permitted by the Turnpike Roads Act, 1822 (e), for such a carriage; if it has cylindrical wheels (d) it may not carry, over and above its own weight, any greater weight than $1\frac{1}{2}$ tons for each pair of wheels, unless the fellies, tires or shoes are 4 inches or more in breadth, nor any greater weight than 2 tons for each pair of wheels, unless the fellies, tires or shoes are 6 inches or more in breadth, nor any greater weight than 3 tons for each pair of wheels, unless the fellies, tires or shoes are 8 inches or more in breadth, and for every single wheel one-half of that permitted to be carried on a pair of wheels, and in no case may it carry a greater weight than 4 tons on each pair of wheels or 2 tons on each wheel; but if it has springs upon each axle, one-sixth more weight is permissible on each pair of wheels (f). These limits do not apply to any wagon carrying only one block, plate, cable, roll, vessel of stone

Exceptional
loads.

(a) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28 (2). A proviso to *ibid.*, s. 28, permits the use of a locomotive constructed before the passing of the Act if its tires are at least 9 inches in width.

(b) *Ibid.*, s. 28 (3), and proviso. The use of larger locomotives may be specially sanctioned by the Common Council of the City of London and the councils of counties, county boroughs, and larger quarter sessions boroughs (*ibid.*; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (8), 35 (4) (a), 40 (8), 41 (4) (a)).

(c) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28 (4); Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 7; Order of Local Government Board, 21st November, 1903 (wheels with wooden blocks); Order of Local Government Board, 7th August, 1905 (wheels with movable feet). For decisions upon earlier enactments as to "shoes," see *Stringer v. Sykes* (1877), 41 J. P. 296; *Body v. Jeffery* (1878), 42 J. P. 121. The use in frosty weather of metal spikes which damage the road is a breach of the statutory provision (*Milne & Co. v. MacLennan* (1902), 4 Fraser (Justiciary Cases), 79).

(d) For a definition of cylindrical wheels, see the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 9, referred to in the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 1.

(e) Turnpike Roads Act, 1822 (3 Geo. 4, c. 126); see *ibid.*, ss. 12—14, 16.

(f) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 4.

or metal or other single article exceeding 16 tons in weight, but the fellies, tires, or shoes of the wagon must not be less than 8 inches in breadth; and any damage arising from its use is to be deemed damage caused by excessive weight within the meaning of the statutory provisions as to extraordinary traffic and excessive weight (*g*).

SECT. 2.
Heavy
Locomotives.

644. The council of a municipal borough as regards any highway within it, and the council of any county as regards any highway within it and not within a borough, may permit a wagon to carry weights in excess of those mentioned above (*h*); for such purpose a council may act through its surveyor or other authorised officer (*i*). Permission to exceed limit.

A person who without such permission uses on any highway a wagon to carry weights in excess of those above mentioned, or being the owner thereof permits it to be so used, is liable to a penalty not exceeding £10 (*k*).

The weight unloaded of every wagon drawn or propelled by a heavy locomotive must be conspicuously and legibly affixed thereto (*l*). Weight plate.

645. Road authorities may erect weighing machines, and may by their servants require persons in charge of heavy locomotives and wagons to take the same to such machines to be weighed (*m*). If the weight is found to be within the authorised limits, the authority must pay for any loss caused by the delay (*n*). Certificates of weight are to be given, conferring exemption from weighing during the continuance of the same journey (*o*). Weighing machines.

SUB-SECT. 4.—*Conditions of and Restrictions on Use.*

646. A heavy locomotive may not be used on any highway to draw more than three loaded wagons, exclusive of any wagon solely used for carrying water for the locomotive, without the consent, so far as regards highways in a borough, of the council of the borough, and, so far as regards other highways, of the county council (*p*). Number of wagons.

(*g*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 1 (3). As to "excessive weight" and "extraordinary traffic," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 172 *et seq.*

(*h*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 1 (1).

(*i*) *Ibid.*, s. 14.

(*k*) *Ibid.*, s. 1 (2).

(*l*) *Ibid.*, s. 2; the penalty on the owner for failure to affix is a sum not exceeding £5; for fraudulently affixing incorrect weight, a sum not exceeding £10 (*ibid.*).

(*m*) *Ibid.*, s. 4 (1); the penalty for failing to comply with such a requirement is a sum not exceeding £10 (*ibid.*). An authority may borrow for the purpose of providing weighing machines (*ibid.*, s. 4 (3)).

(*n*) *Ibid.*, s. 4 (1), (2).

(*o*) *Ibid.*, s. 4 (2).

(*p*) *Ibid.*, s. 3 (1); the penalty for using, or, in the case of an owner, for permitting to be used, in contravention, is a sum not exceeding £10 (*ibid.*, s. 3 (2)). The consent may be given by the council's surveyor or other authorised officer (*ibid.*, s. 14).

SECT. 2.

Heavy
Locomotives.Number of
attendants.

647. When a heavy locomotive is passing on any highway, the following rules must be observed (*q*) :—

(1) Two persons must be employed in driving or attending to it; (2) except in the case of a steam roller, another person (*r*) must be employed to accompany it in such a manner as to be able to give assistance to any person with horses or horse-drawn carriages, and must give such assistance when required; (3) if it is drawing more than three wagons another person must be employed to attend to the wagons.

So long as a heavy locomotive has its fires alight, or contains in itself sufficient motive power to move it, one person must remain in attendance whilst it is on any highway, although stationary (*s*).

Lights.

648. A heavy locomotive worked on a highway must carry two efficient lights affixed conspicuously, one on each side, on the front thereof (*t*), and also an efficient red light on the rear of the locomotive, or, if it is drawing wagons, on the rear of the last wagon, fixed in such a manner as to be conspicuous (*a*). The lights required to be carried on a locomotive or its wagons, whether stationary or passing on any highway, must be carried between the hours of one hour after sunset and one hour before sunrise from the 1st April to the 30th September, and between sunset and sunrise from the 1st October to the 31st March (*a*); they must be fitted with such shutters or other contrivances as will enable the light to be temporarily screened in an effective manner (*a*).

Safety of
other traffic.

649. When a heavy locomotive is being worked on a highway, the following provisions must be observed (*b*) :—

(1) The driver must give as much space as possible for the passing of other traffic; (2) the whistle must not be sounded; the cylinder taps must not be opened within sight of any person riding, driving, leading, or in charge of, a horse on the road; the steam must not be allowed to attain a pressure exceeding the limit fixed by the safety valve, so that no steam may blow off when the locomotive is on the road; (3) it must be instantly stopped on any person with a horse or horse-drawn carriage putting up his hand as a signal for it to be stopped.

Speed.

650. A heavy locomotive may not be driven along any highway at a speed greater than four miles an hour, or through

(*q*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 5 (1). There is a special proviso in favour of locomotive plough engines (*ibid.*). The penalty on the owner is a sum not exceeding £10 (*ibid.*, s. 5 (5)).

(*r*) Under a similar provision a boy has been held in Scotland not to be a "person," *i.e.*, not a competent person (*Smith v. Wood* (1882), 10 *Rettie* (Justiciary Cases), 31, 33). A person leading a pony and cart may be a sufficient attendant (*Davis v. Brown* (1879), 43 J. P. 416).

(*s*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 5 (2); the penalty on the owner is a sum not exceeding £10 (*ibid.*, s. 5 (5)).

(*t*) Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 3; the penalty on the owner is a sum not exceeding £10 (*ibid.*).

(*a*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 5 (3), (4); the penalty on the owner is a sum not exceeding £10 (*ibid.*, s. 5 (5)).

(*b*) Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 3; the penalty on the owner is a sum not exceeding £10 (*ibid.*).

any city, town, or village at a speed greater than two miles an hour (c).

651. The council of a county, a county borough, or a non-county borough containing in 1881 a population of 10,000, may by bye-law (d) (1) prohibit or restrict the use of heavy locomotives on any specified highway in the county or borough, on account of its being crowded or unfitted for locomotive traffic, or of the inconvenience caused to the inhabitants, or of any other reasonable cause; (2) regulate the use of heavy locomotives and of wagons drawn by them in any highway within the county or borough; (3) prohibit or restrict the use of a heavy locomotive on any specified bridge (e) within the county or borough, if satisfied that it is unsuited for such traffic, or that such use would be attended with damage to the bridge or danger to the public.

Such a council, where a bye-law prohibits the use of a locomotive on any highway, may give special permission for its use thereon, if in any case it appears necessary for any particular purpose; but if a bridge is to be used, the council must first obtain the consent of the person liable to repair the same, and may, with such consent, give its permission subject to payment of the cost of temporarily strengthening the bridge (f).

652. It is unlawful for the owner or driver of any heavy locomotive to drive it over any suspension bridge, or over any bridge on which a conspicuous notice has been placed by the surveyor or persons liable to repair the bridge that it is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor, bridgemaster, or persons liable to repair (g).

SECT. 2.

Heavy
Locomotives.

Bye-laws
restricting
use :
on highways ;

on bridges.

Heavy
locomotives
use on bridges.

(c) Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 4; the penalty is a sum not exceeding £10 (*ibid.*). This provision was held applicable to a railway engine running over lines laid along a highway between a station and a pier (*London and South Western Rail. Co. v. Myers* (1881), 45 J. P. 731).

(d) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6 (1), (6). The Corporation of the City of London may make similar bye-laws (*ibid.*, s. 6 (5)). A penalty for breach of a bye-law may be imposed not exceeding £5 (*ibid.*, s. 6 (2)). As to the making and confirmation of bye-laws, matters to be considered by the Local Government Board when asked to confirm them, representations to and inquiries by the Board etc., see *ibid.*, ss. 6 (3), (4), 15. The Board has issued model bye-laws under this provision. As to bye-laws generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*

(e) Under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 31, certain councils could by bye-law prohibit the use of heavy locomotives on specified bridges. A bye-law so made would appear to be still operative as to any particular bridge as to which no bye-law has been made under the powers here stated; see Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 18 (1), (2). A locomotive hauling wagons across a bridge, but not itself crossing the bridge, is not "using" it (*Dawson v. Cruit* (1884), 48 J. P. 148). As to extraordinary traffic, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 174 *et seq.*

(f) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6 (1). The permission may be given by the council's surveyor or other authorised officer (*ibid.*, s. 14).

(g) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 6. Apparently this provision can only be enforced by indictment or action for an injunction.

SECT. 2.

Heavy
Locomotives.Appeal
against
restrictions.

653. If an owner of a locomotive is aggrieved by any restriction or prohibition placed on the passing of locomotives over any bridge, either under the provision just stated or any bye-law (*h*), he may appeal to the Local Government Board, or, if the bridge be repairable by a railway company, to the Board of Trade (*i*). The Board, if it considers that the bridge is sufficient to bear locomotives, and that there is no other reasonable cause for imposing the restriction or prohibition, may order such restriction to be removed or varied, and the order must be complied with (*k*). If, however, circumstances alter, the prohibition or restriction may be reimposed, subject to a like appeal (*l*).

Menai Bridge.

654. No heavy locomotive may be driven over the Menai Bridge when prohibited by official notice thereon, and no appeal lies against any such prohibition (*m*).

Passing other
locomotives.

655. No heavy locomotive may be taken across any bridge so as to meet or pass any other locomotive on such bridge (*n*).

Liability for
damage to
bridges.

656. If damage is done by a locomotive (*o*), or a wagon drawn by it, to any bridge vested in or repairable by persons other than a highway authority, such persons are by statute relieved of any liability to repair the damage, or to pay compensation in respect of any resulting obstruction or delay to users of the bridge, or of the river, canal, or railway crossed by it. The owner, and the person in charge, of the locomotive are liable for repair of the bridge, and are also liable to pay compensation in respect of the obstruction and delay (*p*).

SUB-SECT. 5.—Miscellaneous.

Tolls.

657. The Locomotive Act, 1861 (*q*), fixed the scale of tolls to be charged under any Turnpike or Public Bridge Act in respect of locomotives or vehicles drawn by them, and repealed (*r*) existing scales, but without prejudice to any tolls authorised to be taken in

As to its effect, see *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Worcester Corporation*, *A.-G. v. Sharpness New Docks and Gloucester and Birmingham Navigation Co.*, [1913] 1 K. B. 422.

(*h*) See p. 313, *ante*.

(*i*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 7 (1), (6).

(*k*) *Ibid.*, s. 7 (1), (2). As to the method of determining appeals, see *ibid.*, s. 7 (3), (5); as to inquiries by the Board, see *ibid.*, s. 15.

(*l*) *Ibid.*, s. 7 (4).

(*m*) *Ibid.*, s. 16; the penalty is a sum not exceeding £5 (*ibid.*). The Commissioners of Works have issued regulations (19th March, 1909) as to the use of motor cars on this bridge.

(*n*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 8; the penalty is a sum not exceeding £5 (*ibid.*).

(*o*) Whether "heavy" or "light"; see pp. 305 *et seq.*, *ante*.

(*p*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 7; see *R. v. Kitchener* (1873), L. R. 2 C. C. R. 88, deciding that this provision does not apply to a county bridge. As to the repair of bridges generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 188 *et seq.*

(*q*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 1. This provision applies to motor cars (Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, Sched.); see note (*h*), p. 306, *ante*.

(*r*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 2.

respect of private roads or private bridges or the roads comprised in the Commercial Roads Continuation Act, 1849 (*s*).

Vehicles drawn by heavy locomotives and containing materials exempted from toll under any statute applicable to horse-drawn vehicles are entitled to the same exemption (*t*).

658. The provisions of any general or local Act relating to highways apply to heavy locomotives, or vehicles drawn by them and their owners, drivers and attendants, as if they were drawn by animal power, so far as those provisions are not altered by, or inconsistent with, the provisions of the statutes regulating the use of such locomotives (*u*).

A locomotive may be requisitioned as a carriage for military purposes in case of emergency (*w*).

The statutory restrictions as to the use of engines and machinery within 25 yards of a road unless screened from view (*x*) do not prohibit the use of locomotives for ploughing within that distance, if a person is stationed in the road to signal to the driver when it is necessary to stop and to assist horses and carriages, so long as the driver does stop in proper time (*a*).

659. The use of steam locomotives in any street constructed under the Thames Embankment Act, 1862 (*b*), is prohibited (*c*).

660. Nothing in the Locomotives Acts, 1861 and 1865 (*d*), is to authorise the use on a highway of any locomotive, heavy or light (*e*), which is so constructed or used as to cause a public or private nuisance (*f*).

661. The Crown is not bound by the Acts relating to heavy locomotives or by bye-laws made thereunder (*g*).

SUB-SECT. 6.—*Liability of Owner and Servants.*

662. Where an offence under any Act or bye-law relating to heavy locomotives on highways, for which the owner of a locomotive

SECT. 2.
Heavy
Locomotives.

Exemptions.
Application
of Highway
Acts and
other statutes.

Thames
Embank-
ment.
Nuisance.

Crown.

Liability of
owner and
servants.

(*s*) 12 & 13 Vict. c. lxxvi.

(*t*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 10. As to tolls generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 62 *et seq.*

(*u*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 12.

(*w*) Army (Annual) Act, 1909 (9 Edw. 7, c. 3), s. 5; Army Act (44 & 45 Vict. c. 58), s. 115; see title ROYAL FORCES, Vol. XXV., pp. 48 *et seq.* As to the Army Act, see *ibid.*, p. 30, note (*s*).

(*x*) See p. 275, *ante*.

(*a*) Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 6.

(*b*) 25 & 26 Vict. c. 93.

(*c*) *Ibid.*, s. 41, which does not apply to motor cars (Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, Sched.; Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 11).

(*d*) 24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; see p. 305, *ante*.

(*e*) This provision applies to motor cars; see p. 306, *ante*.

(*f*) Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 13; Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 12; as to locomotives "skidding," see note (*g*), p. 333, *post*; as to fires caused by sparks from locomotives, see title NUISANCE, Vol. XXI., p. 403, note (*d*).

(*g*) *Cooper v. Hawkins*, [1904] 2 K. B. 164; compare *Hornsey Urban Council v. Hennell*, [1902] 2 K. B. 73; *Gorton Local Board v. Prison Commissioners* (1887), [1904] 2 K. B. 165, n. As to motor cars, see p. 333, *post*. As to the extent to which the Crown is bound by statute, see title STATUTES, pp. 164 *et seq.*, *ante*.

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tives.

or wagon is liable to a penalty, has in fact been committed by some servant, workman or other person, that person is liable to the same penalty (*h*).

Where an owner is charged with any such offence, he may, upon information duly laid by him, have any other person whom he charges as the actual offender brought before the court at the time fixed for hearing the charge, and if, after the commission of the offence has been proved, the owner satisfies the court that he used due diligence to enforce the execution of the Act, and that the other person committed the offence without his knowledge, consent or connivance, such other person must be convicted, and the owner is exempt from any fine (*i*).

SUB-SECT. 7.—*Appeals*.

Appeals.

663. An appeal lies to quarter sessions against any conviction under the Highways and Locomotives (Amendment) Act, 1878 (*j*). In the Metropolis there is a similar right in the case of any penalty exceeding £3 (*k*). Except as above mentioned, there appears to be no right of appeal to quarter sessions under the Acts regulating heavy locomotives (*l*).

SECT. 3.—*Motor Cars (or Light Locomotives)*.

SUB-SECT. 1.—*Registration of Cars*.

Necessity for
registration.

664. All motor cars used on a highway, or roadway to which the public are granted access, must, with the exception of certain cars "on trial" (*m*), be registered, and must carry identification plates (*n*). A trailer drawn by a motor car does not require registration (*o*).

The register.

In general (*p*), a motor car must be registered with the council of a county or county borough (*q*). Every such council must keep a register for the registration of motor cars, and has assigned to it a letter or combination of letters as a distinguishing index mark (*r*). The register, for which a form is prescribed, must be kept in two parts at least, one being reserved for heavy motor cars; and may,

(*h*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 13 (1).

(*i*) *Ibid.*, s. 13 (2).

(*j*) 41 & 42 Vict. c. 77, s. 37. As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*k*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 50.

(*l*) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19, only applies where imprisonment can be ordered without the option of a fine; see title MAGISTRATES, Vol. XIX., p. 642.

(*m*) As to these, see p. 319, *post*.

(*n*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2. As to the meaning of "motor car" and "trailer," see pp. 306, 307, *ante*.

(*o*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1).

(*p*) The exceptions are (i.) cars on trial (see p. 319, *post*), and (ii.) foreign cars temporarily in the United Kingdom (see p. 334, *post*).

(*q*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (1). The clerk or other authorised officer of the council may perform any duty or exercise any power of the council under the Motor Car (Registration and Licensing) Order, 1903 (Stat. R. & O., 1903, p. 986); see *ibid.*, art. 20.

(*r*) Many councils have now more than one such mark.

if the council sees fit, be kept in three parts, one being reserved for motor cycles (*s*).

665. The owner of a motor car desiring to register it with any council must with his application furnish certain prescribed particulars (*t*); and a fee of 20s., or, in the case of a motor cycle 5s., must be paid before it can be registered (*u*). The council on receipt of any such application with the required particulars and fee must forthwith assign a separate number to the car, register it by making the required entries in the register, and furnish the owner with a copy of such entries (*a*).

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Motor Cars
(or Light
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tives).

Registration.

666. If the ownership of a car is changed, notice of the change must be given either by the new or by the old owner to the registering council and an application made to either cancel the registration or to continue it under the new ownership. If the only application made is for cancellation, the registration must be cancelled; if an application is made for continuance, the new owner must furnish the necessary particulars as to ownership, and on receipt of a fee of 5s., or, in the case of a motor cycle 1s., the council must alter the register, and furnish the new owner with a copy of the altered entries. If the above provisions are not complied with the registration of the car becomes void. The notice may be given, and the application or alteration made, before the date of the actual change of ownership, so as to operate from that date (*b*). If any circumstance, other than a change of ownership, occurs in relation to any car affecting the accuracy of any particulars entered as respects that car in the register, the owner must forthwith inform the registering council, which must without charge forthwith cause the entries to be amended and furnish the owner with a copy of the entries as so amended (*c*). If a council is satisfied that a motor car registered with it is destroyed, broken up, or permanently removed from the United Kingdom, or registered with another authority, or if the owner requests the council in writing to cancel the registration, except where in case of change of ownership there is an application to continue it, the council must cancel the entries relating to the car; and may, if it sees fit, assign the same registered number to any other motor car, whether belonging to the same or another owner (*d*).

Change of
ownership.

667. An identification mark indicating the registered number of the car and the registering council must be fixed on the car, or

Identification
mark.

(*s*) Motor Car (Registration and Licensing) Order, 1903, art. 1, Scheds. I., II.; Heavy Motor Car Order, 1904, art. 15 (1), Sched.

(*t*) Motor Car (Registration and Licensing) Order, 1903, art. 2, Sched. III.; Heavy Motor Car Order, 1904, art. 15 (1), Sched.

(*u*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (3); Motor Car (Registration and Licensing) Order, 1903, art. 2.

(*a*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (1); Motor Car (Registration and Licensing) Order, 1903, art. 3.

(*b*) Motor Car (Registration and Licensing) Order, 1903, art. 4.

(*c*) *Ibid.*, art. 5.

(*d*) *Ibid.*, art. 6.

SECT. 3. Motor Cars (or Light Locomo- tives). <hr/> Front and back plates.	<p>on a vehicle drawn by it, or on both, in such manner as the council requires in conformity with the following regulations (e) :</p> <p>The mark to be carried by a motor car must consist of two plates (f) bearing the council's index mark followed by the car's registered number, and conforming as to lettering, numbering and otherwise with prescribed conditions (g). The plates must be fixed, one on the front and the other on the back of the car, in an upright position, so that every letter or figure is upright and easily distinguishable from the front of the car and from behind the car respectively ; but in the case of a motor cycle of a weight unladen not exceeding 3 cwt. the front plate may be one with duplicate faces so fixed that the letters or figures are easily distinguishable from either side, though not from in front of the cycle. Subject to the foregoing provisions, the plates are to be fixed in the position indicated in the particulars furnished to the council on application for registration or subsequently, or, if the council is not satisfied with the position so indicated, in such position as it directs. So long as the provisions of the Order are complied with, different plates may be used on a car by day and night or on different occasions (h). When another vehicle is attached to a motor car either in front or behind, the plate required to be fixed on the front or on the back of the car, or a duplicate thereof, must be fixed on the front or on the back of the vehicle attached, as the case requires, in the same manner as the plate is required to be fixed on the car (i). Whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway, a lamp must be kept burning on the car, so contrived as to illuminate by reflection, transparency or otherwise, and render easily distinguishable every letter or figure on the plate fixed on the back of the car, or of any vehicle attached to its back ; but in the case of a motor cycle of a weight unladen not exceeding 3 cwt. the front plate may, if preferred, be thus illuminated instead of the back plate (j).</p> <p>A registering council may supply and charge for plates (k).</p> <p>668. If a motor car is used on a highway without being registered, or if the identification mark required to be fixed in accordance with the Motor Car Act, 1903 (l), is not so fixed, or if being so fixed it is in any way obscured, or rendered or allowed to become</p>
Illumination of mark.	
Penalty for using unregis- tered car.	

(e) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (2).

(f) Instead of plates, a design painted or otherwise shown on the car may be used (Motor Car (Registration and Licensing) Order, 1903, art. 7).

(g) *Ibid.*, art. 7, Sched. IV.

(h) *Ibid.*, art. 8.

(i) *Ibid.*, art. 9.

(j) *Ibid.*, art. 11. As to lamps on motor cars, see, further, pp. 322, 323, *post.* On a prosecution for not having the plate illuminated the defendant may prove as a defence that he has taken all steps reasonably practicable to keep it illuminated (*Printz v. Sewell*, [1912] 2 K. B. 511, following *Brown v. Crossley*, [1911] 1 K. B. 603). The proprietor is responsible if his servants do not fix the lamp in its proper position (*Provincial Motor Cab Co. v. Dunning*, [1909] 2 K. B. 599).

(k) Motor Car (Registration and Licensing) Order, 1903, art. 10.

(l) 3 Edw. 7, c. 36.

not easily distinguishable, the driver is guilty of an offence under the Act, unless, in the case of a prosecution for obscuring a mark or rendering or allowing it to become not easily distinguishable, he proves that he has taken all steps reasonably practicable to prevent it being obscured or rendered not easily distinguishable^(m). A person is not, however, liable to a penalty under this provision (1) if he proves that he has had no reasonable opportunity of registering the car and that it is being driven on the highway for the purpose of being so registered⁽ⁿ⁾; or (2) if he is driving a car which is entitled to bear a general identification mark, and has such a mark fixed upon it in the required manner^(o).

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Motor Cars
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tives).

669. A council in whose area are situated the business premises of any manufacturer of, or dealer in, motor cars, may, upon payment of such annual fee not exceeding £3 as they require, assign to him a general identification mark for use on any car on trial after completion or on trial by an intending purchaser^(p). The mark will be such as the council directs in each case, provided that (1) it must consist of two plates, each bearing the council's index mark and some other distinguishing letter or letters, and each having placed thereon or annexed thereto some distinguishing number; (2) the plates must be coloured differently to the ordinary marks; and (3) the lettering and numbering must as far as possible be similar to those required for the ordinary marks. Whenever the general identification mark is used on a car, the manufacturer or dealer must keep a record of the distinguishing number placed on or annexed to the plates on that occasion, and of the name and address of the driver. If the general mark is used at the same time on more than one car, different distinguishing numbers must be used. The same provisions as to fixing and illuminating the plates apply as in the case of ordinary marks. The council must keep a register of general identification marks assigned by it^(q).

General
identification
marks.

670. A council must on request by any other registering council, or by any police authority, or by any superior officer of police or constable authorised by him, provide free of charge a copy of the entries in its register of cars relating to any specified car, or of the entries in its register of general marks relating to any specified manufacturer or dealer. On payment of a fee of 1s., the council must supply to any other applicant a copy of the entries relating to any specified car, if he shows that he has reasonable cause for requiring such a copy^(r).

Inspection
and copies of
register.

Inland Revenue officers may without charge at all reasonable times inspect the register of cars and take copies of any entries^(r).

^(m) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (4); see *Printz v. Sewell*, [1912] 2 K. B. 511.

⁽ⁿ⁾ Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (4) (a).

^(o) *Ibid.*, s. 2 (4) (b). This proviso is so worded that the driver of a car bearing a general mark is perhaps not liable if the mark is obscured or not easily distinguishable. As to general marks, see the text, *infra*.

^(p) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 (4) (b).

^(q) Motor Car (Registration and Licensing) Order, 1903, art. 12.

^(r) *Ibid.*, art. 13.

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Locomotives).

The record of numbers and of drivers' names and addresses kept by a manufacturer or dealer to whom a council has assigned a general identification mark is open to inspection by the council, and by any superior officer of police, or constable authorised by such officer (s).

Forgery of
marks.

671. Any person who forges, or fraudulently alters, or uses, or fraudulently lends, or allows to be used by any other person, any mark for identifying a motor car is guilty of a statutory offence (t).

SUB-SECT. 2.—*Licensing of Drivers.*

The register
of licences.

672. The council (u) of every county or county borough must grant a licence to drive a motor car to any applicant not otherwise disqualified (a) who resides in its area or satisfies the council that he has no residence in the United Kingdom (b), on payment of a fee of 5s.; and must keep a register of such licences according to a prescribed form (c). The licence lasts for twelve months from the date of its grant; it is renewable, and the same provisions apply to a renewal as to a grant (d). A person under seventeen is disqualified for obtaining a full licence, but if over fourteen he may receive a licence limited to driving motor cycles (e); any person already holding a licence is, while it is in force, disqualified for obtaining another licence (e). Any person whose licence is suspended, or who is declared by a court to be disqualified for obtaining a licence (f), is, during the period of suspension or disqualification, disqualified for obtaining a licence (g).

If any person who is disqualified for obtaining a licence applies for or obtains one whilst so disqualified, or if any person whose licence has been indorsed applies for or obtains a licence without giving particulars of the indorsement, he is guilty of a statutory offence (h).

Application
for licence.

673. Applicants for grants and renewals must furnish to the licensing council the prescribed particulars, and their applications may be received and dealt with at any time within a month before the date on which the grant or renewal is to take effect (i). Forms are prescribed for licences and renewals (k). If a person satisfies

(s) Motor Car (Registration and Licensing) Order, 1903, art. 12.

(t) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 5; as to the penalty, see p. 329, *post*.

(u) A council acts by its clerk or authorised officer; see note (q), p. 316, *ante*.

(a) As to disqualifications, see the text, *infra*.

(b) In certain circumstances foreigners can obtain a licence from the customs officer at a port of landing; see p. 335, *post*.

(c) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 3 (2); Motor Car (Registration and Licensing) Order, 1903, arts. 16, 18.

(d) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 3 (3).

(e) *Ibid.*, s. 3 (5).

(f) Under *ibid.*, s. 4; see p. 329, *post*.

(g) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4 (3).

(h) *Ibid.*, s. 4 (5). As to offences and penalty, see p. 329, *post*. The licence is also void; see p. 321, *post*.

(i) Motor Car (Registration and Licensing) Order, 1903, art. 14.

(k) *Ibid.*, art. 15.

the licensing council that his licence or any renewal thereof has been lost or defaced, the council must on payment of 1s. issue to him a duplicate licence or renewal, including in the case of a duplicate licence any particulars indorsed or entered upon the original licence (*l*).

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tives).

674. Any licensing council must, on application by any other such council, any police authority, any superior officer of police or constable authorised by such officer, forthwith supply free of charge a copy of the particulars in its register relating to any licence. Upon receiving from any court particulars of any conviction of the holder of a licence and of the court's order, the council must send a copy to the police authority for the area in which the holder resides (*m*).

Copies of
entries in
register.

675. No person may drive a motor car on any highway or roadway to which the public are granted access (*n*), unless he is licensed for the purpose, and no person may employ an unlicensed person to drive a motor car (*o*). Any person driving a motor car must produce his licence on demand to any police constable; if he fails to do so, he is liable to a fine not exceeding £5 (*p*).

Driving with-
out licence.

676. A licence suspended by a court (*q*) is of no effect during the term of suspension (*r*); and if any person who, under the provisions of that Act, is disqualified for obtaining a licence (*s*) obtains one while so disqualified, or if any person whose licence has been indorsed (*t*) obtains a licence without giving particulars of the indorsement, such licence is of no effect (*u*).

Void licences.

677. Any person who forges or fraudulently alters, or uses, or fraudulently lends, or allows to be used by any other person, any driver's licence, is guilty of an offence under the Motor Car Act, 1903 (*a*).

Forgery etc.
of licence.

SUB-SECT. 3.—Construction and Use of Motor Cars.

678. No person may cause or permit a motor car (*b*) to be used on any highway or roadway to which the public are granted access, or drive or have charge of a motor car when so used, unless the following conditions are satisfied (*c*):—(1) The motor car, if it exceeds in weight unladen 7 cwt., must be capable of being so worked that it may travel either forwards or backwards (*d*); (2) the motor car

Conditions of
use:—

reversing
gear;

(*l*) Motor Car (Registration and Licensing) Order, 1903, art. 17.

(*m*) *Ibid.*, art. 19.

(*n*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1).

(*o*) *Ibid.*, s. 3 (1); as to the penalty, see p. 329, *post*.

(*p*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 3 (4).

(*q*) Under *ibid.*, s. 4 (1); see p. 329, *post*.

(*r*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4 (3).

(*s*) As to the disqualifications, see p. 320, *ante*.

(*t*) As to indorsement, see p. 329, *post*.

(*u*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4 (3), (5).

(*a*) *Ibid.*, s. 5; as to the penalty, see p. 329, *post*; compare the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 4.

(*b*) As to the special provisions applicable in the case of "heavy motor cars," see p. 330, *post*.

(*c*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1); Motor Cars (Use and Construction) Order, 1904 (stat. R. & O. 1904, p. 516), arts. 1, 2.

(*d*) Motor Cars (Use and Construction) Order, 1904, art. 2 (1); Motor Cars (Use and Construction) Amendment Order, 1911 (Stat. R. & O. 1911, p. 208), art. 1.

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tires;

brakes;

weight plate;

safe
condition;

Lights.

must not exceed 7 ft. 2 in. in width measured between its extreme projecting points (*e*); (3) unless a pneumatic tire or other tire of a soft or elastic material is used, the tire of each wheel must be smooth, and must, where it touches the ground, be flat and of a specified width, varying with the weight of the car (*f*); (4) the motor car must have two independent brakes (*g*) in good working order and of such efficiency that the application of either will cause two wheels on the same axle to be so held as to be effectually prevented from revolving, or will have the same effect in stopping the car as if such wheels were so held; in the case of a car having less than four wheels, this condition applies as if one wheel was referred to therein instead of two wheels on the same axle (*h*); (5) where the weight of a motor car unladen exceeds 15 cwt., and the car is fitted with tires other than pneumatic tires or tires of a soft or elastic material, the weight must be painted on the off side of the car in the prescribed manner (*i*); (6) the motor car and all the fittings thereof must be in such a condition as not to cause, or be likely to cause, danger to any person (*k*).

During the period between one hour after sunset and one hour before sunrise the person in charge of a motor car or trailer must carry attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations made by the Local Government Board (*l*). Such regulations provide that no person may cause or permit a motor car, including a motor bicycle (*m*), to be used on any highway or road to which the public are granted access, or drive, or have charge of a motor car when so used, unless the lamp required to be carried attached to the motor car is so constructed and placed as to exhibit during the period between one hour after sunset and one hour before sunrise a white light visible within a reasonable distance in the direction in which the car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction. It must be placed on the extreme off side in such a position as to be free from all obstruction to the light. Such lamp need not, however, exhibit a red light towards the rear if a separate lamp exhibiting such a light is carried attached at the back of the car (*n*). Lamps on motor cars or

(*e*) Motor Cars (Use and Construction) Order, 1904, art. 2 (2).

(*f*) *Ibid.*, art. 2 (3); if the weight unladen is from 15 cwt. to 1 ton, the width must be 2½ inches at least; if from 1 ton to 2 tons, 3 inches at least; if above 2 tons, 4 inches.

(*g*) In the case of a motor car propelled by steam, which exceeds 2 tons in weight unladen, the engine of the motor car, if capable of being reversed, is deemed to be the second independent brake required (Motor Cars (Use and Construction) Amendment Order, 1913 (Stat. R. & O., 1913, No. 444)). Previously, power to "cut off" the engine, and so lock the wheels, had been held not to be equivalent to a brake (*Wilmott v. Southwell* (1908), 72 J. P. 491).

(*h*) Motor Cars (Use and Construction), Order 1904, art. 2 (4).

(*i*) *Ibid.*, art. 2 (5).

(*k*) *Ibid.*, art. 2 (6).

(*l*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2. As to illuminating the identification mark, see p. 318, *ante*.

(*m*) *Webster v. Terry* (1913), *Times*, 21st October.

(*n*) Motor Cars (Use and Construction) Order, 1904, art. 2 (7).

motor cycles are to be so constructed, fitted and attached as to prevent their movement or use as a searchlight (o).

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tives).

Trailers.

679. No person may cause or permit a motor car to be used on any highway or roadway to which the public are granted access, for the purpose of drawing any vehicle, or drive or have charge of a motor car when so used, unless the following conditions are satisfied:—(1) The conditions applicable to motor cars relating to limit of width, construction of tires, inscription of weight, and condition of cars and fittings, are to apply also to the vehicle drawn (p); (2) every vehicle exceeding 2 cwt. unladen drawn by a motor car must have a brake in good working order of such efficiency that its application will cause two wheels on the same axle to be so held as to be effectually prevented from revolving or will have the same effect in stopping the vehicle as if such wheels were so held (q); (3) a vehicle required by the last provision to have a brake must carry a person competent to apply the same efficiently, unless the application of either of the brakes on the motor car brings simultaneously into action the brake on the vehicle drawn by it, or unless the brake on the vehicle drawn can be applied from the motor car by a person thereon, independently of the brakes on the car (r).

Brakes.

Attendant.

680. Every motor car must be so constructed as to enable the driver, when the car is stationary otherwise than through an enforced stoppage owing to necessities of traffic, to stop the action of any machinery attached to or forming part of the car, so far as may be necessary for the prevention of noise. The driver must on every such occasion make prompt and effective use of all such means for the prevention of noise, except when it is necessary to examine or work the machinery in consequence of some failure or derangement thereof (s).

Power to
stop engine.

681. Every motor car must carry a bell or other instrument capable of giving audible and sufficient warning of its approach or position (t).

Bell or horn.

682. A person may not in any circumstances drive a motor car on a highway or roadway to which the public are granted access (u) at a speed exceeding twenty miles per hour, and within any limits or place referred to in regulations made by the Local Government Board (a), a person may not drive a motor car at a speed exceeding

Speed limit.

(o) Motor Cars (Use and Construction) Order, 1904, art. 2 (7).

(p) *Ibid.*, art. 3 (1); for the conditions referred to, see pp. 321, 322, *ante*.

(q) Motor Cars (Use and Construction) Order, 1904, art. 3 (2).

(r) *Ibid.*, art. 3 (3).

(s) *Ibid.*, art. 5.

(t) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 3.

(u) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1).

(a) As to such regulations, see pp. 326, 327, *post*. A motor "scout" who, finding that a car is exceeding the legal speed limit, warns the driver so that the speed is reduced and the police are thereby prevented from ascertaining the speed, is obstructing the police in the execution of their duty (*Betts v. Stevens*, [1910] 1 K. B. 1, *per* Lord ALVERSTONE, C.J., at p. 6), but not a person who merely warns a driver that there is a police "control" ahead, in

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tives).

ten miles per hour. The penalty is a fine not exceeding for a first offence £10, for a second offence £20, and for any subsequent offence £50 (*b*).

A person cannot be convicted for exceeding the speed limit of twenty miles per hour merely on the opinion (*c*) of one witness as to the rate of speed (*d*); nor for exceeding any speed limit, unless he is warned (*e*) of the intended prosecution at the time when the offence is committed, or unless notice (*f*) of the intended prosecution is sent to him, or to the owner of the car as entered on the register, within such time, not exceeding twenty-one days, after the commission of the offence as the court thinks reasonable (*g*).

Reckless,
negligent or
dangerous
driving.

683. Any person who, on a public highway or roadway to which the public are granted access (*h*), drives a motor car recklessly or negligently or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and to the amount of traffic which actually is at the time or might reasonably be expected to be (*i*) on the road, is guilty of an offence under the Motor Car Act, 1903 (*j*). A police constable may arrest without warrant

the absence of evidence that the car was at the time of the warning exceeding the legal speed (*Betts v. Stevens*, [1910] 1 K. B. 1, *per* Lord ALVERSTONE, C.J., at p. 7; *Bastable v. Little*, [1907] 1 K. B. 59).

(*b*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 9 (1). In Scotland a conviction has been quashed for not indicating with sufficient certainty the *locus* of the offence (*Connell v. Mitchell*, [1909] S. C. (Justiciary) 13). The fact that an owner is driving when stopped at one end of a "trap" is some evidence that he was driving whilst the speed was excessive (*Beresford v. St. Albans Justices* (1905), 22 T. L. R. 1).

(*c*) Evidence given by the holder of a stop watch as to the time taken in travelling between two points is evidence of fact, and not of opinion (*Planck v. Marks* (1906), 70 J. P. 216). For decisions as to accuracy of timing and the measurement of distances, see *Gorham v. Brice* (1902), 18 T. L. R. 424, where evidence as to speed, though timed by an untested watch, was held admissible; *Yeaman v. Jameson*, [1910] S. C. (Justiciary) 8; *Wright v. Dumbartonshire Procurator-Fiscal* (1910), 47 Sc. L. R. 699.

(*d*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 9 (1).

(*e*) Warning that a prosecution will follow unless a comparison of times shows no offence to have been committed is sufficient (*Jessop v. Clarke* (1908), 72 J. P. 358).

(*f*) It has been held in Scotland that this notice should be a written one, and should state particulars of the alleged offence, giving place, date and hour (*Hughes v. Nimmo*, [1910] S. C. (Justiciary) 45). In *Beresford v. St. Albans Justices* (1905), 22 T. L. R. 1, it was held that, in the absence of any evidence that the defendant was misled, a notice alleging an offence between two towns ten miles apart was sufficient. As to service of such a notice on a hall porter at defendant's chambers, see *Martin v. Brooman* (1909), 73 J. P. 484.

(*g*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 9 (2). The prosecution must prove that a warning or notice was given to the accused person (*Dickson v. Stevenson*, [1912] S. C. (Justiciary) 1).

(*h*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 20 (1).

(*i*) These words apparently reproduce the effect of the decisions under the earlier statute of *Smith v. Boon* (1901), 84 L. T. 593, and *Mayhew v. Sutton* (1901), 86 L. T. 18: as to excessive speed in a village street, see also *Ex parte Stone* (1909), 73 J. P. 444.

(*j*) 3 Edw. 7, c. 36, s. 1 (1). As to the penalty, see p. 329, *post*. The provision creates apparently four distinct offences, only one of which can be included in a single conviction (*R. v. Wells* (1904), 68 J. P. 392). In

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a driver who commits such an offence within his view, if he refuses to give his name and address, or produce his licence on demand, or if the car does not bear the identification marks (*k*). If a driver who commits such an offence refuses to give his name or address, or gives a false name or address, he is guilty of an offence under the Motor Car Act, 1903 (*l*); and even though he does not so refuse (*m*), it is the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and arrest of the driver; if he fails to do so, he is guilty of an offence under the Act (*n*).

An owner, who is sitting by his driver and does not interfere to check a speed which he must know to be improper, may be convicted as a principal offender (*o*).

684. A person driving or in charge of a motor car when used on any highway or roadway to which the public are granted access may not cause the motor car to travel backwards for any greater distance or time than may be requisite for the safety or convenience of the occupants and of the passenger and other traffic on the road (*p*); he may not when on the motor car be in such a position that he cannot have control over it, or cannot obtain a full view of the road and traffic ahead of it (*q*); he may not quit the motor car without having taken due precautions to prevent its being started in his absence (*q*); he may not allow the motor car or a vehicle drawn by it to stand on the road so as to cause any unnecessary obstruction thereof (*q*); he must whenever necessary give audible and sufficient

Rules to be observed by driver :
driving backward ;
position of driver ;
quitting car ;
obstruction ;
warning of approach ;

Scotland a conviction for driving "recklessly or negligently" has been quashed for duplicity (*Connell v. Mitchell*, [1909] S. C. (Justiciary) 13). It would seem that the words "having regard etc." apply to all four offences (*Troughton v. Manning* (1905), 69 J. P. 207); further, the words "including the nature etc." appear to be mere surplusage; their omission from a conviction does not vitiate it, nor limit the evidence admissible on an appeal (*R. (Cahill) v. Dublin Justices*, [1904] 2 I. R. 698; *Elwes v. Hopkins*, [1906] 2 K. B. 1). The provision is intended to safeguard passengers on the highway; therefore, if proper regard is being paid to their safety, a driver ought not to be convicted merely because some one choosing to hang on to the car for his own purposes is thereby endangered (*Troughton v. Manning*, *supra*). Although driving at a dangerous speed is an offence in itself, evidence of excessive speed is admissible on a charge of driving in a dangerous manner (*Hargreaves v. Baldwin* (1905), 69 J. P. 397). If, in convicting a defendant of dangerous driving, the court takes into account the question of speed, there cannot on the same facts be a conviction for exceeding the speed limit (*Welton v. Taneborne* (1908), 72 J. P. 419).

(*k*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (2).

(*l*) *Ibid.*, s. 1 (3).

(*m*) If, for example, the driver does not stop and cannot be questioned (*R. v. Hankey* (1905), 69 J. P. 219). The owner's obligation only arises if the driver is alleged to have committed an offence under the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1, and a conviction of the owner must contain such an allegation (*R. v. Hankey*, *supra*; *R. v. Chancellor, Ex parte Hassall* (1905), 69 J. P. 383); an allegation, however, of an offence under the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (1), not specifying which of the four possible offences is sufficient (*Ex parte Beecham*, [1913] 3 K. B. 45).

(*n*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (3); see *Ex parte Beecham*, *supra*.

(*o*) *Du Cros v. Lambourne*, [1907] 1 K. B. 40.

(*p*) Motor Cars (Use and Construction) Order, 1904, art. 4 (1).

(*q*) *Ibid.*, art. 4 (2).

SECT. 3.
Motor Cars
(or Light
Locomotives).

stop on
request ;
"cut-out" prohibited
except on
cycles.

warning of the approach or position of the motor car by sounding the bell or other instrument required (*r*) to be carried by it (*s*) ; he must on the request of any police constable in uniform, or of any person in charge of a horse, mule, or other beast of draught or burden, or upon any such constable or person raising his hand as a signal for that purpose, cause the motor car to stop, and to remain stationary so long as may be reasonably necessary (*t*) ; and he must not use any cut-out, fitting, or other apparatus or device which will allow the exhaust gases from the engine of the motor car to escape into the atmosphere without first passing through a silencer, expansion chamber, or other contrivance, suitable and sufficient for reducing, as far as may reasonably be practicable, the noise which would otherwise be caused by the escape of the said gases (*u*). This last-mentioned regulation applies only to a motor car propelled by an internal combustion engine (*w*).

Duty in case
of accidents.

685. A person driving a motor car must in any case, if an accident occurs to any person (whether on foot or horseback, or in a vehicle), or to any horse or vehicle in charge of any person, owing to the presence of the motor car on the road, stop, and, if required, give his name and address, and also the name and address of the owner and the registration mark or number of the car. A person knowingly contravening these provisions is liable to a fine not exceeding £10 for a first offence, to a fine not exceeding £20 for a second offence, and to a fine not exceeding £20, or to imprisonment for a period not exceeding one month, for any subsequent offence (*a*).

SUB-SECT. 4.—*Restrictions on Motor Car Traffic.*

Regulations
of Local
Government
Board.

686. The Local Government Board (*b*) may make regulations with respect to the use of motor cars and trailers on highways and roadways to which the public are granted access, their construction, and the conditions under which they may be used (*c*). Such regulations may be of a local nature and limited in their application to a particular area, and may, on the application of any local authority, prohibit or restrict the use of motor cars for purposes of traction in crowded streets, or in other places where such use may be attended

(*r*) By the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 3 ; see p. 323, *ante*.

(*s*) Motor Cars (Use and Construction) Order, 1904, art. 4 (5).

(*t*) *Ibid.*, arts. 1, 4 (6).

(*u*) Motor Cars (Use and Construction) Amendment Order (No. II.), 1912 (Stat. R. & O. 1912, p. 421), art. 2.

(*w*) *Ibid.* It applies to motor cycles, though the original order on the point did not do so.

(*a*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 6.

(*b*) For the purpose of the carrying out by the Local Government Board of any of their duties under the Motor Car Act, 1903 (3 Edw. 7, c. 36), the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 87 (1), (5), as to local inquiries apply (Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 14) ; see titles LOCAL GOVERNMENT, Vol. XIX., p. 388 ; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 375.

(*c*) As to the special provisions applicable in the case of "heavy motor cars," see pp. 330 *et seq.*, *post*.

with danger to the public (*d*). Regulations so made must be forthwith laid before both Houses of Parliament, and override any statute, statutory regulation or bye-law (*d*).

687. The regulations made by the Local Government Board may (1) prohibit or restrict the driving of any motor cars, or motor cars of any special kind, on any specified highway or roadway to which the public are granted access, or any part thereof, which does not exceed 16 feet in width, or on which ordinary motor car traffic would, in the opinion of the Board, be especially dangerous (*e*); (2) impose restrictions as to speed in the case of motor cars exceeding 2 tons in weight unladen (*f*); (3) make provision generally for facilitating the identification of motor cars, and in particular for determining and regulating generally the size, shape and character of the identifying marks to be carried and the mode in which they are to be fixed and rendered easily distinguishable; whether by day or night, and with respect to the registration of cars, and the entry of particulars, including particulars of the ownership of the car, in the register, and the giving of those particulars, and for making any particulars contained in the register available for use by the police, and for making the registration of the car void if the regulations as to registration are not complied with (*g*); (4) make provision with respect to drivers' licences, and in particular with respect to the register to be kept of such licences, and the renewal of licences, and for providing special facilities for granting licences to persons not resident in the United Kingdom, and for communicating particulars thereof to adjoining and other county or county borough councils, and for making any particulars as to persons whose licences are suspended or indorsed available for use by the police, and for preventing a person holding more than one licence (*h*).

688. Upon the application of the local authority (*i*) for any area, the Local Government Board may, by regulations with a view to the safety of the public, limit to ten miles per hour the speed of motor cars within any limits or place in that area (*j*). The Board

SECT. 3.
Motor Cars
(or Light
Locomo-
tives).

Restrictions
on particular
roads or in
case of
heavy cars.

Use and
construction
regulations.

Licensing
regulations.

Reduced
speed limit in
certain cases.

(*d*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 6; the penalty for infringing any regulations made under this provision is a fine not exceeding £10 (*ibid.*, s. 7). Under this provision are issued the various Use and Construction Orders.

(*e*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 8. It seems that, notwithstanding the provision as to a ten-mile limit in *ibid.*, s. 9 (see the text, *infra*), the Board may fix under this provision a lower limit on narrow and specially dangerous roads.

(*f*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 12 (2).

(*g*) *Ibid.*, s. 7 (1). Under this provision the registration and licensing order is issued, as to which see pp. 316 *et seq.*, *ante*. County and county borough councils are required to comply with regulations made under this provision (Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 7 (2)).

(*h*) *Ibid.*

(*i*) The local authority is, in the City of London, the Common Council; in a municipal borough, with a population exceeding 10,000 in 1901, the borough council; and elsewhere, the county council (*ibid.*, s. 9 (4)).

(*j*) *Ibid.*, s. 9 (1). It seems that this provision does not prevent

SECT. 3.
Motor Cars
(or Light
Locomotives).

Notice of
regulations
etc.

Speed limit
in royal
parks.

Motor cars on
bridges.

may, without any application from the local authority, but after considering any objections raised by it, revoke or alter any such regulation (*k*).

689. Local authorities (*l*) must give public notice of any regulation of the Local Government Board prohibiting or restricting the use of motor cars on particular roads (*m*), or limiting their speed within any limits or place (*n*), and must place notices in conspicuous places on or near to the road, part of a road, limits, or place to which the regulation refers (*o*), and, subject to regulations (*p*) as to size and colour, they must within their areas cause to be set up sign-posts denoting dangerous corners, cross roads, and precipitous places, where such posts appear to them to be necessary (*q*).

690. By virtue of the Parks Regulation Act, 1872 (*r*), and a statutory rule made thereunder, the Commissioners of Works may make regulations as to the speed of motor cars in royal parks (*s*).

691. The council of any county or borough may make bye-laws preventing or restricting the use of motor cars and trailers upon any bridge within its area, if satisfied that such use would be attended with damage to the bridge or danger to the public (*t*).

A motor car may not be driven on or over the Menai Bridge, except in accordance with regulations made by the Commissioners of Works (*u*).

If injury is done to a bridge repairable by individuals by a motor car or trailer, the same statutory provisions as to making good damage and consequential loss apply as in the case of heavy locomotives (*a*).

the Board fixing a lower speed limit under the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 8 (see p. 327, *ante*), on narrow or specially dangerous roads.

(*k*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 9 (3).

(*l*) See note (*i*), p. 327, *ante*.

(*m*) Under the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 8; see p. 327, *ante*.

(*n*) Under the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 9; see p. 327, *ante*.

(*o*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 10 (1).

(*p*) The Local Government Board has not issued regulations, but has recommended for general adoption certain suggestions as to uniformity of signs, size and colour put forward by the Associations of County Councils and Municipal Corporations; see the Board's Circular Letter of 10th March, 1904.

(*q*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 10 (2).

(*r*) 35 & 36 Vict. c. 15, ss. 4, 9.

(*s*) *Musgrave v. Kennison* (1905), 69 J. P. 341. As to royal parks generally, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 133, 134; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 582, 583.

(*t*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1) (*a*). As to the repair of bridges, see also p. 313, *ante*; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 188 *et seq.*

(*u*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 17; the penalty is a sum not exceeding, for a first offence, £10; for a second offence, £20; and for a subsequent offence, £50 (*ibid.*, s. 17 (2)).

(*a*) See p. 314, *ante*.

SUB-SECT. 5.—Penalties and Appeals.

SECT. 3.

Motor Cars
(or Light
Locomotives).

Penalties.

Suspension
and indorse-
ment of
licences.

692. Any person infringing any provision of the Locomotives on Highways Act, 1896 (*b*), or any bye-law or regulation made thereunder, is liable to a penalty not exceeding £10 (*c*).

Any person guilty of an offence under the Motor Car Act, 1903 (*d*), for which no special penalty is provided is liable to a fine not exceeding £20, and in the case of a subsequent conviction to a fine not exceeding £50, or imprisonment for a period not exceeding three months (*e*).

693. Any court before which a person is convicted of an offence under the Motor Car Act, 1903 (*d*), or of any offence in connexion with the driving of a motor car (*f*), other than a first or second offence consisting solely of exceeding any limit of speed fixed under the Motor Car Act, 1903 (*g*), (1) may, if the offender holds a driver's licence, suspend it for such time as the court thinks fit, and may also declare him disqualified for obtaining a licence for such further time after the expiration of his licence as the court thinks fit; and (2) may, if he does not hold a driver's licence, declare him disqualified for obtaining a licence for such time as the court thinks fit; and (3) must (*h*), if he holds a driver's licence, cause particulars of the conviction, and of any order of the court made under the section, to be indorsed on the licence, and cause a copy of such particulars to be sent to the council granting such licence (*i*).

(*b*) 59 & 60 Vict. c. 36.

(*c*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 7.

(*d*) 3 Edw. 7, c. 36.

(*e*) *Ibid.*, s. 11 (1). Previous convictions should not be referred to in the summons, but notice should be given to a defendant of the intention to charge them (*R. v. Hankey* (1910), 55 Sol. Jo. 77).

(*f*) It has been held that convictions for the following offences must be indorsed:—Driving with back lamp not burning (*Brown v. Crossley*, [1911] 1 K. B. 603); with head lamp not burning (*Ex parte Symes* (1910), 75 J. P. 33); identification mark with figures of insufficient size (*R. v. Gill, Ex parte McKim* (1909), 73 J. P. 290); third offence against speed limit in royal parks (*R. v. Plowden*, [1909] 2 K. B. 269); and that convictions for the following need not be indorsed:—Obstructing the highway by leaving car standing by kerb whilst delivering goods at some distance (*R. v. Yorkshire (West Riding) Justices, Ex parte Shackleton*, [1910] 1 K. B. 439; compare *R. v. Lyndon, Ex parte Moffat* (1908), 72 J. P. 227). The production of a licence is *prima facie* evidence that the person producing it is the person named in it, and that the particulars which it contains refer to him (*Martin v. White*, [1910] 1 K. B. 665); and secondary evidence of such particulars may be given although no notice to produce the licence at the hearing has been given (*ibid.*; *Marshall v. Ford* (1908), 72 J. P. 480). If the defendant is not present to be identified, his identity, for the purpose of proving previous convictions, may be established by showing that his name and address and other particulars stated in the licence correspond with those of a person previously convicted (*Martin v. White, supra*); but a warrant cannot be issued for the arrest of the defendant so that he may be present to be identified when he is represented (*R. v. Montgomery, Ex parte Long* (1910), 74 J. P. 110; *R. v. Thompson*, [1909] 2 K. B. 614).

(*g*) 3 Edw. 7, c. 36. Notwithstanding these words the offence of exceeding a speed limit fixed under the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), is within the exception, and cannot therefore be indorsed on the first or second occasion (*R. v. Marsham, Ex parte Chamberlain*, [1907] 2 K. B. 638).

(*h*) Neither the justices nor the High Court have any discretion in the matter if they convict or uphold a conviction (*Cromwell v. Renton*, [1911] S. C. (Justiciary) 86).

(*i*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4 (1).

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Motor Cars
(or Light
Locomo-
tives).

Appeal.

A person so convicted must, if he holds a driver's licence, produce it within a reasonable time for the purpose of indorsement; failure to do so is an offence under the Motor Car Act, 1903 (*j*).

694. An appeal lies to quarter sessions against an order of suspension or disqualification, if the defendant did not plead guilty, and, pending the hearing of the appeal, the court may in their discretion defer the operation of the order (*k*).

Any person adjudged to pay a fine (*l*) exceeding 20s. under the Motor Car Act, 1903 (*m*), may, if he did not plead guilty, appeal against the conviction to quarter sessions (*n*).

There is apparently no general right of appeal to quarter sessions against a conviction under the Locomotives on Highways Act, 1896 (*o*), or bye-laws or regulations made thereunder (*p*).

In the Metropolis an appeal lies to quarter sessions in any case where the fine imposed exceeds £3 (*q*).

SUB-SECT. 6.—Heavy Motor Cars and Trailers thereto.

Registration.

695. In the case of a heavy motor car (*r*), the owner on applying for registration must declare the weight of the car unladen, the axle weight of each axle (*s*), and the diameter of each wheel, and must submit the car for inspection and verification. The register must record the weight unladen, the axle weight of each axle, the diameter of each wheel, the width and material of the tire of each wheel, and the highest rate of speed at which in conformity with

(*j*) 3 Edw. 7, c. 36, s. 4 (2).

(*k*) *Ibid.*, s. 4 (4); Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19. If the operation of the order is not deferred, a period of suspension runs from the date of the conviction (*Kidner v. Daniels* (1910), 74 J. P. 127). As to appeals to quarter sessions, see also title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*l*) The fine and costs cannot be aggregated (*Ex parte Novis*, [1905] 2 K. B. 456).

(*m*) 3 Edw. 7, c. 36.

(*n*) *Ibid.*, s. 11 (2); Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19. A defendant cannot appeal if he pleads guilty (*Kidner v. Daniels, supra*). Whilst an appeal is pending, a writ of *certiorari* will not be granted (*R. v. Barnes, Ex parte Vernon (Lord)* (1910), 74 J. P. 231); and see title CROWN PRACTICE, Vol. X., p. 187. As to appeals to quarter sessions generally, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.* For attempts to quash convictions in motor car cases on the ground that justices were biased, or that cases were unfairly tried, see *Cholerton v. Copping* (1906), 70 J. P. 484; *Ex parte Wilder* (1902), 66 J. P. 761; *R. v. Sparks* (1909), 73 J. P. 485; *R. v. Barnes, Ex parte Vernon (Lord), supra*; see also title MAGISTRATES, Vol. XIX., p. 551.

(*o*) 59 & 60 Vict. c. 36.

(*p*) *Steer v. Bennett* (1903), 67 J. P. 112; *Davey v. Bennett* (1905), 69 J. P. 200; but see *Brown v. Crossley*, [1911] 1 K. B. 603; *R. v. Gill, Ex parte McKim* (1909), 73 J. P. 290; *Willingale v. Norris*, [1909] 1 K. B. 517.

(*q*) Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 50.

(*r*) As to the definition, see p. 307, *ante*. The provisions applicable to motor cars generally apply to heavy motor cars except so far as they may be inconsistent with the special provisions of the Heavy Motor Car Order, 1904; see *ibid.*, art. 16.

(*s*) Namely, the aggregate weight transmitted to the surface of the road or other base whereon the vehicle moves or rests by the several wheels attached to that axle when the vehicle is loaded (Heavy Motor Car Order, 1904, art. 2).

the regulations the car may be driven without a trailer (*a*). The authority cannot be required to register any heavy motor car which does not satisfy each condition applicable to it or in respect of which the prescribed procedure has not been complied with (*b*).

SECT. 3.
Motor Cars
(or Light
Locomo-
tives).

696. A heavy motor car, if its weight unladen is 3 tons or upwards, and any trailer drawn by it, may, when measured between the extreme projecting points, be $7\frac{1}{2}$ feet in width (*c*).

Width.

697. A heavy motor car must bear on its off side its registered weight unladen and the registered axle weight (*d*) of each axle, and on the near side the highest rate of speed at which in conformity with the regulations it may be driven without a trailer (*e*). It must be constructed with sufficient and suitable springs between each axle and its frame (*f*); the diameter of the wheels must not be less than two feet if fitted with a tire which is not pneumatic nor made of a soft or elastic material (*g*); if the tires are not pneumatic or made of a soft or elastic material, they must comply with certain requirements as to construction and width (*h*). The axle weight of an axle of a heavy motor car may not exceed the registered axle weight. The registered axle weight of an axle may not exceed 8 tons, and the sum of the registered axle weights of all the axles may not exceed 12 tons (*i*).

Weight and
speed plates.

Springs.

Wheels.

Tires.

Axle weight.

698. A heavy motor car which is used as a stage carriage or otherwise for the conveyance of passengers for gain or hire may not draw a trailer (*k*). Every trailer drawn by a heavy motor car must be constructed with suitable and sufficient springs between each axle and its frame (*l*); and the axle weight of an axle may not exceed 4 tons (*m*). It must bear on the off side its weight unladen, and also, if its weight exceeds 1 ton, the axle weight of each axle (*n*). If its weight unladen exceeds 1 ton, the tires and wheels must be of a prescribed width and size (*o*).

Trailer drawn
by heavy
motor car.

699. In certain circumstances an officer of a local authority may require a heavy motor car to be taken to a weighing machine to ascertain whether the axle weight of any axle of the car, or of a trailer, exceeds the registered or marked axle weight (*p*).

Power to
weigh.

(*a*) Heavy Motor Car Order, 1904, art. 4 (1), (2), (3).

(*b*) *Ibid.*, art. 4 (6).

(*c*) *Ibid.*, art. 9.

(*d*) That is, the axle weight (see note (*s*), p. 330, *ante*) of that axle as recorded in the register (Heavy Motor Car Order, 1904, art. 2).

(*e*) *Ibid.*, art. 4 (3).

(*f*) *Ibid.*, art. 10.

(*g*) *Ibid.*, art. 8. As to measuring the diameter of a wheel, see *ibid.*, art. 2.

(*h*) *Ibid.*, art. 6; they must, in general, be smooth and flat, and the minimum width is 5 inches; as to measuring "width," see *ibid.*, art. 2. There is a special provision applicable to military motor cars (Heavy Motor Car (Amendment) Order, 1911, art. 1).

(*i*) Heavy Motor Car Order, 1904, art. 5.

(*k*) *Ibid.*, art. 11 (5).

(*l*) *Ibid.*, art. 11 (4).

(*m*) *Ibid.*, art. 11 (3).

(*n*) *Ibid.*, art. 11 (1).

(*o*) *Ibid.*, art. 11 (2).

(*p*) *Ibid.*, art. 12.

SECT. 3.
Motor Cars
(or Light
Locomotives).

Contraven-
tion of
regulations.
Speed.

700. No person may on any highway or roadway to which the public are granted access cause or permit to be used, or drive, or have charge of a heavy motor car, or trailer drawn by it, which is not in all respects in accordance with the regulations relating thereto, or which is so used or driven as to contravene the regulations (*q*).

701. The speed at which a heavy motor car is driven on a highway or roadway to which the public are granted access may not exceed eight miles per hour, and it may not exceed five miles per hour if the weight unladen exceeds 3 tons, or if the registered axle weight of any axle exceeds 6 tons, or if it draws a trailer; if, however, the heavy motor car has all its wheels fitted with pneumatic tires or tires of a soft or elastic material, the maximum speed is twelve miles per hour if the registered axle weight of any axle does not exceed 6 tons, and eight miles per hour if the registered axle weight of any axle exceeds 6 tons (*r*).

Bridges.

702. In the case of an ordinary bridge(s) forming part of a highway, if the person liable for its repair states in a prescribed notice (*t*) (1) that the bridge is insufficient to carry a heavy motor car the registered axle weight of any axle of which exceeds 3 tons, or the registered axle weights of the several axles of which exceed in the aggregate 5 tons, or any greater weight specified in the notice; or (2) that the bridge is insufficient to carry a heavy motor car drawing a trailer if the registered axle weights of the several axles of the car and the axle weights of the several axles of the trailer exceed in the aggregate 5 tons or any greater weight specified in the notice, then the owner of any such heavy motor car may not cause or suffer it to be driven, and the person driving or in charge of it may not drive it upon the bridge without the consent of the person liable for the repair (*a*). Differences arising between persons liable to repair bridges and aggrieved owners of heavy motor cars as to the sufficiency of the bridges are to be determined by arbitration. If the person liable to repair refuses or neglects to join in referring the difference to arbitration, the restrictive notice will cease to be of effect, and he must remove it (*b*).

(*q*) Heavy Motor Car Order, 1904, art. 13. Penalty not exceeding £10 (Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 7).

(*r*) Heavy Motor Car Order, 1904, art. 7.

(*s*) Heavy Motor Car Order, art. 14, 1904, as altered by the Heavy Motor Car (Amendment) Order, 1907 (Stat. R. & O., 1907, p. 428), art. 1, does not apply to (1) the Menai Bridge, or any bridge which crosses the Thames and of which any part is in the Metropolis, nor (2) to any bridge (*i*.) whereof the use is subject to a statutory restriction inconsistent with its use by such motor cars as are described in the article, and (*ii*.) whereon the effect of such restriction is notified in the prescribed way (*ibid.*, art. 14 (5)). The validity of *ibid.*, art. 14, was supported as being *intra vires* in *Lloyd v. Ross*, [1913] 2 K. B. 332. As to bridges, generally, and the persons liable for their repair, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 184 *et seq.*

(*t*) The Heavy Motor Car Order, 1904, art. 14 (3), as amended by the Heavy Motor Car (Amendment) Order, 1907, art. 1, prescribes the form of notice and how it is to be displayed.

(*a*) Heavy Motor Car Order, 1904, art. 14 (1), as amended by the Heavy Motor Car (Amendment) Order, 1907, art. 1.

(*b*) Heavy Motor Car Order, 1904, art. 14 (2), as amended by the Heavy Motor Car (Amendment) Order, 1907, art. 1.

In the case of an ordinary bridge forming part of a highway, the owner of a heavy motor car the registered axle weights of the several axles of which, with the axle weights of the several axles of any trailer drawn by it, exceed in the aggregate 6 tons, may not cause or suffer it to be driven, and the person driving or in charge of it may not drive it, upon the bridge at any time when another heavy motor car, or a heavy locomotive, is on the bridge (c).

SECT. 3.
Motor Cars
(or Light
Locomotives).

SUB-SECT. 7.—*Miscellaneous.*

703. A motor car is to be deemed to be a carriage within the meaning of any statute or of any statutory regulation or bye-law, and, if used as a carriage of any particular class, to be a carriage of that class, and subject to the law relating thereto (d). It is liable to be requisitioned as a carriage for military purposes in case of emergency (e). A "carriage."

704. Nothing in the Locomotive Act, 1861 (f), is to authorise the use on any highway of a motor car constructed or used so as to be a public or private nuisance (g), and nothing in the Motor Car Act, 1903 (h), is to affect any statutory or common law liability of the driver or owner of a motor car (i). Liability of owner or driver.

705. The Locomotive Act, 1861 (k), fixes the scale of tolls to be charged in respect of motor cars and trailers drawn by them under any Public Bridge Act (l). Tolls.

706. The Locomotives on Highways Act, 1896 (m), and the Motor Car Act, 1903 (n), apply to persons in the public service of the Crown. The Crown.

707. The keeping and use of petroleum and any other inflammable liquid or fuel for motor cars is dealt with by regulations made by the Home Secretary (o). Petrol storage.

(c) Heavy Motor Car Order, 1904, art. 14 (4), as amended by the Heavy Motor Car (Amendment) Order, 1907, art. 1.

(d) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1) (b).

(e) Army (Annual) Act, 1909 (9 Edw. 7, c. 3), s. 5; Army Act (44 & 45 Vict. c. 58), s. 115; see title ROYAL FORCES, Vol. XXV., pp. 48 *et seq.* As to the Army Act, see *ibid.*, p. 30, note (s).

(f) 24 & 25 Vict. c. 70.

(g) *Ibid.*, s. 13; Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, Sched. The mere fact that a vehicle skids is no evidence that it is a nuisance (*Parker v. London General Omnibus Co., Ltd.* (1909), 74 J. P. 20, C. A.; *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652, C. A., not following *Gibbons v. Vanguard Motor Bus Co.* (1908), 72 J. P. 505, 506). The fact that a lamp on the pavement is damaged by a vehicle is *prima facie* evidence of negligence (*Barnes Urban District Council v. London General Omnibus Co.* (1909), 73 J. P. 68; *Isaac Walton & Co., Ltd. v. Vanguard Motor Bus Co.* (1908), 72 J. P. 505).

(h) 3 Edw. 7, c. 36.

(i) *Ibid.*, s. 15.

(k) 24 & 25 Vict. c. 70.

(l) *Ibid.*, s. 1; Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, Sched. As to tolls generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 62 *et seq.*

(m) 59 & 60 Vict. c. 36.

(n) 3 Edw. 7, c. 36, s. 16.

(o) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 570 *et seq.* As to the customs and excise duties and exemptions

SECT. 3.

Motor Cars
(or Light
Locomotives).Carriage
licence duties.

708. In the case of motor cars which are "carriages" within the meaning of the Customs and Inland Revenue Act, 1881, s. 4 (*p*), the excise licence duty varies, except in the case of motor cycles, with the "horse-power" (*q*). In the case of motor cars which are "hackney carriages" (*r*) within the meaning of that provision there is payable an original licence duty of 15s. (*a*), and an additional duty dependent upon weight (*b*). A medical practitioner keeping a motor car for the purpose of his profession is entitled to a rebate of half the duty (*c*); and in certain circumstances an officer of the Army Motor Reserve is entitled to a varying rebate (*d*).

Drivers.

709. For the purposes of the statutes rendering an employer liable to pay duty in respect of his male servants, a person employed to drive a motor car is a "male servant" (*e*).

SUB-SECT. 8.—*Foreign Motor Cars.*Regulation
of foreign
touring cars
and licensing
of their
drivers.

710. The Motor Car (International Circulation) Act, 1909 (*f*), and Orders in Council (*g*) made thereunder make special provision for facilitating the international circulation of motor cars taken temporarily into a foreign country by persons not resident therein. In each country (*h*) some authority (*i*) or association empowered by that authority (*j*), may issue (1) certificates of fitness in respect of motor cars intended to be taken into a foreign country; (2) drivers' certificates of competence; and (3) an international travelling pass for any motor car in respect of which a certificate of fitness has been granted; such pass will give particulars of the person or persons intending to drive the car, and each such person must hold a certificate of competence (*k*).

When a car is brought into a foreign country, production of the the pass and relevant certificates will confer certain advantages and

relating to motor spirit, see title REVENUE, Vol. XXIV., pp. 597, 598, 620, 621; as to licences for the manufacture and sale of motor spirit, see *ibid.*, pp. 635, 636, 661, 662.

(*p*) 51 & 52 Vict. c. 8; see title REVENUE, Vol. XXIV., pp. 689 *et seq.*

(*q*) As to the scale of duties, see title REVENUE, Vol. XXIV., pp. 690, 691.

(*r*) An omnibus is for this purpose a "hackney carriage"; see note (*e*), p. 295, *ante*.

(*a*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 4; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 86 (3).

(*b*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 8. As to the scale of duty, see title REVENUE, Vol. XXIV., p. 692.

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 86 (4).

(*d*) *Ibid.*, s. 86 (5); see title REVENUE, Vol. XXIV., p. 691.

(*e*) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 13; see title REVENUE, Vol. XXIV., p. 692.

(*f*) 9 Edw. 7, c. 37.

(*g*) See the Motor Car (International Circulation) Order, 1910 (Stat. R. & O., 1910, p. 406), and the Motor Car (International Circulation) Amendment Order, 1912 (Stat. R. & O., 1912, p. 425).

(*h*) Almost all the European countries were parties, or have acceded, to the convention to which the Act and Orders give effect.

(*i*) In England, the Local Government Board.

(*j*) At present the Royal Automobile Club, the Motor Union of Great Britain and Ireland, and the Automobile Association act for the Local Government Board.

(*k*) Motor Car (International Circulation) Order, 1910.

privileges. In the case of a car so brought into England, the chief customs officer of the port of landing can register the car and issue drivers' licences to the persons mentioned in the pass. The car will carry a special plate indicating its nationality, in addition to its own national number plate. Details of all cars registered and licences issued will be forwarded to Scotland Yard, where full registers are kept. Such registration, licences, and marks are treated as satisfying the provisions of the Motor Car Act, 1903 (*l*); and the necessary modifications are made in that statute for the purposes of its application to such cars and drivers (*m*). Such cars are in general exempt from carriage licence duty (*n*).

SECT. 3.
Motor Cars
(or Light
Locomo-
tives).

Part VI.—Cycles and Velocipedes.

711. All provisions in public or private Acts under which before 1888 bye-laws could be made for regulating the use of bicycles, tricycles, velocipedes and other similar machines are repealed (*o*). Such machines are "carriages" within the meaning of the Highway Acts (*p*); and, in addition to the provisions of those Acts as to carriages (*q*), the following regulations apply:—

Cycles are
"carriages."

(1) Every person riding or being upon a bicycle, tricycle, or velocipede during the period between one hour after sunset and one hour before sunrise (*r*) must carry attached to it a lamp so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so lighted as to afford adequate means of signalling his approach or position (*s*);

Lamp.

(2) Every such person upon overtaking any cart or carriage, or any horse, mule, or other beast of burden, or any foot passenger being on or proceeding along the carriageway, must, within a reasonable distance from and before passing the same, by sounding a bell or whistle, or otherwise, give audible and sufficient warning of his approach (*t*).

Overtaking
carriages and
passengers.

A person offending against the above regulations is liable on

(*l*) 3 Edw. 7, c. 36.

(*m*) Motor Car (International Circulation) Order, 1910.

(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 86 (7); Treasury Regulations dated 22nd August, 1910 (Stat. R. & O., 1910, p. 417).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1). As to the liability of a bicycle to pay toll as a "carriage," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 63, 64; and see note (*l*), p. 277, *ante*. A bicycle has been held to be a "vehicle" within a local Act relating to vehicles displaying advertisements (*Ellis v. Nott-Bower* (1896), 60 J. P. 760); see note (*m*), p. 289, *ante*. As to cycles propelled by other than human power, see pp. 316 *et seq.*, *ante*.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1). As to the term "Highway Acts," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 24. An errand boy's bicycle with a basket strapped to it has been held to be a "carriage" for the purposes of the Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 7 (*Pollard v. Turner*, [1912] 3 K. B. 625).

(*q*) As to these provisions, see pp. 275 *et seq.*, *ante*.

(*r*) Sunrise and sunset must be determined by local and not Greenwich time (*Gordon v. Cann* (1899), 68 L. J. (Q. B.) 434); see title TIME, p. 441, *post*.

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1) (a).

(*t*) *Ibid.*, s. 85 (1) (b).

PART VI.
Cycles and
Velocipedes.

summary conviction for each offence to a penalty not exceeding 40s. (*u*): he cannot, however, be arrested without a warrant (*x*).

Part VII.—Aircraft.

Prescribed
areas.

712. A Secretary of State may for the purpose of protecting the public from danger (*a*), or for the purposes of the defence or safety of the realm (*b*), from time to time by order prohibit the navigation of aircraft over such areas as may be prescribed in the order. Such an order may apply either to all aircraft generally or to aircraft of specified classes and descriptions; and may prohibit the navigation of aircraft over any prescribed area either at all times or at specified times or on specified occasions, and either absolutely or subject to specified exceptions (*c*). When an order is made for the purposes of the defence or safety of the realm, the area prescribed may include the whole or any part of the coastline of the United Kingdom and the territorial waters adjacent thereto (*d*). The Secretary of State may also by order prescribe the areas within which aircraft coming from any place outside the United Kingdom are to land, and the other conditions to be complied with by such aircraft (*e*).

Any person navigating an aircraft over a prescribed area in contravention of an order, or contravening any provision of an order as to the landing or navigation of aircraft coming from abroad (*f*), is, unless he proves that he was compelled to do so by stress of weather or other circumstances over which he had no control, liable on conviction on indictment or on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding £200, or to both imprisonment and fine (*g*).

If an aircraft flies, or attempts to fly, over any area prescribed by an order made for the purposes of the defence or safety of the realm, or in the case of an aircraft coming from abroad fails to comply with any of the prescribed conditions as to landing, an authorised official may cause signals to be made, and, if the

(*u*) Local Government Act, s. 85 (2).

(*x*) *Hatton v. Treeby*, [1897] 2 Q. B. 452; the reason being that the offence is not one under the "Highway Acts."

(*a*) Aerial Navigation Act, 1911 (1 & 2 Geo. 5, c. 4), s. 1 (1).

(*b*) Aerial Navigation Act, 1913 (2 & 3 Geo. 5, c. 22), s. 1 (1).

(*c*) Aerial Navigation Act, 1911 (1 & 2 Geo. 5, c. 4), s. 1 (2). Under this provision an order has been made prohibiting the navigation of aeroplanes unless a special exemption order is obtained within a four miles radius from Charing Cross: see Order of 22nd September, 1913.

(*d*) Aerial Navigation Act, 1913 (2 & 3 Geo. 5, c. 22), s. 1 (2).

(*e*) *Ibid.*, s. 1 (2); see p. 337, *post*.

(*f*) Aerial Navigation Act, 1913 (2 & 3 Geo. 5, c. 22), s. 1 (2).

(*g*) Aerial Navigation Act, 1911 (1 & 2 Geo. 5, c. 4), ss. 1 (1), 2; an appeal lies to quarter sessions against a summary conviction (*ibid.*). As to appeals to quarter sessions. see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*; as to summary procedure, see *ibid.*, pp. 589 *et seq.*

aircraft fails to respond thereto, such officer may fire into such aircraft and use any other means necessary to compel compliance (*h*).

An order (*i*) made under the powers above referred to has prescribed certain areas as prohibited areas for all aircraft, and certain portions of the coastline and adjacent territorial waters as prohibited areas for aircraft coming from abroad; for such aircraft certain landing places are prescribed, and various conditions laid down for their navigation (*k*). British naval and military aircraft are not affected by the order. Foreign naval and military aircraft may not land in or pass over the United Kingdom except on the invitation of the Government. Special provision is made in respect of British airships returning from a voyage abroad. Nothing in the order is to be construed as conferring any right to land upon any spot as against the owner thereof or as interfering with any civil rights (*l*).

Espionage by a person in an aircraft is punishable with penal servitude for seven years (*m*).

An aircraft may be requisitioned for military purposes in case of emergency (*n*).

(*h*) Aerial Navigation Act, 1913 (2 & 3 Geo. 5, c. 22), s. 2. Regulations as to signals etc. under this provision were issued on the 1st March, 1913 (Stat. R. & O., 1913, No. 243).

(*i*) See the Aerial Navigation Order of the 1st March, 1913 (Stat. R. & O., 1913, No. 228).

(*k*) *Inter alia*, a pilot must before starting obtain a "clearance" from a consular agent, and must give notice to the Home Office, and on landing he must make a report. Certain articles may not be carried on the aircraft (*ibid.*).

(*l*) As to the rights of owners of land in respect of aircraft, see titles REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 156, note (*f*); TRESPASS, p. 848, note (*e*), *post*.

(*m*) Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), s. 1; see the Aerial Navigation Order of the 1st March, 1913.

(*n*) Army (Annual) Act, 1913 (3 Geo. 5, c. 2), s. 5, extending the Army Act, s. 115. As to requisitioning for military purposes, see title ROYAL FORCES, Vol. XXV., pp. 48 *et seq.* As to the Army Act, see *ibid.* (p. 30, note (*s*)).

PART VII.
Aircraft.

Aircraft
coming from
abroad.

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STRIKING OUT.

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STURGEON.

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SUBINFEUDATION.

See REAL PROPERTY AND CHATTELS REAL.

SUBMISSION.

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SUBORNATION OF PERJURY.

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SUBPŒNA.

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SUBROGATION.

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SUBSTITUTED SERVICE.

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Part I.—Introductory.

SECT. 1.—*Course and Scope of Telegraph Legislation.*

Necessity for
legislation.

713. The transmission of messages from a distance by means of wires was brought to the attention of Parliament soon after science rendered such means of communication commercially practicable(*a*). For the purpose of obtaining compulsory powers of interference with or purchase of property under public control, or the subject of private rights and interests, those who first undertook the business of telegraphy found it advisable to come to Parliament to legalise proceedings which otherwise would have

(*a*) Before the commencement of the Telegraph Acts in 1863 (see note (*m*), p. 349, *post*), three enactments (still in force) were passed relating to telegraphy, namely, the Admiralty (Signal Stations) Act, 1815 (55 Geo. 3, c. 128), whereby powers were given to the Admiralty for the compulsory purchase of lands for signal and telegraph stations; the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), ss. 13, 14, which was prefaced by a recital that electric telegraphs had been established on certain railways, and that it was expedient to provide for their due regulation (the first statutory mention of what is now understood by telegraphy); and the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), as to which see p. 385, *post*.

been indictable or actionable (*b*). Accordingly by the year 1863, in virtue of various special Acts or charters, companies had been formed for purposes of telegraphy, armed with the necessary statutory authority, which was of course only conferred subject to necessary statutory restrictions; and many railway companies were in possession of telegraphs worked under agreements with such telegraph companies. In that year, therefore, it was considered that the time had come to initiate general legislation for the facilitation and control of the telegraphic undertakings of all such companies as then were, or thereafter might be, authorised by special Act to construct and maintain telegraphs, and the first of a long series of Telegraphs Acts was passed (*c*). In 1868 the importance of telegraphy as a source of public revenue, and therefore proper to be placed, as the postal service already had been, under the control of the State, was realised, and the Postmaster-General was accordingly empowered by Parliament to acquire certain specified telegraphic undertakings (*d*). In 1869 he was invested with the monopoly of transmitting telegrams, and the services incidental thereto, together with much larger and more general powers of purchase (*e*), followed by further powers and privileges in 1878 (*f*), 1892 (*g*), 1899 (*h*), 1908 (*i*) and 1911 (*j*). In 1899 telephones were for the first time specifically made the subject of legislation (*k*), and in 1904 provision was made for wireless telegraphy (*l*). The above represent the main stages in the course of telegraphic legislation, and the statutes of the years named, together with others of minor importance, constitute the Telegraph Acts, 1863—1911 (*m*).

SECT. 1.
Course and
Scope of
Telegraph
Legislation.

Legislation
initiated in
1863.

SECT. 2.—Definitions.

714. The term “telegraph” is defined in the Telegraph Acts (*m*) as meaning a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe enclosing the same, and apparatus connected therewith, for the purpose of

(*b*) See pp. 392 *et seq.*, *post*.

(*c*) Telegraph Act, 1863 (26 & 27 Vict. c. 112).

(*d*) Telegraph Act, 1868 (31 & 32 Vict. c. 110).

(*e*) Telegraph Act, 1869 (32 & 33 Vict. c. 73).

(*f*) Telegraph Act, 1878 (41 & 42 Vict. c. 76).

(*g*) Telegraph Act, 1892 (55 & 56 Vict. c. 59).

(*h*) Telegraph Act, 1899 (62 & 63 Vict. 38), in which telephones are first mentioned.

(*i*) Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33).

(*j*) Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39).

(*k*) See note (*h*), *supra*.

(*l*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24). This Act was to be in force until the 31st July, 1906, but by the Wireless Telegraphy Act, 1906 (6 Edw. 7, c. 13), and a succession of Expiring Laws Continuance Acts, it has been continued to the present time; see, *e.g.*, Expiring Laws Continuance Act, 1913 (3 & 4 Geo. 5, c. 15), s. 1 (1), Sched.

(*m*) Each of the statutes since 1863 contains a provision that it may be cited with its predecessors as the Telegraphs Act, 1863, to date. The remaining statutes are the following:—Telegraph Act Amendment Act, 1866 (29 & 30 Vict. c. 3); Telegraph Act, 1870 (33 & 34 Vict. c. 88); Telegraph Act, 1885 (48 & 49 Vict. c. 58); Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34); Post Office and Telegraph Act, 1897 (60 & 61 Vict. c. 41); Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20); Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26); Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56). There are, in addition, certain Money Acts, as to which see p. 391, *post*.

SECT. 2.
Definitions.

telegraphic communication (*n*), and also as meaning and including any apparatus for transmitting messages and other communications by means of electric signals (*o*). The fact that new methods of telegraphy have been invented since the date of the passing of the Acts containing the definition does not prevent the application of the Acts to such methods, provided that they answer the requirements and fall within the terms of the definition (*p*). The expression therefore includes telephones (*a*) and wireless telegraphy (*b*), each of which, however, is also the subject of special legislation (*c*). Pneumatic and other tubes (*d*) used for the purpose of transmitting telegraphic messages, or maintaining telegraphic communication, are expressly made subject to certain provisions of the Telegraph Acts (*e*), but submarine cables do not fall within the scope of the Telegraph Acts (*f*).

Telegram.

The term "telegram" means any message or other communication transmitted or intended for transmission by a telegraph (*g*).

Post.

The term "post" means any post, pole, standard, stay, strut, or other above-ground contrivance for carrying, suspending, or supporting a telegraph (*h*).

Work.

The term "work" includes telegraphs and posts (*i*).

Telegraphic line.

The term "telegraphic line" comprises telegraphs, posts, and any work, and also any cable, apparatus, pneumatic or other tube, pipe, or thing whatsoever used for the purpose of transmitting telegraphic messages or maintaining telegraphic communication, and any portion of such telegraphic line (*k*).

Other definitions.

715. There are various descriptions of real property in relation to which certain public and local authorities and private individuals have rights, duties, and interests which are affected by the Acts. To these special statutory meanings are assigned. The principal terms defined are the following, namely:—

(*n*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3.

(*o*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 3.

(*p*) *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q. B. D. 244.

(*a*) *Ibid.* Further, the use either of wires without electricity, such as an arrangement of common bells, if intended as a code of signals (*ibid.*, at p. 249), or of electricity without wires, such as a system of fire alarm signals etc. (*Postmaster-General v. National Telephone Co., Ltd.*, [1909] A. C. 269, 274), is sufficient to bring the apparatus within the definition.

(*b*) "Wireless telegraphy" is defined in the Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (7), for the purposes of that Act; see p. 374, *post*; see also *A.-G. v. Edison Telephone Co. of London, supra*, at p. 249.

(*c*) See pp. 371 *et seq.*, *post*.

(*d*) These are included in the expression "telegraphic line"; see the text, *infra*.

(*e*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 8, applying the sections of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), and of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), which relate to underground telegraphs. As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*f*) See p. 375, *post*. As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*g*) Telegraph Act, 1863 (26 & 27 Vict. 112), s. 3; Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 3.

(*h*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3, a definition adopted also in the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 89.

(*i*) Telegraph Act, 1863 (26 & 27 Vict. 112), s. 3.

(*k*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2.

The term "street" in the Telegraph Act, 1863 (*l*), is defined as meaning a public way, situate within a city, town, or village, or between lands continuously built upon on either side, and repaired at the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*, and as including the footpaths of such way, and any bridge forming part thereof (*m*). For the purposes of the Telegraph Act, 1878 (*n*), the expression includes any highway (*o*), and, for the purposes of the Telegraph Act, 1892 (*p*), any public way, though not repairable as above mentioned (*q*).

SECT. 2.
Definitions.
Street.

The term "public road" is defined in the Telegraph Act, 1863, as a public highway for carriages repaired at the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*, and not being a street, and as including its footpaths and any bridge forming part thereof (*r*). The expression, for the purposes of the Telegraph Act, 1878 (*n*), includes any highway (*s*), and, for the purposes of the Telegraph Act, 1892 (*p*), any public highway for carriages, though not repairable as above mentioned, and, if enclosed between hedges, water, or other fences, any public highway for horses, and any private road which is also a public footpath (*t*).

Public road.

The term "land" is defined as meaning any land, not being a street or public road, as above defined, and not being land by the side of and forming part of a public road; and it includes land laid out for, and proposed by the owner to be converted into, a street or public road (*a*). For the purposes of the Telegraph Act, 1868 (*b*), it further includes any term, estate, easement, right, or privilege, in, over, or affecting such land, and in the case of undertakings purchased or acquired by the Postmaster-General, the works, tubes, wires, posts, and other property so purchased or acquired (*c*).

Land.

The term "railway" includes any station, work, or building connected with a railway (*d*).

Railway.

"Canal" comprises navigation, navigable river, and any dock, basin, towing path, wharf, work, or building connected with a canal (*e*).

Canal.

The terms "hedge" and "bank" include, for the purposes of certain special enactments, a ditch adjoining thereto, and forming part of the boundary of a street or public road, as if such ditch formed part of the hedge or bank (*f*).

Hedge, and bank.

(*l*) 26 & 27 Vict. c. 112.

(*m*) *Ibid.*, s. 3.

(*n*) 41 & 42 Vict. c. 76.

(*o*) *Ibid.*, s. 2.

(*p*) 55 & 56 Vict. c. 59.

(*q*) *Ibid.*, s. 3.

(*r*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3. As to the liability to repair *ratione tenuræ*, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 88 *et seq.*

(*s*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2.

(*t*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 3.

(*a*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3.

(*b*) 31 & 32 Vict. c. 110.

(*c*) *Ibid.*, s. 3.

(*d*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3.

(*e*) *Ibid.*

(*f*) Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 9 (1); see p. 365, *post*.

SECT. 3.

Persons to
whom the
Telegraph
Acts Apply.

Two classes
of persons.

Telegraphic
undertakers.

Owners and
authorities
in control of
property
affected.

SECT. 3.—Persons to whom the Telegraph Acts Apply.

716. Telegraphic legislation regulates the relations between, on the one hand, persons, companies (*g*), and bodies (*h*) acquiring or carrying on telegraphic undertakings, and, on the other, persons, corporations, and bodies having the control of public property, namely, public, local, or road authorities, or owning private property or businesses, the exercise of whose powers, rights, and duties, whether statutory or not, affect, and are affected by, the exercise of statutory rights, powers, and duties under the Telegraph Acts (*i*).

717. As regards the former of the above two classes, the Telegraph Act, 1863 (*k*), applies only to companies then or thereafter to be authorised by special Act to construct and maintain telegraphs (*l*), and to the Postmaster-General (*m*). A company not so authorised by special Act, such as an ordinary limited company, is not entitled to the rights conferred, or subject to the liabilities imposed, by that statute (*n*). The persons and bodies whose telegraphic undertakings may be purchased by the Postmaster-General under later statutes (*o*), and who are otherwise affected thereby, comprise any company, corporation, or persons for the time being engaged in transmitting, or authorised by their instrument of incorporation to transmit, telegrams for money or other consideration (*p*). The Telegraph Act, 1878 (*q*), applies some of its provisions to the agents of the Postmaster-General and other persons concerned (*a*).

718. In conceding powers and facilities to telegraphic undertakers Parliament has been careful to give adequate protection to the necessarily, at times, conflicting rights, interests, and duties

(*g*) For a form of clause to be inserted in the memorandum of association of a company formed to acquire and carry on telegraphic undertakings, see *Encyclopædia of Forms and Precedents*, Vol. IV., p. 312.

(*h*) The term "body" is defined in the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3, as including "a body of trustees or commissioners, municipal corporation, grand jury, board, vestry, company, or society, whether incorporated or not," and any provision referring to a body applies to a person, as the case may require.

(*i*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*k*) 26 & 27 Vict. c. 112.

(*l*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 2, 3.

(*m*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 2. As to the office of Postmaster-General, see *titles CONSTITUTIONAL LAW*, Vol. VII., pp. 105, 106; *POST OFFICE*, Vol. XXII., pp. 625 *et seq.*

(*n*) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904, C. A., *per* BRETT, M.R., at pp. 917, 918; *Cochrane v. Exchange Telegraph Co., Ltd.* (1896), 65 L. J. (CH.) 334, *per* CHITTY, J., at p. 339.

(*o*) See p. 355, *post*.

(*p*) The definition of "any company" in the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 3, comprised only such companies as were then engaged in telegraphic business, but the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 3, removed this limitation.

(*q*) 41 & 42 Vict. c. 76.

(*a*) The term "agents" is defined in the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2, as including contractors, and also the officers, engineers, workmen, or servants of the Postmaster-General, undertakers, bodies or persons, as well as of his or their contractors. For the definition of "undertakers," see note (*d*), p. 353, *post*; for the definition of "bodies," see note (*h*), *supra*.

of public authorities, such as the Board of Trade, in relation to the seashore (*b*); local and road authorities, in respect of streets and public roads and other matters under their control (*c*); companies engaged in undertakings, other than telegraphic, under parliamentary authority (*d*), such as railway, canal, water, gas, electric light, tramway, and other commercial companies (*e*); and the owners, lessees, and occupiers of lands and buildings (*f*). Such protection is also given by other legislation specially directed to the facilitation and regulation of the undertakings referred to, whilst at the same time according reciprocal protection to, amongst others, those engaged in telegraphic business (*g*).

SECT. 3.
Persons to
whom the
Telegraph
Acts Apply.

SECT. 4.—*Extent of the Telegraph Acts.*

719. All the Telegraph Acts (*h*) extend to the whole of the United Kingdom. Most of the Acts extend to the Isle of Man, and many of them to the Channel Islands also, as well as to the United Kingdom (*i*); and special provision has been made in some of the Acts for the necessary modifications in the application of them to these islands (*k*). The wireless telegraphy legislation applies further to British and foreign ships in certain waters (*l*). The statutes relating to submarine cables, which are not included in the Telegraph Acts, extend to the whole of His Majesty's dominions (*m*). With reference to places outside His Majesty's dominions, where

Places to
which Acts
apply.

(*b*) See p. 362, *post*.

(*c*) See p. 360, *post*.

(*d*) "Undertaking," for this purpose, is defined in the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2, as "the works or undertaking, of whatever nature, the execution of which is authorized by an Act of Parliament," and "undertakers" as "the parties, whether company, commissioners, trustees, corporations, or private persons, empowered by such Act of Parliament to execute an undertaking, and any lessee or tenant thereof."

(*e*) See pp. 365, 366, *post*. Certain railway and canal companies are excepted from the operation of certain of the statutes; see Telegraph Act, 1868 (31 & 32 Vict. c. 110), ss. 11, 12; Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 13, 14; Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 7; Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 8; Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), ss. 4, 5, 6.

(*f*) See p. 363, *post*.

(*g*) See p. 368, *post*.

(*h*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*i*) The Telegraph Act, 1899 (62 & 63 Vict. c. 38), and the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), both of which relate largely to telephones, and the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), are not expressed to extend beyond the United Kingdom. The following extend to the Isle of Man as well as the United Kingdom:—Telegraph Act, 1878 (41 & 42 Vict. c. 76); Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34); and Telegraph Act, 1892 (55 & 56 Vict. c. 59). The rest of the Telegraph Acts extend to the whole of the British Islands, *i.e.*, the United Kingdom, the Isle of Man, and the Channel Islands (Jersey, Guernsey, Alderney, and Sark), either in virtue of the Telegraph Act, 1870 (33 & 34 Vict. c. 88), s. 3, which relates to all the previous Telegraph Acts, or by virtue of express provisions in the several Acts themselves. As to the United Kingdom, see title STATUTES, p. 162, note (*p*), *ante*.

(*k*) Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34), s. 1; Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 12; Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (2).

(*l*) See pp. 374, 375, *post*.

(*m*) See p. 376, *post*.

SECT. 4.
Extent of
the
Telegraph
Acts.

Submarine
cables.

Wireless
telegraphy.

His Majesty has jurisdiction, there is authority to make an Order in Council as to (*inter alia*) the installation and use of telegraphy (*a*).

720. Submarine cable legislation is based on an international convention which continues in force for successive periods, unless and until determined by notice at specified times on the part of any of the high contracting parties, in which case it is determined as regards that party only (*b*).

721. The wireless telegraphy legislation, the duration of which was, in the first instance, limited, has been continued periodically by successive statutes (*c*).

Part II.—Monopoly of the Postmaster-General.

SECT. 1.—*Preferential Rights of the State.*

Privileges.

722. The State has always claimed certain rights of control over telegraphs for the public service. In 1815 and in 1844 privileges of this character were conferred on the Admiralty (*d*) and on the Treasury (*e*) respectively. The Telegraph Acts (*f*) have preserved and extended such rights and privileges. Thus, any Secretary of State, or, in Ireland, the Lord Lieutenant, and any department of the Government, is entitled to priority for messages on His Majesty's service; any company authorised by special Act to construct and maintain telegraphs may be required by the Board of Trade to place and maintain a telegraph for the exclusive use of His Majesty; and any Secretary of State, or, in Ireland, the Lord Lieutenant, may by warrant require the works or business of any such company to be placed in the possession or under the control of the State (*g*).

(*a*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). Such an order has been made for the island of Cyprus; see Cyprus Telegraphs Order, 1904 (Stat. R. & O., 1904, p. 248).

(*b*) See p. 376, *post*.

(*c*) See p. 349, *ante*.

(*d*) Admiralty (Signal Stations) Act, 1815 (55 Geo. 3, c. 128); see p. 348, *ante*.

(*e*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), ss. 13, 14, empowering the Treasury to call upon any railway company to lay down a line of telegraph for the exclusive use of the Crown, and giving the Crown preferential rights to the use of all telegraphs of railway companies generally.

(*f*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*g*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 48–52, as amended by the Telegraph Act Amendment Act, 1866 (29 & 30 Vict. c. 3), ss. 1, 2, 3. Government messages are to be specially marked "priority" (Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 17). Compensation must be paid for the exclusive use of any telegraph required for the purposes of the State; as to this, see p. 382, *post*; and title CONSTITUTIONAL LAW, Vol. VII., p. 69, note (*k*).

SECT. 2.—*Monopoly and Exclusive Rights of the Postmaster-General.*

723. The Postmaster-General (*h*) was empowered in 1868 and 1869 to purchase the telegraphic undertakings of any company, corporation, or persons for the time being engaged in transmitting, or by any instrument of incorporation authorised to transmit telegrams, for money or other consideration, on certain prescribed terms (*i*).

724. The Postmaster-General has, by himself or his deputies, subject to certain exceptions (*k*), the exclusive privilege of transmitting telegrams and of performing all the incidental services of receiving, collecting, or delivering them within the territorial limits of the Telegraph Acts (*l*), from which it results that, with the exceptions referred to, no one can lawfully conduct a telegraphic business otherwise than as his licensee, agent, or lessee (*m*).

725. The classes of excepted telegrams are six in number (*n*), namely:—(1) Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of its owner (*o*); (2) telegrams transmitted without charge by a telegraph maintained for the private use of a corporation, company, or person (*p*); in this case, the telegraph need not invariably be used for the purposes of, nor need the telegrams invariably relate to, the private affairs of the corporation, company, or person, provided that the main object of the maintenance of the telegraph is to facilitate the conduct of such affairs (*q*); (3) telegrams transmitted

SECT. 2.
**Monopoly
and Exclusive Rights
of the
Postmaster-
General.**Purchase of
undertakings.
Exclusive
transmission
of telegrams.

Exceptions.

(*h*) As to the status, office, official name, and powers of the Postmaster-General, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 105, 106; POST OFFICE, Vol. XXII., pp. 625 *et seq.*; see also Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 11; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (11).

(*i*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), ss. 4—14; Telegraph Act, 1869 (32 & 33 Vict. c. 73), ss. 7—11; Telegraph Act, 1870 (33 & 34 Vict. c. 88), ss. 4, 5, 6, 8 (all repealed). These powers as regards telegraphs in the popular sense of the word have long been exhausted. Telephones have, as from 31st December, 1911, been transferred to the Postmaster-General; see Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26); Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56); *Postmaster-General v. National Telephone Co., Ltd.*, [1909] A. C. 269; *National Telephone Co., Ltd. v. Postmaster-General*, [1913] 2 K. B. 614, C. A. As to the territorial limits within which the powers of purchase may be exercised, see p. 353, *ante*. As to the Postmaster-General's authority to purchase, sell, or exchange lands for the requirements of the postal and telegraphic services, see, generally, title POST OFFICE, Vol. XXII., pp. 634 *et seq.*

(*k*) See the text, *infra*.

(*l*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*m*) This monopoly, which, to a very limited extent, had been conferred by the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9 (9), was granted in the general and absolute terms stated in the text by the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 4. As to the territorial extent of the monopoly, see pp. 353, 354, *ante*. For the punishments provided for the violation of the monopoly, see pp. 385, 386, *post*.

(*n*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5.

(*o*) *Ibid.*

(*p*) *Ibid.*

(*q*) The common element in the two classes is the absence of charge or

SECT. 2.
Monopoly
and Exclu-
sive Rights
of the
Postmaster-
General.

with the written licence or consent, either special or general, of the Postmaster-General, under the hand of any officer of the Post Office authorised by him for that purpose (a); (4) telegrams transmitted by any company existing on the 22nd July, 1869, the undertaking of which has not been purchased by the Postmaster-General (b); (5) telegrams the transmission of which is authorised by the Telegraph Act, 1868 (c), or by any agreement confirmed thereby or made in pursuance thereof (d); (6) telegrams transmitted to or from any place outside the territorial limits of the Telegraph Acts (e).

valuable consideration. In neither case must any profit be made out of the use of the telegraphs by others. The distinctions between the two classes, owing to the cumbrous drafting of the enactment, are not easy to detect: see *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q. B. D. 244, 259—262; *Postmaster-General v. National Telephone Co., Ltd.*, [1909] A. C. 269. Both these cases related to telephones, which (see p. 350, *ante*) are a species of statutory “telegraph.” In *A.-G. v. Edison Telephone Co. of London*, *supra*, it was thought that there was very little, if any, difference in substance between the two classes; but in *Postmaster-General v. National Telephone Co., Ltd.*, *supra*, the following distinction was drawn: the first class contemplates both maintenance and user of the telegraph exclusively for the purpose of transmitting telegrams relating solely to the affairs of the owner of the telegraph, such as communications between the head office of a bank and its branches, or between a merchant’s private residence and his office. The second class, on the other hand, is designed to cover the case of the maintenance of a telegraph for the private use of its owner; but it is not imperative that the telegraph should be maintained or used solely for his private use, or that the telegram transmitted should relate to his business, and the casual and gratuitous use of the telegraph by third persons for business in which its owner has no concern is not prohibited, as, for instance, where the telegraph is maintained for the main purpose of communications between a railway company and coal merchants or other traders, the very case mentioned as an exception in the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9 (8). Telegrams transmitted by such a telegraph may, on occasion, relate to the affairs of other persons, but not so frequently as to constitute it a practice, for, in that event, it could not be said that the telegraph was maintained for private use. The two classes are designed to cover different sets of circumstances, though the ground covered by them may, in many cases, overlap. All the kinds of telephonic communication, however, set out in the schedule to the special case there stated, appeared to the House of Lords to fall outside both classes. These included a system of fire-alarm signals between police, householders, and local authorities, and telephonic communications between a doctor and chemist, between a brewery and a distillery company, between a theatre-ticket agency and theatres or hotels, between an estate agent and a builder, between a bank and a firm of printers, between a steamship company and a tourist agency, and between a company and its solicitor. In none of these cases could it fairly be said that the telegraph was either maintained and used exclusively for the private purposes of its owner, or maintained, as a general practice, for the private purposes of one only of the companies or persons between whom it was used as a medium of communication.

(a) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5.

(b) *Ibid.*

(c) 31 & 32 Vict. c. 110.

(d) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5.

(e) *Ibid.*, which refers to “telegrams transmitted to or from any place out of the united kingdom of Great Britain and Ireland,” but by the Telegraph Act, 1870 (33 & 34 Vict. c. 88), s. 3, the Isle of Man and the Channel Islands are to be deemed part of the United Kingdom for all the purposes of (*inter alia*) the Telegraph Act, 1869 (32 & 33 Vict. c. 73). As to the Telegraph Acts, see note (m), p. 349, *ante*; as to their territorial limits, see p. 353, *ante*.

726. The Postmaster-General has the exclusive privilege of applying to certain tribunals to dispense with the consents of bodies and persons which, in other cases, constitute a condition precedent to the construction or execution of certain telegraphic works, and to substitute therefor, in the event of the application being granted, the consents of such tribunals (*f*).

SECT. 2.
Monopoly and Exclusive Rights of the Postmaster-General.

SECT. 3.—*Special Exemptions of the Postmaster-General.*

727. In addition to the above-mentioned exclusive rights and powers, the Postmaster-General is entitled, either under the Telegraph Acts (*g*) or by virtue of his office, to certain exemptions from liabilities and duties to which others engaged in the transmission of telegrams are subject. Thus, where he comes into the possession of a telegraphic line which has been constructed by his predecessor in title otherwise than in conformity with the Telegraph Acts in force for the time being, he is, in the first instance, exempt from the liability, which would attach in any other case, to have his property and undertaking treated as illegally held and exercised (*h*), and remains so exempt unless and until some road authority or landowner, who would have been entitled under the Acts to require the removal of the line, if it had been constructed in accordance therewith, gives notice to him to remove it (*i*).

Dispensing with consents.
Exemptions from liability.

Statutory exemptions.

The Postmaster-General is unaffected by any of the provisions for the prevention of danger or obstruction to the public from any of his posts or underground wires, tubes, or other apparatus or property which may be contained in bye-laws or regulations framed by urban authorities under the Public Health Acts Amendment Act, 1890 (*k*), and also by any of the like provisions in certain local Acts (*l*).

The Postmaster-General is also exempted under the Telegraph Acts (*g*) from all stamp duties in the case of any instrument executed by him (*m*), and also from the necessity of finding sureties when giving the bond required by the Lands Clauses Acts (*n*) in certain cases of compensation (*o*).

(*f*) As to the circumstances and modes in which the Postmaster-General is authorised to exercise these rights, see pp. 377 *et seq.*, *post*.

(*g*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*h*) See p. 392, *post*.

(*i*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 4 (1).

(*k*) Public Health Acts Amendment Act, 1890 (55 & 56 Vict. c. 59), ss. 13, 15 (1).

(*l*) For an instance, see London Overhead Wires Act, 1891 (54 & 55 Vict. c. lxxvii.), s. 21; see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 641, 642; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206; METROPOLIS, Vol. XX., pp. 405, 461.

(*m*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 22, amending the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 5; see also Post Office Act, 1908 (8 Edw. 7, c. 48), s. 38; see titles POST OFFICE, Vol. XXII., p. 629; REVENUE, Vol. XXIV., p. 722, note (*e*).

(*n*) As to the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(*o*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 10 (3). As to when these sureties are required, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 101. As to the Postmaster-General's right to be indemnified by a local authority for any loss incurred in supplying additional telegraph

SECT. 3.

Special
Exemptions
of the
Postmaster-
General.Exemptions
by virtue
of office.
Leasing.

728. Independently of the above immunities, which are the creation of the Telegraph Acts (*p*), the Postmaster-General is entitled to various exemptions by virtue of his office (*q*).

SECT. 4.—*Delegation of Powers and Duties.*

729. On acquiring the undertaking of any telegraph company, the Postmaster-General may, with the consent of the Treasury, lease the whole or part of the undertaking, or of any property acquired for telegraphic purposes, to any company or person (*r*), whereas other telegraph undertakers are prohibited, with certain specified exceptions, from transferring, selling, or leasing their undertaking or works, or any part thereof, without the consent of the Board of Trade (*s*).

Agents.

730. The Postmaster-General may appoint deputies, officers, and agents to execute works, transact telegraphic business, make applications to the prescribed authorities or tribunals for necessary consents, serve notices, or grant licences, on his behalf (*t*).

Licences.

731. The Postmaster-General is empowered to grant written licences on such pecuniary and other terms as he may deem proper, either generally or in the individual case, to any company, person or body, to transmit telegrams (*u*). By the same or another licence,

offices or telegraph facilities at the request of the authority, see title POST OFFICE, Vol. XXII., p. 650.

(*p*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*q*) Thus, estoppel cannot be set up against him (*Postmaster-General v. Green* (1887), 51 J. P. 582, C. A. (where, a post office clerk having allowed the defendant to send a telegram, which was not a "press telegram," at "press telegram" rates, the Postmaster-General recovered the difference, and the defendants were not allowed to set up any estoppel against a public official discharging his statutory duty under the Telegraph Acts)). Again, in his official capacity, he is not responsible to third persons for the wrongful acts or defaults of those who are executing his directions, since they, like himself, are officers of the Crown (*Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178, C. A.); nor does he incur any liability in his individual capacity (*Jones v. Monsell* (1872), 6 I. R. C. L. 155). The proper procedure in such cases is to present a petition of right to the Crown (*St. James and Pall Mall Electric Light Co. v. R.* (1904), 73 L. J. (K. B.) 518). Lastly, a debt due to him is a Crown debt, and therefore preferential, and not subject to the ordinary bankruptcy rule of rateable distribution amongst creditors (*Re Niblock*, [1907] 2 I. R. 559). As to the position of the Postmaster-General generally, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 105, 106; POST OFFICE, Vol. XXII., p. 628; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 299 *et seq.*

(*r*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 14. As to the Postmaster-General's powers to sell, lease, exchange, or surrender lands generally for the postal and telegraphic services, see Post Office Act, 1908 (8 Edw. 7, c. 48), s. 47; title POST OFFICE, Vol. XXII., p. 636.

(*s*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 43.

(*t*) By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9 (7), the railway companies therein referred to are to act, in receiving and transmitting telegrams by their telegraphs, as the agents of the Postmaster-General. As to the Postmaster-General's powers generally of appointing officers, deputies, and agents for postal, including telegraphic, purposes, see title POST OFFICE, Vol. XXII., pp. 628 *et seq.* As to the meaning of "agents" in the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2, see p. 352, *ante*; as to the granting of licences by an officer, see the text, *infra*.

(*u*) The Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5, impliedly authorises the Postmaster-General, by himself or by an officer appointed by him for that

he may authorise the licensee, during the time and within the area specified therein, to exercise any other of the powers, also to be specified therein, which are conferred upon him by certain enactments of the Telegraph Acts (*a*). The licensee is not to exercise any such powers except in an urban district, or such area adjoining an urban sanitary district as is described in the licence, or without the consent in London of the London County Council, and in any urban sanitary district outside London of the urban sanitary authority, and elsewhere of the county council (*b*); the licensee is to be subject to any terms and conditions which the county council or urban sanitary authority may attach to such consent, and must comply with any regulations of such council or authority from time to time in force in relation to telegraphic lines (*c*). There are special and elaborate provisions as to licences for telephonic communication and for wireless telegraphy respectively (*d*).

A licence to transmit telegrams, as distinct from a licence delegating any of the powers and duties above mentioned, merely operates to except the acts licensed from the Postmaster-General's

SECT. 4.
Delegation
of Powers
and Duties.

Distinction
between
kinds of
licences.

purpose, to grant written licences or consents, either special or general, to any person to transmit telegrams, inasmuch as telegrams so transmitted are thereby excepted from his monopoly.

(*a*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 5 (1). The powers which may be so delegated are those conferred upon the Postmaster-General by any provision of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), or of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), or of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2, as to which last see p. 378, *post*. In the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 6 (1), the authority of a licensee in that behalf to enter into agreements with electric lighting companies is recognised. As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*b*) As to urban districts and urban sanitary districts, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*; as to the extent of "London," as controlled by the London County Council, see title METROPOLIS, Vol. XX., pp. 393 *et seq.*

(*c*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 5 (2). The terms and regulations here referred to are such as regulate user, and not construction. Therefore, *primâ facie*, it is for the Postmaster-General to require the proper authority to give its consent to the laying or placing of the telegraphs, or to submit the question to the prescribed tribunal (*Postmaster-General v. Edinburgh Corporation* (1899), 10 Ry. & Can. Tr. Cas. 247). No licensee has such right, unless given him in the clearest and most explicit terms by his licence; where it is not so given, and the licensee, notwithstanding, invokes the assistance of the statutory tribunal in case of any difference, prohibition will lie (*National Telephone Co., Ltd. v. Tunbridge Wells Corporation* (1901), 17 T. L. R. 459, C. A.; followed in *National Telephone Co., Ltd. v. Huddersfield Corporation* (1901), 17 T. L. R. 460, C. A.). As a further illustration of the strictness with which these licences must be construed, see *South Eastern Railway v. National Telephone Co., Ltd.*, [1908] 2 Ch. 50 (affirmed on other grounds, and without expressing any opinion on the construction of the clause in question, [1908] 2 Ch. 514, C. A.), where the defendants had a telephone licence containing, amongst other restrictive clauses, a clause excepting from the delegated powers all powers of constructing works in, under, upon, along, over, or across any railway, and it was held by WARRINGTON, J., that they were not licensed to place a telegraph along a public road which crossed a railway, notwithstanding that, by a proviso to the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 32, the placing of a telegraph along such a public road is authorised, the reason being that the statutory proviso was not repeated as a proviso to the clear and comprehensive prohibitory words of the clause in the licence. For a form of clause relating to the placing of telegraph wires, see *Encyclopædia of Forms and Precedents*, Vol. IV., p. 228.

(*d*) See pp. 372 *et seq.*, *post*.

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Delegation
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statutory monopoly, and to render lawful that which otherwise would be illegal; the licensee is not a monopolist to the extent of the delegated privileges in place of the Postmaster-General, nor is he entitled to the rights or subject to the liabilities of such a monopolist, and he may therefore give a preference to one customer over another (*e*). In the case, however, of a licence delegating any of the above-mentioned statutory powers, the position is different. The licensee is something more than a bare licensee, and stands in the place of the Postmaster-General as regards all rights appearing clearly and expressly from the terms of the licence and the enactments authorising the delegation. Outside these precise limits the licence has no efficacy (*f*).

Part III.—Construction and Maintenance of Telegraphs.

SECT. 1.—Powers and Duties of Public Authorities.

SUB-SECT. 1.—Streets and Public Roads.

Interference
with streets
and roads.

732. Companies authorised by special Act to construct and maintain telegraphs, and the Postmaster-General (*g*), are, subject to certain conditions, empowered to execute the following works in streets and public roads (*h*), namely:—(1) to place and maintain any telegraph under, over, along, or across, or any post in or upon, any street or public road, and, when placed, alter or remove the same (*i*); (2) to alter the position, in any street or public road, of any pipe (not being a main) for the supply of water or gas (*k*); and (3), for any of the purposes mentioned above, to open or break up any street or public road (*l*).

Conditions
as to notices
and consents.

733. Notice must be given before breaking up the street or public road to the body having control thereof, specifying the time for the commencement of the work (*m*); and before placing any telegraph, the consent of such body must be obtained (*n*), with this

(*e*) *Cochrane v. Exchange Telegraph Co., Ltd.* (1896), 65 L. J. (CH.) 334, 339, 340.

(*f*) See the cases cited in note (*c*), p. 359, *ante*.

(*g*) See p. 352, *ante*.

(*h*) For the statutory meaning of "street" and "public road," see p. 351, *ante*.

(*i*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (1), (2).

(*k*) *Ibid.*, s. 6 (3); see titles GAS, Vol. XV., p. 358; WATER SUPPLY.

(*l*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (3).

(*m*) *Ibid.*, s. 17. Ten days' notice is required where the telegraph is to be underground, and five where it is to be above ground (*ibid.*). For the statutory definition of "body," see note (*h*), p. 352, *ante*.

(*n*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 9 (underground works), 12 (above-ground works). A body not liable to repair a street or public road is not a body having the control of it (*Postmaster-General v. Hendon Urban District Council* (1913), 82 L. J. (K. B.) 1081).

qualification, that in the case of the Postmaster-General the withholding of such consent is not final, but creates a difference, which thereupon becomes the subject of statutory adjustment (*o*); and before placing any telegraph underground, notice must be given to such body of the intended depth, course, and position thereof, which matters must either be agreed or form the subject of a counter-notice, any difference as to which is to be settled in the prescribed manner (*p*).

SECT. 1.
Powers and
Duties of
Public
Authorities.

734. Upon breaking up any street or public road, (1) the work must be completed as soon as possible and the street or road reinstated, and in the meantime fenced, watched, and lighted (*q*); (2) payments must be made to the body having control for any increased expense for six months of repairing the street or road occasioned by the breaking up (*r*); (3) the body is entitled to do the work of opening the street or road instead of the company or the Postmaster-General, and, if it elects so to do, may recover the expenses from it or him (*s*); and (4) not more than a certain prescribed extent of the roadway may be opened up at one time (*t*).

Conditions
as to con-
struction.

735. Upon placing the telegraph, (1) all underground tubes and pipes are to have distinguishing marks (*a*); (2) all above-ground telegraphs are to be placed at such a height as not to interfere with passage for any purpose in the street or public road (*b*); (3) any telegraph which is abandoned or falls into decay may be removed by the body having control of the street or road (*c*); (4) whenever any such body has occasion to alter the level of such street or road, the company or the Postmaster-General, as the case may be, must on one month's notice remove and replace any of their works as required by such notice, subject, however, to adjustment in the prescribed manner of any difference which may arise on the question (*d*); (5) any post in or upon a street or public road which such body may consider dangerous or inconvenient must be removed or placed in a different position on a fourteen days' notice, subject to a seven days' counter-notice if the Postmaster-General or the company object, whereupon a difference arises, to be adjusted as prescribed (*e*); and (6) any

Conditions
as to main-
tenance.

(*o*) As to the mode in, and tribunal by, which such difference is to be settled, see pp. 378 *et seq.*, *post*.

(*p*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 10; as to the determination of the difference, see pp. 378 *et seq.*, *post*.

(*q*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 18. Penalties are provided for the breach of this and of the next condition, as to which see p. 386, *post*.

(*r*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 18.

(*s*) *Ibid.*, s. 19.

(*t*) *Ibid.*, s. 20. Not more than one-third in width, and if the remaining two-thirds does not admit of two carriages passing, not more than fifty yards in length, of the road may be opened up at one time (*ibid.*).

(*a*) *Ibid.*, s. 11.

(*b*) *Ibid.*, s. 13.

(*c*) *Ibid.*, s. 14.

(*d*) *Ibid.*, s. 15. If any difference arises, it is to be settled in the prescribed manner; see pp. 378 *et seq.*, *post*.

(*e*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 16. As to the settlement of differences, see pp. 378 *et seq.*, *post*.

SECT. 1.
Powers and
Duties of
Public
Authorities.

such company, but not the Postmaster-General, must conform to any regulations and bye-laws subsequently made by certain urban authorities for the safety and convenience of traffic (*f*).

In the execution of a telegraphic work, as little damage must be done as may be, and compensation therefor must be paid to all bodies and persons interested (*g*).

SUB-SECT. 2.—*The Seashore.*

Construction
and mainten-
ance.

736. The Postmaster-General, or any company authorised by special Act to construct and maintain telegraphs, may place and maintain telegraphs and posts under, in, over, along, or across any estuary or branch of the sea or the shore or bed of any tidal water, and, when placed, may alter and remove them (*h*), and, for the purposes of construction, maintenance, or repair, may use, on board ship or elsewhere, any light or signal allowed by any Board of Trade regulations (*i*).

Consents.

737. The consent of all bodies and persons interested must first be obtained, such consent, in the case of the Crown, to be given in writing by the Commissioners of Woods, or one of them (*k*). If such consent is withheld a difference arises, which is the subject of statutory adjustment (*l*).

Powers of
Board of
Trade.

738. Before constructing or placing any work or buoy or sea-mark connected therewith, a plan is to be submitted to the Board of Trade for its approval (*m*). The work must be done in accordance with the approved plans, otherwise it may be removed by the Board of Trade (*n*). Any such work, buoy, or sea-mark which falls into decay may also be so removed (*o*), and is subject to survey and examination from time to time by the Board of Trade at the expense of the company or Postmaster-General (*p*), such expenses being recoverable, with costs, as a penalty (*q*).

(*f*) As to these regulations, see p. 357, *ante*.

(*g*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 7. As to how the compensation is assessed, see pp. 381 *et seq.*, *post*.

(*h*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (4).

(*i*) *Ibid.*, s. 37. As to the seashore generally, see title WATERS AND WATERCOURSES.

(*k*) Telegraph Act, 1863 (26 & 27 Vict. c. 112) s. 35. "Commissioners of Woods" is the short title which by the Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 2, is given to the body described in the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 35, by the longer name of "Commissioners of Woods, Forests, and Land Revenues"; see, generally, title CONSTITUTIONAL LAW, Vol. VII., pp. 122 *et seq.*

(*l*) See pp. 378 *et seq.*, *post*.

(*m*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 36, applied to the Isle of Man by the Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34), s. 1.

(*n*) *Ibid.*

(*o*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 38, applied to the Isle of Man by the Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34), s. 1.

(*p*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 39, applied to the Isle of Man by the Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34), s. 1.

(*q*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 40, applied to the Isle of Man by the Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34), s. 1. As to the recovery of these expenses as a penalty, see p. 386, *post*.

SECT. 2.—*Rights and Interests of Private Owners.*SUB-SECT. 1.—*Land or Buildings.*

739. Any company authorised by special Act to construct and maintain telegraphs, and the Postmaster-General, may place and maintain telegraphs and posts under, in, upon, over, along, or across any private land or building (*r*).

740. The consent of the owner, lessee, or occupier must be obtained before any work is placed in, upon, over, along, or across any such land or building, or by the side thereof, in such a position as to interfere with the landowner's access thereto; where, however, a work has been placed over, along, or across any building, or across any land, near a street or public road, and the consent of the body having control of such street or road has been obtained to the placing thereof over, across, or along the street or road, the consent of the landowner is not necessary, unless the land or building is Crown property, or the land is laid out as building ground, or as a garden or pleasure ground, or is dedicated to the recreation of the public, or unless the public road passes through or by the side of, or crosses or abuts on, any park or pleasure grounds or ornamental water, or private drive through the same, or to any mansion (*s*). No above-ground telegraph or post may be placed within ten yards of a dwelling-house, nor any above-ground telegraph across any avenue or approach to a dwelling-house, without the consent of the occupier, or, if none, the lessee, or, if neither, the owner (*t*). In cases where the consent of the body having control has been obtained, notice must be given to the landowner, or to the frontagers, as the case may be, in the prescribed manner, of the fact of such consent having been obtained, and of the proposed course of the telegraph, subject, in the case of frontagers, to a statutory settlement of any difference that may arise (*a*).

SECT. 2.
Rights and
Interests
of Private
Owners.User of
private pro-
perty.

Consents.

(*r*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (4). For the definition of "land," see p. 351, *ante*.

(*s*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 12, 21. *Ibid.*, s. 21, must be read with the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 3, and the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 2, by which its application is extended. The consent of the Crown, in the case of Crown property, is given by the Commissioners of Works, or any one of them (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 21). For the statutory meaning of "work," see p. 350, *ante*. For form of application for consent, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 339; and for form of consent, see *ibid.*, p. 340.

(*t*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 22 (1).

(*a*) In urban districts the notice must be served on the landowner, or each landowner, affected. In rural districts it is sufficient to publish the required notice by fixing it in conspicuous places, not more than one mile apart, by the side of the street, and leaving copies at every dwelling-house within fifty feet, and advertising in the local newspapers; see Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 21 (1), 23, as amended and applied by the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 2. As to the mode of adjusting the statutory difference in the case of a frontager, see note (*n*), p. 383, *post*.

SECT. 2.
Rights and
Interests
of Private
Owners.

Height of
line.

Person liable
to repair.

Difference.

Compensa-
tion.

Alteration
when
required.

No telegraph can be placed less than six feet over a dwelling-house if the owner, lessee, or occupier objects (*b*).

Where any landowner or other person (*c*) is liable for the repair of any street or public road dedicated to the public, his consent, as well as that of the road authority, must be obtained to the placing of any work in, upon, over, along, or across such street or road (*d*). The provision in question contemplates the existence of two separate and distinct persons, the one being the road authority and the other the landowner or person liable to repair, not the case of a road authority which happens to be also the landowner; a road authority, therefore, in which these two characters are united, and which has no absolute or unappealable veto as a road authority, cannot assert that right in its other character as a landowner (*e*).

In all the above cases the withholding of any consent by any landowner as above mentioned creates, as between the Postmaster-General (*f*) and the landowner, a statutory difference, to be adjusted as prescribed (*g*).

741. The exercise of the statutory powers of interfering with private lands or buildings is subject to the payment of full compensation to every landowner whose land is injuriously affected, to be settled as prescribed (*h*).

If any landowner at any time after the placing of the telegraph desires to extend, vertically or laterally, any building owned or occupied by him over which such telegraph has been placed, or if any such landowner, or the lord of the manor, or other person interested in any land or building, in, upon, over, along, or across which, or any street or public road adjoining which, any telegraphic work has been placed, desires subsequently to build on or inclose such land, or to alter or improve, or apply to other uses, such land or building, and the continuance of the telegraphic work will interfere with the accomplishment of his desires, he may give notice of his intention, requiring, within fourteen days, the necessary raising or alteration in position of the telegraphic work, so as to obviate such interference; the company or the Postmaster-General, as the case may be, must then execute the required alterations within the fourteen days, unless the existence of the alleged intention is challenged, in which case a statutory means of deciding the question is provided; if the decision of the prescribed tribunal is in favour of the landowner, the alterations must be executed within fourteen

(*b*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 21 (2).

(*c*) This perhaps includes a company under statutory liability to keep a part of the roadway in repair (*Bristol Tramways and Carriage Co. v. National Telephone Co.*, [1899] 2 Ch. 282 (where NORTH, J., seemed to think this view a possible one, though it was not necessary to decide the point)).

(*d*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 13. As to the liability for repair of roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 82 *et seq.*

(*e*) *Postmaster-General v. Edinburgh Corporation* (1899), 10 Ry. & Can. Tr. Cas. 247.

(*f*) This does not apply in the case of a company; see p. 378, *post*.

(*g*) See pp. 378 *et seq.*, *post*.

(*h*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 21 (4). As to the mode of assessing the compensation, see pp. 381 *et seq.*, *post*.

days of the date of the certificate whereby such decision is given (i).

Where an occupier has consented to the placing of an above-ground telegraph or post within ten yards of his dwelling-house, on his occupation coming to an end the lessee or owner in possession has the right to require the removal thereof, subject to statutory adjustment in case of difference (j).

SECT. 2.
Rights and
Interests
of Private
Owners.
Removal.

742. If the Postmaster-General desires to construct or is constructing a telegraphic line along a street or public road, the owner, lessee, or occupier of any hedge or bank forming the boundary of such street or road, or of any uninclosed land on the side and within twenty feet thereof, not being common land, or land dedicated to the recreation of the public, may be required to give his consent to the construction of the line, and if he fails to do so within a month, a difference is to be deemed to have arisen, which is the subject of statutory adjustment (k). Where a tree overhangs any street or road, and interferes with the maintenance or construction of any telegraphic line, the Postmaster-General may require the tree to be lopped, and if the owner or occupier of the land on which the tree is growing fails to comply within a month the Postmaster-General may cause the tree to be lopped, subject to compensation (l).

Hedges and
overhanging
trees.

SUB-SECT. 2.—*Commercial Undertakings.*

743. The execution of telegraphic works may obviously affect the interests of those engaged in commercial undertakings for other than telegraphic purposes. Detailed provision is made in the Telegraph Acts (m), or in the Acts regulating such other undertakings, or in both, for the safeguarding of these interests, where they conflict with those of the Postmaster-General, or with those of any company authorised to construct and maintain telegraphs,

Protection
of interests.

(i) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 21 (3), 30. The certificate referred to is a certificate of a justice of the peace that he is satisfied of the landowner's intention (*ibid.*, s. 21 (3)).

(j) *Ibid.*, s. 22 (2), (3), (4), (5). As to the mode of determining the "difference," see pp. 378 *et seq.*, *post.* There are also provisions of a transitory nature, the object of which must long since have been exhausted, for the satisfaction of any objection by a private landowner to the continuance of telegraphic works constructed under, in, upon, over, along, or across any street or public road before the commencement of the Telegraph Acts (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 31). As to the Telegraph Acts, see note (m), p. 349, *ante*.

(k) Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 1. As to the statutory meaning of "hedge," "bank," "telegraphic line," "street," "public road," and "land," see pp. 350, 351, *ante*; as to statutory adjustment, see pp. 378 *et seq.*, *post.*

(l) Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 5 (1), (3). The owner or the occupier may, under *ibid.*, s. 5 (2), object by counter-notice, whereupon a difference arises, to be settled as prescribed, as to which see pp. 378 *et seq.*, *post.* The Postmaster-General may execute the lopping himself if within the month no counter-notice is given, or if the authority having jurisdiction over the difference makes an order in that behalf (Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 5 (3)). He must instruct his officers to do the work in a husbandlike manner, and so as not to injure the growth of the tree (*ibid.*, s. 5 (4)). As to the payment of compensation, see pp. 381 *et seq.*, *post.*

(m) As to the Telegraph Acts, see note m), p. 349, *ante*.

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Rights and
Interests
of Private
Owners.

in the case of undertakings relating to the following:—railways (*n*), canals (*o*), gas and water (*p*), electric lighting (*q*), and tramways (*r*).

(*n*) Any company authorised by special Act to construct and maintain telegraphs, to which the Postmaster-General was afterwards added (see pp. 352, 355, *ante*), may place and maintain a telegraph and posts under, in, upon, over, along, or across any railway or canal, and, when placed, may alter and remove the same (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (4)), but the consent of the owners or lessees of the railway or canal must first be obtained (*ibid.*, s. 32). Should it be withheld, however, a statutory difference will arise between the parties where the Postmaster-General, not where a company, is concerned, which must be settled in the prescribed manner; see pp. 378 *et seq.*, *post*. This consent is not required where the telegraph or post is merely to be placed under, in, upon, along, over, or across any street or public road which crosses, or is crossed by, a railway or canal, if no damage is done thereto, and its user, alteration, or improvement is not interfered with (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 32). By the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), ss. 1, 2, the Postmaster-General is invested with certain additional powers, subject to conditions specified in these provisions, of entering upon a railway or canal for the purpose of maintaining and altering any telegraphic line which he has already constructed along a street or public road, or over or under any land, including buildings, or for the purpose of placing any telegraphic line which he desires so to construct, either overhead or underground, and maintaining and altering the same, and executing the necessary works, except as regards any portion of a telegraphic line placed or intended to be placed along the course of a railway or canal for a greater distance than a quarter of a mile. When the Postmaster-General has acquired a telegraphic undertaking, and handed it over to a railway company to work as his agents, he and such railway company have reciprocal rights against each other to affix wires to existing posts at divided cost, and the railway company may, if necessary for the purposes of the railway traffic, from time to time require the Postmaster-General to shift his poles and wires at his expense, or, where the poles carry the wires of both, at an apportioned expense (Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9 (4), (5)).

(*o*) In the case of canals it is provided by the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 33, that if, upon the placing of the telegraph or post, any person having power to do so constructs any dock, basin, or other work upon any land adjoining or near to the telegraphic work, and is prevented thereby from having communication between the dock etc. and the canal for the convenient passage of vessels, or if the basin of the dock is interfered with, then, at the request of such person, and on his giving reasonable facilities for taking the telegraph round the dock through land belonging to him, the telegraph must be so moved and so placed accordingly, subject to the adjustment in the prescribed manner of any "difference" that may arise on this question, as to which see pp. 378 *et seq.*, *post*. As to the further powers conferred on the Postmaster-General in relation to canals by the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), see note (*n*), *supra*. For the statutory definition of "railway," "canal," "telegraph," "post," "telegraph line," "street," "public road," and "land," see pp. 349 *et seq.*, *ante*.

(*p*) Any such company as is above mentioned (see note (*n*), *supra*), or the Postmaster-General, may, in placing a telegraph under any street or public road, alter the position therein of any pipe (not being a main) for the supply of gas or water, doing as little damage as need be, and giving the owner of such pipe notice of the intended operation, and executing it to his reasonable satisfaction and under his superintendence, the cost of which must be paid (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6 (3)). By *ibid.*, s. 8, as amended by the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7, corresponding rights, with similar restrictions, are given to gas and water undertakers as against telegraph undertakers. See, generally, titles GAS, Vol. XV., p. 358; WATER SUPPLY.

(*q*) There is only one enactment in the Telegraph Acts (see note (*m*), p. 349, *ante*) relating specifically to electric light undertakings, namely, the Telegraph

(*r*) For note (*r*), see p. 367, *post*.

744. Apart from, and without prejudice to, the above specific enactments, there are provisions in the Telegraph Acts (s) of a more general and comprehensive scope, relating to the reciprocal rights and liabilities of telegraphic and non-telegraphic undertakings and businesses. Besides the condition that, in the exercise of their statutory powers, both the Postmaster-General and any company authorised by special Act to construct and maintain telegraphs must pay compensation to all bodies and persons interested for all damage sustained by them by reason of the exercise of such power (t), it is expressly provided that, in the case of certain authorised classes of non-telegraphic undertakings (u), the

SECT. 2.
Rights and
Interests
of Private
Owners.

Conditions of
interference.

Act, 1892 (55 & 56 Vict. c. 59), s. 6, whereby it is provided that any company or person authorised to lay an "electric line" may, with the approval of the Board of Trade and the consent of the local authority of the district, make an agreement with the Postmaster-General, or his licensee, that the latter shall be at liberty to place his telegraphs in the trenches, tubes, pipes, or apparatus used for the purposes of the "electric line," and all enactments relating to the laying of electric lines are, so far as applicable, to extend to anything done under this provision. In the Electric Lighting Acts (see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 542), however, there are elaborate provisions for the protection of the Postmaster-General's telegraphic works (no other telegraphic undertakings are protected or referred to); see Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), ss. 26, 32, 35 (definitions of "electric line," "telegram," "street," "land" etc.); Electric Lighting Act, 1888 (51 & 52 Vict. c. 12), s. 4; Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sched., clauses 1, 14, 62, 79; and see, generally, title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 572. There is no protection, it is to be observed, in any of the Electric Lighting Acts for any licensee of the Postmaster-General; consequently a telegraph company, though holding such a licence, would not be protected, or not specially protected, from the statutory operations of an electric lighting company; compare *National Telephone Co. v. Baker*, [1893] 2 Ch. 186, where a similarly licensed company was held to be devoid of special protection against the statutory operations of a tramway company under a provisional order which only mentioned the Postmaster-General.

(r) There is nothing in the Telegraph Acts (see note (m), p. 349, *ante*) relating to street tramways, though the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 6, mentions "tramways other than street tramways" as the subject of protection. But the Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 30, 32, 33, contain detailed provisions for the regulation of the reciprocal rights and duties of telegraph and tramway undertakers, in interfering with one another's works. The Act itself does not limit its protective enactments to the Postmaster-General alone, but the common form of provisional order framed thereunder does so; and under any such order only the Postmaster-General, but not any licensee, much less any telegraphic company, can take the benefit of such enactments (*National Telephone Co. v. Baker*, *supra*). The conditions subject to which any telegraphic wires or apparatus are authorised to be laid down by the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 32, are all in the nature of conditions subsequent, relating to the maintenance and working of the telegraph, not conditions precedent to the placing thereof; thus, it was held in *Bristol Tramways and Carriage Co. v. National Telephone Co.*, [1899] 2 Ch. 282, that it was no necessary for the telephone company to obtain the consent of the tramway company before laying down its telephone wires. Generally it may be added that, in the case of any tramway undertaking authorised by provisional order under the Tramways Act, 1870 (33 & 34 Vict. c. 78), or by special Act incorporating and varying its provisions, the language of the special, as well as the general, legislation must be closely observed; see, for instance, *Re Rhondda Urban District Council and Taff Vale Rail. Co.* (1907), 97 L. T. 892, C. A.; see also title TRAMWAYS AND LIGHT RAILWAYS, pp. 801, 802, *post*.

(s) As to the Telegraph Acts, see note (m), p. 349, *ante*.

(t) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 7.

(u) The undertakings referred to are those relating to any railway, canal,

SECT. 2.
Rights and
Interests
of Private
Owners.

Postmaster-General, but no other person or company, may place and maintain telegraphic lines (*v*) in, under, upon, along, over, or across any such undertaking, and from time to time alter the same and enter upon the lands of the undertakers for those purposes, and for purposes of examination and repair and the execution of all other necessary works, subject to the following conditions and restrictions, namely:—(1) there is to be no obstacle to the undertakers' traffic or business; (2) not less than one month's notice must be given by the Postmaster-General of the proposed course and position of the telegraphic line, and if the undertakers notify their objection within that time a difference arises, to be settled in the prescribed manner; (3) all damage is to be made good, and the undertakers are to be indemnified against the consequences of any stoppage and delay in the conduct of their undertaking; and (4) any additional expense to which the undertakers may be put for repairs or maintenance must be made good (*a*).

Rights of
alteration.

745. Corresponding rights of interference with the telegraphic lines of the Postmaster-General are given to any non-telegraphic undertakers for the necessary purposes of their undertaking of whatever kind, without restriction to the classes of undertaking with which alone the Postmaster-General is authorised to interfere, if the undertaking is authorised by any Act of Parliament passed after the 1st January, 1878 (*b*), subject to the following conditions, namely: (1) the undertakers must give not less than seven nor more than fourteen days' notice of the time and place at which the work is to be commenced, and the nature of the alterations which they require the Postmaster-General to execute; (2) within seven days of the receipt of such notice the Postmaster-General may serve a counter-notice, stating his intention to do the work himself, or requiring the undertakers to do it to his satisfaction and under his supervision; (3) in case of a counter-notice to the former effect, the Postmaster-General may do the work, by himself or his agents, and charge the expenses and all loss or damage to the undertakers; (4) in case of a counter-notice to the latter effect, the undertakers

tramway, other than street tramway, railway or river embankment, subway, or aqueduct over or across a river, dock, harbour, or pier (Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 6). All such undertakings of the above character as should thereafter be authorised by special Act, and also the existing railway undertakings specifically mentioned in the schedule to the Telegraph Act, 1878 (41 & 42 Vict. c. 76), are the subject of the section, which, however, is not to apply to the railways of the companies named in the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9, or in the schedule thereto, so long as such companies are able and willing to construct and maintain telegraphic lines on the terms of that Act or any agreement thereunder; see note (*n*), p. 366, *ante*.

(*v*) For the meaning of "telegraphic line", see p. 350, *ante*.

(*a*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 6. As to railways and canals in particular, the exercise of the Postmaster-General's powers of entering and executing works thereon is subject to the conditions specified in the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), s. 1 (2), which, though not materially, differ from the conditions specified in the Telegraph Act, 1878 (41 & 42 Vict. c. 76). As to the statutory mode of settling differences, see pp. 378 *et seq.*, *post*. For the statutory meaning of "undertaking," "undertakers," "alter" etc., see Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 2; see note (*d*), p. 353, *ante*.

(*b*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 6.

must do the work at their own expense, and to the reasonable satisfaction, and under the supervision, of the Postmaster-General, or his agents, and to pay the expenses of such supervision and the amount of all loss and damage; and (5) if no counter-notice is given, or if the Postmaster-General fails to do any work which he has thereby expressed his intention of doing, the undertakers may do it, but at their own expense, and to the reasonable satisfaction of him, or of his agents (*c*).

SECT. 2.
Rights and
Interests
of Private
Owners.

Part IV.—The Conduct of Telegraphic Business.

SECT. 1.—Statutory Duties to the Public Using the Telegraphs.

746. Apart from their common law rights and liabilities, as agents, contractors and otherwise (*d*), those who are engaged in the business of transmitting telegrams are subject to the special duties and liabilities imposed by the statutes facilitating and regulating the conduct of such business.

Duties
imposed by
statute.

747. These statutory duties and liabilities are, in substance, as follows:—every telegraph is to be open for the messages of all persons alike, without favour or preference to any individual or class, either as regards charges, expedition, or otherwise (*e*), except so far as such preference is authorised by any statutory lease or agreement (*f*), or is given to the Crown or Government, pursuant to the requirements of the Acts (*g*), or to newspaper proprietors under special arrangements as to press telegrams (*h*). There must be no omission to transmit or deliver, or delay in the transmission or delivery of, any telegram (*i*). The purport or contents of any telegram or message entrusted to the Postmaster-General for transmission, must not, nor must any part of such contents, be divulged or intercepted (*k*), except when a court of justice by its

Transmission
of telegrams.

(*c*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7. Violation of these provisions is the subject of penalties; see p. 385, *post*. As regards railways and canals in particular, it is provided by the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), s. 1 (2) (*f*), that the Postmaster-General, on being required to do so by the railway or canal company, must remove or alter any telegraphic line constructed or maintained by him under the authority of that Act which interferes with any existing or proposed works of the railway or canal company, unless within twenty-one days he signifies his objection to the removal or alteration, in which case a "difference" arises, to be determined in the prescribed manner; see pp. 378 *et seq.*, *post*.

(*d*) See pp. 392 *et seq.*, *post*.

(*e*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 41; as to telephone licences, compare the Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (1).

(*f*) See the proviso to the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 41.

(*g*) See p. 354, *ante*.

(*h*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 16.

(*i*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 45.

(*k*) *Ibid.*, as amended and extended by the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 20.

SECT. 1.
Statutory
Duties to
the Public
Using the
Telegraphs.
Regulations.

subpœna or order requires the production of a telegram, or batch of telegrams, in which case the disclosure must be made, and the documents produced (*l*). The conduct of telegraphic business by any telegraphic company renders such company liable for all accidents and damages arising therefrom by reason of the wrongful acts or defaults of its servants or agents (*m*); the Postmaster-General, however, in his official capacity, cannot be made responsible for the act or omission of any of the servants of the Post Office, for they, like himself, are officers of the Crown (*n*); but a petition of right may be presented to the Crown, when justice will be done to the suppliant (*o*).

The conduct of telegraphic business is subject to all regulations, as to the conditions on and purposes for which the use of the telegraph may be permitted, which the Postmaster-General may think fit to make (*p*).

SECT. 2.—*Statutory Charges for the Use of the Telegraphs.*

Uniform
charges.

748. The Postmaster-General may fix the charges to be paid for the transmission of telegrams (*q*). Such charges for the transmission of written telegrams throughout the United Kingdom are to be made uniformly and without regard to distance, and are not to exceed the prescribed sums, which are regulated in accordance with the number of words used (*r*). The charge for each such written telegram covers the cost of delivery within the limits fixed by the Postmaster-General; and where the addressee does not reside within the limits of free delivery, and does not direct delivery by post (in which case free delivery must be made by the next post), the Postmaster-General may make an extra charge for delivery by special messenger, which must be prepaid; otherwise delivery by this means is not required to be made (*s*). As to

(*l*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 23, which expressly provides that there shall be no distinction, in this respect, between the Postmaster-General and any other person. This provision applies to election cases (*Coventry Election Petition, Ince's Case* (1869), 20 L. T. 421; *Tomline v. Tyler* (*Sir H.*) (1880), 44 L. T. 187, 188); compare *Re Smith, a Bankrupt* (1881), 7 L. R. 1r. 286 (bankruptcy), where the subpœna was in very wide terms, namely, to produce all telegrams sent by the bankrupt to his wife or any other person. As to *subpœna duces tecum*, see, generally, title EVIDENCE, Vol. XIII., pp. 580 *et seq.*

(*m*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 42, where the expression used is "act or default"; but the word "act," it is submitted, means "wrongful act"; see *Brocklehurst v. Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (1886), 17 Q. B. D. 118, decided with reference to the same words in an almost exactly similar section of another statute.

(*n*) *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178, C. A.; see titles CONSTITUTIONAL LAW, Vol. VI., p. 416; POST OFFICE, Vol. XXII., p. 629; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 322.

(*o*) *St. James and Pall Mall Electric Light Co. v. R.* (1904), 73 L. J. (K. B.) 518.

(*p*) Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2. As to these regulations, see p. 388, *post*.

(*q*) Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2.

(*r*) *Ibid.*, s. 2 (1). The system of charges thereby introduced is the sixpenny telegram system now in use.

(*s*) Post Office and Telegraph Act, 1897 (60 & 61 Vict. c. 41), s. 1, which

telephonic communications, or “spoken telegrams,” the Postmaster-General has made regulations fixing the charges; he has also made regulations as to the limits of free delivery, and the charges for special messengers, in the case of inland written telegrams, as to reduced rates for press telegrams, and as to the charges for foreign telegrams (*t*).

SECT. 2.
Statutory
Charges
for the Use
of the
Telegraphs.

Part V.—Special Provisions as to Telephones.

749. For the purposes of the Telegraph Acts (*u*) a telephone is a telegraph, and a telephonic message is a telegram; it therefore follows that all their provisions apply to telephonic as much as to any other species of statutory telegraphy (*v*). The necessity, however, of adapting the general language of the Acts to the physical conditions of telephonic telegraphy, and the need for additional fiscal provision, induced Parliament in 1899 to legislate expressly for telephones (*a*).

Application
of Telegraph
Acts.

750. The Telegraph Act, 1899 (*b*), provides expressly for the improvement of telephonic communication (*c*). In 1899 the Postmaster-General also issued regulations, not, however, under that statute, but under the general powers of the previous Telegraph Acts (*c*), regulating the conduct of telephonic business and the charges therefor, and containing definitions of “telephone” (*d*) and of other matters and things incidental to telephonic business (*e*).

Special
legislation.

substitutes new sub-sections—(2), (3), and (4)—for the corresponding sub-sections of the Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2.

(*t*) As to all these regulations, see p. 388, *post*.

(*u*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*v*) *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q. B. D. 244; see p. 350, *ante*.

(*a*) Telephones were dealt with *eo nomine* by certain statutes other than Telegraph Acts before 1899; see, for instance, the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 13, 14, 15. But before the passing of the Telegraph Act, 1899 (62 & 63 Vict. c. 38), there were no enactments specially directed to telephones. Indeed, except in the Telegraph Act, 1892 (55 & 56 Vict. c. 59), there had been no reference by name to telephones, and then only in the preamble to a money provision (*ibid.*, s. 1), or any implied reference, except in so far as the expression “written telegrams” in the Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2 (1), necessarily presupposed the existence of “spoken telegrams” (or telephonic messages), and the application thereto of a distinct scale of charges. As to the money provision for telephones, see pp. 391, 392, *post*.

(*b*) Telegraph Act, 1899 (62 & 63 Vict. c. 38).

(*c*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*d*) This is the first statutory definition of the word “telephone.” Telephones are also referred to in the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), the “long title” of which refers to “the construction and maintenance of telegraphic lines for telephonic and other telegraphic purposes,” and the

(*e*) For note (*e*), see p. 372, *post*.

PART V.
Special
Provisions
as to
Telephones.
Licences.

751. The Telegraph Act, 1899 (*f*), apart from its money provisions (*g*), is devoted solely to the subject of telephonic licences. It recognises the statutory right of the Postmaster-General to grant such licences in respect of telephones, as in respect of any other form of statutory telegraph, and also the fact that such right had already been exercised, and proceeds to deal with the question of new licences within an exchange area already served by an existing company (*h*). Such new licences may be granted subject to certain conditions and restrictions, which are in substance as follows. Where a licence is granted to a local authority, or to a new company, proposing to provide a system of public telephonic communication in any exchange area in which an existing company has already provided such a system, then, if the existing company consents to its being made a condition of its licence that within the area of the new licence it will give no preference either as to charges or facilities, and will not demand more or less by way of charge than is authorised by the Postmaster-General, it must be a condition of the new licence that, if it is proved to the satisfaction of the Postmaster-General that, having acquired powers by agreement with the local authority to lay underground wires within the area of the new licence, the existing company has incurred material expense in the exercise of such powers, such powers shall continue for the period specified in the new licence for the duration thereof, subject, however, to the terms of the agreement with the local authority, including any condition for the determination thereof on the breach of any of its provisions (*i*).

Approval of
local
authority.

The Postmaster-General is not to grant any application for a new licence made by any person or body other than the council of a borough or urban district, unless it is established to his satisfaction that such council has approved the application (*k*).

New
exchanges.

An existing company is prohibited from opening, without the consent of the Postmaster-General, any exchange in an exchange

Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), which similarly, in its "long title," refers to "telegraphs (including telephones)." The Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), and the Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56), are the first statutes in which the word "telephone" forms part of the statutory title.

(*e*) Telephone Regulations, 1899, purporting to have been issued under the Telegraph Acts, 1863—1897 (see note (*m*), p. 349, *ante*) (Stat. R. & O. Rev., Vol. XIII., Telegraph, p. 24), which have now been superseded by the substantially identical Telephone Regulations, 1910 (Stat. R. & O., 1910, p. 770), and formally purporting to have been issued under the Telegraph Acts, 1863—1909, and have been repealed by the Telephone Amendment (No. 1) Regulations, 1910 (Stat. R. & O., 1910, p. 776). As to these, see, further, pp. 388, 389, *post*.

(*f*) 62 & 63 Vict. c. 38.

(*g*) *Ibid.*, ss. 1, 2; see p. 391, *post*.

(*h*) This term is expressed in the Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (6), to mean "an exchange area as defined by any agreement made by an existing company with the Postmaster-General before the passing of the Act."

(*i*) *Ibid.*, s. 3 (1). "For the duration thereof," in this provision, means "for the duration of the powers so acquired," not "for the duration of the new licence"; see *National Telephone Co., Ltd. v. Kingston-upon-Hull Corporation* (1903), 89 L. T. 291.

(*k*) Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (2).

area in which, before the passing of the statute, it had not established an effective exchange (*l*).

752. Where the grant of a new licence results in a competition within the same exchange area between the system of the new licensee and the system of an existing company acting under a licence which is unexpired at the date of the statute, the licence of such existing company, if it is willing to consent to conditions substantially similar to those above mentioned, is to be continued, subject to the provisions of the old licence, for the period of the new licence (*m*); but if this provision results, in any case, in the continuance of the old licence for a period of not less than eight years beyond the term existing at the passing of the Act, the existing company, at the request of any other licensee supplying a system of telephonic communication within the same exchange area, or any part thereof, and such other licensee, at the request of the existing company, must provide proper facilities for intercommunication between the two systems, under such conditions as may be prescribed by an order of the Postmaster-General (*n*). Such an order has been duly made (*o*).

PART V.
Special
Provisions
as to
Telephones.

Competitive
systems.

Part VI.—Special Provisions as to Wireless Telegraphy.

753. Wireless telegraphy, if electricity be the agency employed, is within the terms of the Telegraph Acts (*p*), and all the provisions of those Acts apply to this as much as to any other species of statutory telegraphy (*q*). It has become necessary, however, for several reasons to legislate specially for the regulation and control, and also for the encouragement and facilitation, of wireless telegraphy.

Application
of Telegraph
Acts.

Accordingly, the Wireless Telegraphy Act, 1904 (*r*), was passed for this purpose. It applies not only to all the British Islands, but also to all British ships in the territorial waters abutting on the

Special
legislation.

(*l*) Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (3).

(*m*) *Ibid.*, s. 3 (4).

(*n*) *Ibid.*, s. 3 (5). The order referred to was to be made within six months of the passing of the Act, i.e., the 9th August, 1899 (*ibid.*).

(*o*) Telegraph (Telephonic Intercommunication) Order, 1899 (Stat. R. & O. Rev., Vol. XIII., Telegraph, p. 31); see p. 389, *post*. A question arose in *Swansea Corporation v. National Telephone Co.* (1906), 75 L. J. (CH.) 407, C. A., whether the facilities offered by one competing licensee to the other, under this order and the Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (5), were proper, and the Court of Appeal, after receiving and adopting the report of an expert referee, settled the precise acts and operations which it deemed adequate in the circumstances of the case for the provision of such proper facilities.

(*p*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*q*) *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q. B. D. 244, 249; see p. 350, *ante*.

(*r*) 4 Edw. 7, c. 24.

PART VI.
Special
Provisions
as to
Wireless
Telegraphy.

Definition.

coast thereof (s), and, within certain limits, to foreign ships whilst in territorial waters (t): it may also be applied to British ships whilst on the high seas (u). The Act (v) was limited in duration to a specified period, which, however, by subsequent Acts has been extended to the present time (w).

754. "Wireless telegraphy" is defined in the Wireless Telegraphy Act, 1904 (v), as any system of communication by telegraph as defined in the Telegraph Acts, 1863—1904 (a), without the aid of any wire connecting the points from and on which the messages or other communications are sent and received (b).

Licences.

755. No person may establish any wireless telegraph station, or instal or work any apparatus for wireless telegraphy in any place, or on board any British ship, except under and in accordance with a licence from the Postmaster-General (c). Any such licence must be in such form, for such period, and on such terms as the Postmaster-General may determine, and it may include two or more stations, places, or ships (d); and he may make regulations as to the manner of application for licences, and, with the consent of the Treasury, as to the fees to be charged (e). Penalties are provided for the violation of these provisions (f).

Licences
free of rent.

756. A licence for wireless telegraphy may be granted free of rent or royalty, where, in the case of a licence for any other species of telegraphy, the purposes for which it is required would fall within either of the first two exceptions to the Postmaster-General's monopoly (g); also where it is required solely for experimental

(s) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (2). For the application of the Act to the Isle of Man and the Channel Islands, see *ibid.*, s. 5. As to the extent of territorial waters, see title WATERS AND WATERCOURSES. As to the Channel Islands and the Isle of Man, see title DEPENDENCIES AND COLONIES, Vol. X., pp. 573 *et seq.*

(t) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (4). As to the Postmaster-General's regulations with respect to foreign ships, see p. 389, *post.*

(u) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (3). As to the Order in Council applying the Act to British ships on the high seas, see the text, *infra*.

(v) 4 Edw. 7, c. 24.

(w) See note (l), p. 349, *ante*.

(a) See note (m), p. 349, *ante*.

(b) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (7). The second of the two statutory meanings given to "telegraph" by the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 3, is "any apparatus for transmitting messages and other communications by means of electric signals"; see p. 350, *ante*. Consequently, the definition of wireless telegraphy if written out in full would run—"any system of communication by any apparatus for transmitting messages and other communications by means of electric signals, without the aid of any wire connecting the points from and on which the messages or other communications are sent and received." It is important to remember that a system of communication where neither wires nor electric signals are used would not come within the statutory, though it might within the popular, or the etymological, signification of "wireless telegraphy."

(c) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (1).

(d) *Ibid.*, s. 1 (2).

(e) *Ibid.*, s. 1 (5).

(f) See pp. 385 *et seq.*, *post.*

(g) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 2 (2). As to these two exceptions, see p. 355, *ante*.

purposes (*h*). Special licences may be granted on reduced terms for the establishment and working of wireless telegraph stations to be used exclusively for the transmission within the United Kingdom of news to public registered newspapers (*i*).

757. The Wireless Telegraphy Act, 1904 (*k*), may be applied by Order in Council to British ships when on the high seas (*l*), and an Order to this effect has been made (*m*). As to foreign ships in territorial waters, no apparatus for wireless telegraphy is to be used thereon except in accordance with regulations to be framed by the Postmaster-General (*n*). Such regulations have been issued (*o*).

PART VI.
Special
Provisions
as to
Wireless
Telegraphy.

Special
licences.
British and
Foreign ships.

Part VII.—Statutes Relating to Submarine Cables.

758. The Telegraph Acts (*p*) in no way affect, or deal with, submarine telegraphy between the British Islands and Foreign States (*q*), but so much of the business of transmitting foreign telegrams as is transacted within the territorial limits of the Acts is subject to their provisions (*r*). Until the 1st May, 1888, when the Submarine Telegraph Act, 1885 (*s*), came into force, the owners of such cables were entitled to the rights, and liable to the duties, which the common or Admiralty law conferred and imposed upon them (*t*), and, since that date, they have been entitled and liable to the same rights and duties as increased or varied by special legislation.

Application
of Telegraph
Acts.

(*h*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 2 (1).

(*i*) *Ibid.*, s. 2 (3). A schedule of all reduced rents and royalties is to be laid before Parliament (*ibid.*).

(*k*) 4 Edw. 7, c. 24.

(*l*) *Ibid.*, s. 3 (3).

(*m*) Wireless Telegraphy Order, 1908 (Stat. R. & O., 1908, p. 960).

(*n*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (4).

(*o*) Wireless Telegraphy (Foreign Ships) Regulations, 1908 (Stat. R. & O., 1908, p. 961); see p. 389, *post*. The Postmaster-General is authorised to impose penalties in the regulations for the breach thereof (Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 3 (4)), and this has been done; see p. 389, *post*.

(*p*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*q*) Several enactments, indeed, are careful to except by express language the undertakings of submarine cable companies; see Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 7, as to the undertakings of the Atlantic Telegraph Co. and the Anglo-American Telegraph Co.; Telegraph Act, 1870 (33 & 34 Vict. c. 88), s. 7 (now repealed), as to the undertakings of the Submarine Telegraph Co. and of the Société Carmichael et Cie. As to foreign telegrams generally, one of the exceptions to the Postmaster-General's monopoly set out in the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5, is the class of "telegrams transmitted to or from any place out of the United Kingdom"; see p. 356, *ante*. The control of the State over telegraphs (see p. 354, *ante*) does not extend beyond the territorial limits of the Acts.

(*r*) The territorial limits of the Acts are stated at p. 353, *ante*. With reference to the transmission of foreign telegrams within the United Kingdom, the Postmaster-General has issued regulations; see p. 388, *post*.

(*s*) 48 & 49 Vict. c. 49.

(*t*) See p. 393, *post*.

PART VII.

Statutes
relating to
Submarine
Cables.International
Convention.

759. On the 14th March, 1884, an International Convention was made between Great Britain and several other Powers with reference to submarine telegraph cables (*a*). Domestic legislation was thereupon required to be initiated by each of the signatory Powers to enforce the articles of the Convention within their respective dominions. Accordingly, the Submarine Telegraph Act, 1885 (*b*), and the Submarine Telegraph Act, 1886 (*c*), were passed for this purpose (*d*), applicable to the whole of His Majesty's Dominions, and to any place within the jurisdiction of the Admiralty, or where His Majesty has jurisdiction (*e*), which came into force on the 1st May, 1888, and were to remain operative for five years certain from that date, and thenceforth from year to year, until determined, on the agreed notice, by any of the high contracting parties, in which event the withdrawal is to take effect only so far as that party is concerned (*f*).

Protection
of cables.

760. The above-mentioned legislation is wholly concerned with the protection of submarine cables from the operations of vessels other than those engaged in repairing or laying the cables (*g*), and with the protection of such vessels, and particularly fishing vessels, and their property, from the operations of the owners of the cables (*h*). The violation of the provisions for this purpose is

(*a*) The articles of this Convention are set out in the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), Sched., which by *ibid.*, s. 2, provides that such articles shall have the same effect as if enacted in the body of the Act. For the list of parties to the Convention, comprising nearly all the Powers having, or likely to have, any interest in submarine telegraphy, see *ibid.*, Sched.

(*b*) 48 & 49 Vict. c. 49, which was expressed in its long title to be "an Act for carrying into effect an International Convention for the protection of submarine telegraph cables."

(*c*) 50 Vict. c. 3 (now repealed), passed for the purpose of explaining the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 4.

(*d*) See also the Pacific Cable Act, 1901 (1 Edw. 7, c. 31), providing for a submarine cable from the island of Vancouver to Norfolk Island, and thence by two cables to New Zealand and Queensland respectively; Pacific Cable (Amendment) Act, 1902 (2 Edw. 7, c. 26); Pacific Cable Act, 1911 (1 & 2 Geo. 5, c. 36), dealing mainly with the division of receipts and expenses between the Home and the Colonial Governments, and with finance and borrowing powers, and the establishment and constitution of a body (the "Pacific Cable Board") to manage the undertaking.

(*e*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 11.

(*f*) *Ibid.*, Sched., art. XVI. The agreed date for both the Acts coming into operation, within the meaning of this article, was declared to be the 1st May, 1888, by an Order in Council published in the *London Gazette*, 1888, p. 2331.

(*g*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 3, Sched., art. II., which as explained by the Submarine Telegraph Act, 1886 (50 Vict. c. 3), s. 2, Sched. (now repealed), provides that a person shall not unlawfully or wilfully, or by culpable negligence, break or injure any cable to which the Convention for the time being applies, so as to interrupt or obstruct telegraphic communication; but such breakage or injury is not to be deemed unlawful or wilful for the purpose of any penal provision, if the act is done to preserve life, or limb, or vessel, and reasonable precautions have been taken, or in the *bonâ fide* attempt to repair another submarine cable, or accidentally.

(*h*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 5, providing that the master, or, if he was in fault, the owner, of any vessel engaged in laying or repairing a submarine cable is prohibited from interfering with or wilfully delaying the operations of vessels engaged in fishing, contrary to any article of the scheduled Convention, or to any regulations as to signals which may be in

punishable as prescribed (*i*). Compensation for loss or injury is to be paid in certain cases, on furnishing proof of the prescribed character and in the prescribed manner (*k*). Officers in command of any warship or specially commissioned vessel of His Majesty may exercise the powers conferred, and are subject to the duties imposed, by the Convention (*l*); and penalties are provided for the obstruction of any such officer in the execution of his statutory powers and duties (*m*). On the other hand, there is distinct statutory recognition of the amenability of the officer to civil proceedings at common law in certain cases, but subject to prescribed conditions and restrictions (*n*).

Part VIII.—Statutory Remedies.

SECT. 1.—*Adjustment of Differences.*

SUB-SECT. 1.—*What are Differences.*

761. In a variety of cases differences arise, or are deemed to have arisen, under the Telegraph Acts (*o*) between the interested parties, which differences are the subject of special statutory methods of adjustment. Apart from questions of compensation (*p*), these statutory differences fall into two classes, namely: (1) differences which arise where any body or person having the power to grant or withhold consent (*q*) to the placing, construction, or maintenance of a telegraph or “work” refuses

Classification.

force. As to these regulations, see pp. 389, 390, *post*. On the other hand, when vessels engaged in laying or repairing cables show signals, other vessels, with, in the case of fishing vessels, their fishing nets and gear, must be withdrawn to the distance and within the time specified in the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), Sched., arts. V., VI.

(*i*) See pp. 385, 386, *post*.

(*k*) Owners of vessels who have sacrificed an anchor, net, or other fishing gear, to avoid injury to a cable are to be compensated by the owner of the cable for their loss, which is not necessarily limited to the mere cost of replacing the material: thus, it might include the value of a catch of fish in a net sacrificed. On the other hand, the loss does not extend to every damage remotely flowing from the sacrifice (*Agincourt Steamship Co., Ltd. v. Eastern Extension, Australasia, and China Telegraph Co., Ltd.*, [1907] 2 K. B. 305, C. A., explaining Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), Sched., art. VII.). Further, by *ibid.*, s. 3 (4), any person who breaks or injures a cable, though not “unlawfully or willfully,” so as to constitute an offence as above mentioned, must nevertheless pay the costs of repairing such cable. As to the prescribed mode of proving the necessary facts by statements and documents, see *ibid.*, s. 8; as to forgery of such documents, see *ibid.*, s. 8 (4), as amended by the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 20, Sched., Part I.

(*l*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 6 (1).

(*m*) *Ibid.*, s. 6 (2); see note (*d*), p. 386, *post*.

(*n*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 6 (3), (4), (5); see p. 384, *post*.

(*o*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*p*) As to compensation, see pp. 381 *et seq.*, *post*.

(*q*) “Consents” are required to be in writing, and may be given subject to conditions (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 5). As to the meaning of “work,” “body,” and other terms used in the text, see pp. 350 *et seq.*, *ante*.

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Adjust-
ment of
Differences.

or fails (a) to grant it within twenty-one days after notice from the Postmaster-General, in which event a difference is deemed to have arisen between such body or person and the Postmaster-General (b); and (2) differences specifically named or described as such in various enactments arising out of notices and counter-notices given by and to telegraph undertakers on the one hand, and interested bodies and persons on the other, under the authority of those enactments, with respect to the alteration and removal of telegraphic works (c).

SUB-SECT. 2.—*Procedure for Adjusting Differences.*

Tribunal.

762. The prescribed procedure for the adjustment of differences applies, with three exceptions (d), to all cases of difference. The difference is to be referred for determination to a police or stipendiary magistrate of the district, if there is one, or, if not, to the county court judge (e). Either party may, if dissatisfied with the decision of such tribunal, by notice in writing within twenty-one days thereof require the difference to be referred to the Railway and Canal Commissioners (f), who are to hear and determine it *de novo*, and not by way of appeal (g).

(a) For the purposes of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), this includes the withdrawal of a consent, or the annexing of conditions thereto, to which the Postmaster-General objects (Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 9).

(b) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 3; Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2, as extended by the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 4. No person other than the Postmaster-General has the right to submit to the prescribed tribunal, as a difference, any statutory veto, which, as against any such other person, is absolute. Not even his licensee has this right (see note (c), p. 359, *ante*, and the cases there cited), nor would the Postmaster-General himself have it in any case where it could be proved that he was acting merely as the instrument of such licensee (*Postmaster-General v. Edinburgh Corporation* (1899), 10 Ry. & Can. Tr. Cas. 247 (where, however, the corporation failed to prove the facts)). The cases in which the veto is given by the Telegraph Acts are those mentioned in the Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 9, 10, 12, 13, 32, 35, and in the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 4 (1), as to all which see pp. 360 *et seq.*, *ante*.

(c) Differences of this class are named or described as such in the following enactments:—Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 15, 16, 21 (3), 22, 23—29, 30, 33; Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 6; Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 4 (2), extended as mentioned below; and Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), ss. 1, 3, 5, 7 (the last section having the effect of extending the application of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 4 (2), to telegraphs placed and maintained under a street or public road); Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), s. 1 (2) (a), (d). The form and mode of serving the notices and counter-notices mentioned in the text are regulated by the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 5, and the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 12, which latter enactment is applied to the Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), by *ibid.*, s. 9 (2), and to the Telegraph (Construction) Act, 1911 (1 & 2 Geo. 5, c. 39), by *ibid.*, s. 7 (2).

(d) As to these exceptions, see pp. 380, 381, *post*.

(e) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 4.

(f) *Ibid.*, ss. 4, 5. As to the Railway and Canal Commissioners, see titles COURT, Vol. IX., pp. 217 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 753 *et seq.*

(g) *Postmaster-General v. London Corporation* (1898), 78 L. T. 120, *per* WRIGHT, J., at p. 123.

SECT. 1.
Adjust-
ment of
Differences.

Powers of
tribunal.

Where it is a question of the refusal or failure of any body or person to give any consent required by the Postmaster-General, the authority determining the difference may give a substituted consent (*h*). Where conditions are attached to any consent, the question of their reasonableness or propriety is a question of fact (*i*). Any condition imposed by a body having control over streets or public works must be a condition which concerns that body as a road authority, or at least concerns the whole of the public using the telegraphs, and no condition can be proper which interferes with the Postmaster-General's free exercise of his public duties and rights, or which requires him to prohibit the use of the telegraphs in a manner sanctioned by law (*k*). The tribunal may impose its own terms independently of the conditions which have formed the subject of the difference (*l*). The magistrate, or county court judge, is to act, not as such, but as if he were an arbitrator appointed by the Board of Trade (*m*). There are elaborate provisions in the

(*h*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 3.

(*i*) *Postmaster-General v. Glasgow Corporation* (1900), 10 Ry. & Can. Tr. Cas. 238, following *Postmaster-General v. London Corporation* (1898), 78 L. T. 120.

(*k*) *Postmaster-General v. London Corporation*, *supra* (where the condition sought to be imposed by the corporation was that the Postmaster-General should exclude the National Telephone Co. from the user of the telephones unless they would provide an improved service at a reduced rent, which the Commissioners, agreeing with the county court judge, deemed to be a wholly improper condition); *Postmaster-General v. Glasgow Corporation*, *supra* (where the corporation attempted to clog their consent with a condition that it was not to be applicable to the purposes of any private company whose application, if made direct to the corporation (it being suggested that the Postmaster-General was merely applying for the consent on behalf of his licensees, the National Telephone Co.), would (as it could not in the case of the Postmaster-General) be met with an absolute and unappealable veto, and the Commissioners in Scotland, agreeing with the sheriff, held that this also was based on a misconception of the nature of the conditions contemplated by the statute). In exercising their discretion with reference to these conditions, the Commissioners will consider the character of the district, the feeling of the locality, the amount of existing or probable future traffic, and the relative danger, inconvenience, and expense involved in the conflicting proposals; see *Wandsworth District Local Board v. Postmaster-General* (1884), 4 Ry. & Can. Tr. Cas. 301; *Postmaster-General v. Watford Urban District Council* (1908), 13 Ry. & Can. Tr. Cas. 160; *Postmaster-General v. Woolwich Metropolitan Borough* (1908), 13 Ry. & Can. Tr. Cas. 165; *Croydon Corporation v. Postmaster-General* (1910), 74 J. P. 424; *Re a Difference between the Postmaster-General and the Tottenham Urban District Council* (1910), 74 J. P. 434. It must always be shown, if disputed, that the body or person has the control of the street or public road, within the meaning of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 12. In *Postmaster-General v. Hendon Urban District Council*, [1913] W. N. 249, it was held that a body not liable for the repair of the road is not such a body.

(*l*) *Postmaster-General v. Glasgow Corporation*, *supra*.

(*m*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 5, applying the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 30–33, for *ibid.*, s. 33, of which the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), s. 1, was substituted by the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 17. The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 32, incorporates the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), ss. 18–29. See also the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40). As regards the determination of differences by the county court judge in the character of statutory arbitrator, machinery is provided by the County Court Acts and Rules, as to which see title COUNTY COURTS, Vol. VIII.,

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Adjust-
ment of
Differences.

various Telegraph Acts and incorporated enactments as to the constitution and jurisdiction of the Railway and Canal Commission, and as to the mode in which its above-mentioned functions are to be exercised (*n*). In the discretion of the court, the two appointed Commissioners (*o*) may sit, and their order in that event will have the same effect as the order of the court (*p*). It has been held that in the case of a difference as to the granting or the withholding of a consent there is no appeal from the decision of the Commissioners on any issue of fact (*q*).

Exceptions.

763. The exceptions above referred to are the following, namely: (1) by consent, any difference between the Postmaster-General and any body or person under the Telegraph Acts (*r*), or under any licence or agreement relating to telegraphs, may be referred direct to the Railway and Canal Commissioners, who are to determine the same (*s*); (2) certain differences are expressed to be the subject, without any consent, of such direct reference (*a*); and (3) any difference as to the placing of any telegraphic work under, in, upon, along, over, or across any estuary or branch of the sea, or

pp. 688—690. It is to be noted that all statutory references, except where anything in the statute is inconsistent therewith, are made subject to the provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), by s. 24 thereof, as to which see title ARBITRATION, Vol. I., pp. 492, 493.

(*n*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 4, 5; Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), s. 2. The statutes regulating the jurisdiction, constitution and procedure of the Railway and Canal Commission are the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), by s. 1 whereof the two Acts may be cited together as the Railway and Canal Traffic Acts, 1873 and 1888. The procedure prescribed by these Acts is to govern the determination of any difference referred by consent to the Commissioners, under the Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), s. 2. As to the jurisdiction of the Railway and Canal Commission, see title RAILWAYS AND CANALS, Vol. XXIII., pp. 753 *et seq.*

(*o*) As to the appointed Commissioners, see title COURTS, Vol. IX., p. 217.

(*p*) Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 6.

(*q*) *Postmaster-General v. Glasgow Corporation* (1900), 10 Ry. & Can. Tr. Cas. 238.

(*r*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*s*) Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), s. 1. In the discretion of the Commissioners, and with the consent of the parties, any matter of difference or any question arising before the Commissioners under the Act may be heard and determined by the two appointed Commissioners, whose order is to be deemed the order of the Commission (*ibid.*, s. 2 (1)). It appears from the Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), and the Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56), that questions arising as to the purchase by the Postmaster-General of the plant, property, and assets of the National Telephone Co., Ltd., under the two indentures therein mentioned had been agreed to be the subject of direct reference to the Commissioners. There has already been such a reference, and the Commissioners have decided it (*National Telephone Co., Ltd. v. Postmaster-General* (1913), 29 T. L. R. 190). It was held by the Court of Appeal, when the case was brought before them on the appeal of both parties, that the Commissioners deal with such a reference as a court, and not as mere contractual arbitrators, and that, therefore, there was jurisdiction to entertain the appeal (S. C., [1913] 2 K. B. 614, C. A.; affirmed on the preliminary question, 29 T. L. R. 637, H. L.).

(*a*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 5, which provides that all differences under that Act, namely, those relating to the interference of the Postmaster-General with certain other undertakings (*ibid.*, s. 6), are to be referred direct to the Commissioners.

the shore or bed of any tidal water, must be referred to the Board of Trade (*b*).

SECT. 1.
Adjust-
ment of
Differences.

Provisional
order.

764. Where any differences arise on the refusal or failure of the owner, lessee, or occupier of any land or building, within twenty-one days of a requisition in that behalf, to give his consent to the construction or maintenance of any "work" by the Postmaster-General, and such refusal or failure results in the inhabitants of any district, or any public authority, being debarred from the public convenience of telegraphic communication, or in the impossibility of supplying such communication to any district or place except at an unreasonable cost or on unreasonable conditions, a special form of remedy, in addition to, and not in substitution for, the foregoing procedure, is accorded to the Postmaster-General, who may apply to the Railway and Canal Commissioners for a provisional order, which, if satisfied of the above facts, the Commissioners are empowered to make, that he be at liberty to place or maintain the telegraphic work, as prayed, with or without pecuniary or other conditions (*c*). For the purpose of determining the difference, the Commissioners may hold a local inquiry by one or two of their members, or by an officer appointed for that purpose (*d*), and may make an interlocutory order for the continuance of any work while proceedings are pending (*e*). If the provisional order is made, the landowner may, within one month of the service thereof upon him, petition the Commissioners that the order be laid before Parliament. If no such petition is presented within the month, or, having been so presented, is withdrawn, the Commissioners are to certify the fact, and the order is to take effect as from the date of the certificate (*f*); but, if such petition is so presented and not withdrawn, the order is to have no effect until confirmed by a public Bill, which the Postmaster-General is thereupon empowered to introduce, and which the landowner may petition against, in so far as it purports to confirm the order; and the Bill in that event must be referred to a Select Committee, and the landowner may appear and oppose it as in the case of any private Bill (*g*).

SECT. 2.—Statutory Compensation.

765. The Telegraph Acts (*h*) provide for the payment of statutory compensation in a great number of cases, which may be classified as follows, namely: (1) cases of compulsory acquisition of

When pay-
able.

(*b*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 34.

(*c*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2 (1). "Failure or refusal" to consent includes withdrawal of consent, or the annexing thereto of unacceptable conditions (*ibid.*, s. 9).

(*d*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2 (5); and see the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), Parts I., IV.

(*e*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2 (6).

(*f*) *Ibid.*, s. 2 (2). This procedure, with the necessary adaptations (*e.g.*, substitution of the Governor and Executive Council of the Isle for the Commissioners, and Tynwald for Parliament), applies to the Isle of Man (*ibid.*, s. 12). As to the procedure in Parliament with reference to private Bills and Bills to confirm provisional orders, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

(*g*) Telegraph Act, 1892 (55 & 56 Vict. c. 58), s. 2 (3), (4).

(*h*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

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Statutory
Compensa-
tion.

undertakings, rights, interests, or property (i); (2) cases of damage and injury to the property or interests of others occasioned by the statutory execution or maintenance of telegraphic works (k); and (3) cases of loss of office and emoluments by officers and clerks of certain specified telegraph companies whose undertakings have been acquired by the Postmaster-General (l).

(i) In the following enactments compensation of this character is required to be paid: Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 51 (Treasury to pay telegraph company annual rent or gross sum for exclusive use of telegraph); Telegraph Act, 1868 (31 & 32 Vict. c. 110), ss. 4, 7, 9 (purchase of certain telegraphic undertakings by Postmaster-General is to be subject of compensation; also compensation to be paid to railway companies for perpetual right of way); Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 12 (compensation to be paid by Postmaster-General under arrangements for transmission of foreign telegrams within the United Kingdom, and for connexion of his wires and apparatus with cables of foreign telegram company). By some of the above enactments the Postmaster-General is, under certain conditions, required, and not merely authorised, to purchase telegraphic undertakings. In all such cases no compensation is payable, unless all the prescribed conditions exist. For instance, on purchasing any one of the telegraph undertakings mentioned in the Telegraph Act, 1868 (31 & 32 Vict. c. 110), any other company having a telegraph undertaking established by special Act or Royal Charter, or any railway company possessed of a telegraph open to the use of the public on the 1st January, 1868, or having any beneficial interest in such telegraph, was, by *ibid.*, s. 7, entitled, on written request within twelve months, to call upon the Postmaster-General to purchase, and pay compensation for, such undertaking or beneficial interest. This provision does not apply to a railway company which had no telegraph open to the public, or any beneficial interest in such a telegraph (*Cowes and Newport Rail. Co. v. Board of Trade* (1874), 43 L. J. (Q. B.) 242, in which case it also appeared that the request had not been made within the twelve months, and, but for the point having been waived, this omission would also have been fatal, as was held in *R. v. Coleridge (Lord)* (1876), 45 L. J. (Q. B.) 649). For a case of purchase by agreement, see this Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26); and note (s), p. 380, *ante*.

(k) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 7 (compensation generally to all bodies and persons interested for damage occasioned by execution of statutory operations in streets, public roads, railways, canals, estuaries), 21 (4) (compensation for loss and damage to landowner extending his building etc.), 27 (2) (compensation to frontagers), 42 (responsibility for damage caused by acts and defaults of servants); Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), which provides for compensation for damage occasioned by the exercise of the Postmaster-General's statutory powers of lopping overhanging trees. In *St. James and Pall Mall Electric Light Co., Ltd. v. R.* (1904), 73 L. J. (K. B.) 518, the suppliants established their right to statutory compensation to be assessed by the proper authority (in that case, a sheriff's jury) for a short circuit in their cables occasioned by the execution of a telegraphic work by the Postmaster-General.

(l) Any such officer or clerk, who had been in the service of one of the specified telegraph companies for not less than five years at a yearly salary, or not less than seven years with emoluments or remuneration equivalent to not less than £50 per annum, was, by the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8 (7), entitled to be paid by the Postmaster-General compensation for loss of office, unless any offer of an appointment in the postal service should be made to him which, in the opinion of an arbitrator to be agreed or named by the Recorder of London, should be equal in value to the lost office. The three telegraph companies specified were the Electric and International, the British and Irish Magnetic, and the United Kingdom Electric, Telegraph Companies. An officer or servant of a railway company, whose telegraphs have been taken over by the Postmaster-General, is not within the benefit of this provision, and is not entitled to any compensation whatever (*R. v. Postmaster-General* (1875), 32 L. T. 559).

766. The procedure required by the Telegraph Acts (*m*) to be adopted for the assessment of statutory compensation for property compulsorily acquired, or for damage or injury thereto, is, with certain exceptions (*n*), the procedure authorised by the Lands Clauses Acts (*o*).

SECT. 2.
Statutory
Compensa-
tion.
Procedure.

(*m*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*n*) These exceptions are the following:—(i.) it is provided by the Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 13, that, as regards all railways and canals then existing or authorised, the arbitrators are to be those appointed by that Act, and not those who would otherwise be appointed under the Lands Clauses Acts, pursuant to the Telegraph Acts, 1868 (31 & 32 Vict. c. 110) and 1869 (32 & 33 Vict. c. 72). It is probable that the effect of this provision is to repeal the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9 (10), (11), and that there is no longer any jurisdiction in the Lord Chief Justice to appoint an umpire; see *R. v. Coleridge (Lord)* (1876), 45 L. J. (q. b.) 649, where, however, it was unnecessary to decide the point, as the Postmaster-General waived the objection; (ii.) by the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 12, the mode of conducting the arbitration, in cases of agreements between the Postmaster-General and foreign telegraphic companies, is to be that prescribed by the arbitration provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 128—134; (iii.) the arbitration in relation to the amounts payable for the exclusive use of a telegraph for Government purposes under the Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 51, 52, is to be conducted in the manner prescribed in those enactments; (iv.) the compensation payable to frontagers under the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 27 (2), is to be settled by the Board of Trade, whose determination is to be final and conclusive (*ibid.*, s. 28); the Board has power to deal with the costs (*ibid.*, s. 29). It is to be observed that, in these arbitrations, though *prima facie* the arbitrator has no jurisdiction to deal with any question of compensation other than those submitted, he may include all questions, whether of annual rent or lump sums, in an award of one gross amount, if the parties are aware that he is taking into consideration all such matters, and make no objection; see *R. v. Metropolitan Rail. Co.* (1883), 50 L. T. 6, C. A., where two questions were dealt with by the arbitrator on a reference under the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 9, only one of which had been formally submitted, namely, (i.) what was to be paid by the Postmaster-General to a railway company for the prospective loss of its right to grant wayleaves to others for telegraphs, and (ii.) what yearly rent was to be paid for the perpetual right of way which the Postmaster-General acquired for his posts and wires over the railway company's system, and the arbitrator awarded one gross sum to include (i.) and the capitalised value of (ii.); whereupon the company insisted that they were not bound, and they accordingly refused, to hand over their telegraphs except at an agreed or assessed annual rent, on the ground that the arbitrator had no jurisdiction to deal with, and had not dealt with, the question of rent, and that the sum awarded must be deemed to represent only compensation for the prospective loss above mentioned; but the court made absolute a rule for a mandamus to the company, on the prosecution of the Postmaster-General, to transfer the telegraphs, being of opinion that the company was in no way misled, and were perfectly aware that the arbitrator was in fact dealing with both questions, and intending to adjudicate on both.

(*o*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 7, 21 (4); Telegraph Act, 1868 (31 & 32 Vict. c. 110), ss. 7—9; Telegraph Act, 1869 (32 & 33 Vict. c. 73), ss. 10—12; Telegraph Act, 1870 (33 & 34 Vict. c. 88), s. 4; Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33), s. 5 (3). The Lands Clauses Acts are defined in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.* For a full account of the procedure under the Lands Clauses Acts, see *ibid.*, pp. 5 *et seq.* In the case of compensation to officers and clerks of the telegraph companies referred to in note (*l*), p. 382, *ante*, the assessment was to be made on a basis expressly prescribed in the enactment relating thereto; see Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8 (7); *R. v. Postmaster-General* (1875), 32

SECT. 3.
Other
Remedies.

SECT. 3.—*Other Remedies.*

Civil
remedies.

767. For the violation of certain provisions of the Telegraph Acts (*p*) there are civil remedies provided other than those already mentioned (*q*). Thus, the Board of Trade, on executing any work which the owner of a telegraph placed or maintained in, under, or over any estuary or branch of the sea, or shore or bed of any tidal water, has failed to execute according to the statutory requirement in that behalf, is empowered to recover the expenses thereof from such owner with costs as a Crown debt, and is entitled to all the preferences and privileges attaching to that mode of recovery (*r*). The Postmaster-General may sue for any debt due to him as a private debt, instead of resorting to statutory penalties (*s*). On the other hand, in the case of submarine telegraphy, statutory restrictions are placed upon common law rights of action in respect of the act or default or neglect of any officer of a warship or specially commissioned vessel of His Majesty in the execution of his statutory duties, both as to the time within, and the tribunals before, which such action must be brought, and as to tender of amends, costs, and otherwise (*t*).

L. T. 559; *R. v. Postmaster-General* (1878), 3 Q. B. D. 428, C. A.; see also Pensions Commutation Act, 1872 (35 & 36 Vict. c. 83), s. 2 (now repealed), applying Pensions Commutation Act, 1871 (34 & 35 Vict. c. 36), s. 3. As to pensions of officers and clerks of the Submarine Telegraph Co., Ltd., and of the Société Carmichael et Cie., who, on the 1st April, 1889, had entered the permanent civil service of the State in an established capacity, see Post Office and Telegraph Act, 1897 (60 & 61 Vict. c. 41), s. 3; and as to the rights of the transferred staff of the National Telephone Co., Ltd., to superannuation allowances on the acquisition of such company's undertaking by the Postmaster-General, see Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), ss. 6, 7.

(*p*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*q*) As to ordinary remedies at common law, existing independently of, or expressly saved by, the Telegraph Acts (see note (*m*), p. 349, *ante*), see p. 394, *post*.

(*r*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 40; see note (*q*), p. 358, *ante*. As to the preferential character of a Crown debt, see *Re Niblock*, [1907] 2 I. R. 559. As to the recovery of Crown debts generally, see title CROWN PRACTICE, Vol. X., pp. 14 *et seq*.

(*s*) Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 11. Accordingly, in *A.-G. v. Edison Telephone Co. of London* (1880), 6 Q. B. D. 244, the Attorney-General, on behalf of the Postmaster-General, instead of proceeding for penalties, prayed for and obtained an account.

(*t*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 6 (3), (4), (5), as varied by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), ss. 1, 2; see, generally, title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 338 *et seq*.

Part IX.—Penal Provisions Relating to Telegraphs.

SECT. 1.—*Protection of the Postmaster-General.*

768. Of the various offences in relation to telegraphs which are created by the Telegraph Acts (*u*) and other enactments, the first group concerns the property, rights, and interests of the Postmaster-General, and others authorised by statute to acquire, own, or work telegraphs and transmit telegrams. In this class are comprised the following statutory offences which are punishable as prescribed:—wilful or malicious injury to telegraphs or telegraphic posts or other works, or obstruction of telegraphic communication (*v*); violation of the exclusive privileges of the Postmaster-General in the transmission of telegrams, and services incidental thereto (*a*); refusal or failure on the part of non-telegraphic “undertakers,” when altering their works, to comply with the statutory requirements of the Postmaster-General (*b*); establishment, installation, or working of wireless telegraph stations, or apparatus, without a licence from the Postmaster-General, or in violation of the terms of any such licence (*c*); and wilful or culpably negligent breakage of submarine

SECT. 1. Protection of the Postmaster- General.

—
Interests
protected.

(*u*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*v*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 37, 38; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 787. By the Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 8—11, penalties, recoverable summarily, are annexed to any destruction of, or injury to, any “telegraphic line” of the Postmaster-General, whereby telegraphic communication is carelessly or wilfully interrupted (the penalty being a daily fine of £20 maximum, or a gross penalty of £50 maximum, at the option of the Postmaster-General), and to any obstruction of the Postmaster-General or his agents in placing, maintaining, altering, removing, or repairing any such telegraphic line (the penalty being a fine not exceeding £10, or, if the offence is a continuing one, a daily penalty not exceeding £10). As to unauthorised fixing of notices to telegraph posts, see title POST OFFICE, Vol. XXII., p. 666. For the statutory meaning of “telegraphic line” and “post,” see p. 350, *ante*.

(*a*) Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 6. The offence is punishable summarily by a fine not exceeding £5 (*ibid.*). As to the “exclusive privileges” referred to, see pp. 355 *et seq.*, *ante*.

(*b*) As to the statutory requirements of the Postmaster-General, see pp. 360 *et seq.*, *ante*. Failure to give the prescribed notice to the Postmaster-General is punishable summarily with a penalty not exceeding £10 a day (Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7 (6)); failure to comply with the requirements of the Postmaster-General’s counter-notice is punishable summarily with a penalty not exceeding £10 a day, or, if by reason of such failure telegraphic communication is interrupted, not exceeding £50 a day (*ibid.*, s. 7 (7)). As to similar offences on the part of electric light undertakers, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 572, 577, 578, 640.

(*c*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (3), (4), (5). The punishment is, on conviction on indictment, imprisonment for not exceeding twelve months, with or without hard labour, or a fine not exceeding £100, and on summary conviction a fine not exceeding £10, together with (in either case) forfeiture of the apparatus, which may be seized at any station, place, or ship, pursuant to a search warrant, which warrant any magistrate, on being satisfied of the facts by evidence on oath, may for that purpose grant to any police officer or officer appointed by the Postmaster-General, the Admiralty, the Army Council, or the Board of Trade; and in any such case the Merchant

SECT. 1.
Protection
of the
Postmaster-
General.

Failure to
perform
statutory
duties.

cables, or injury thereto in such manner as may interrupt or obstruct telegraphic communication (*d*).

SECT. 2.—*Protection of Private Rights.*

769. A second group of penal provisions consists of those which are designed to protect the property and safety of bodies and persons affected by the construction and maintenance of telegraphic works. This class comprises the following acts or omissions on the part of telegraph undertakers, which are statutory offences, punishable as prescribed:—failure to make good a street or public road, after having opened or broken it up, or to fence, watch, or light the part broken up during the operation (*e*); non-compliance with directions given by a court of summary jurisdiction for the protection of a landowner, where a telegraph has been placed above ground within a certain distance of his dwelling-house (*f*); non-payment of expenses incurred by the Board of Trade in relation to the placing and maintaining of telegraphs, buoys, or sea-marks in an estuary, or branch of the sea, or bed or shore of any tidal water (*g*); non-compliance, on the part of any telegraph undertakers, other than the Postmaster-General, with any bye-laws made by an urban authority for the prevention of danger and obstruction to the public from posts, wires, tubes, or other apparatus placed above, over, along, or across any street for the purposes of any telegraph or telephone (*h*); and, on the part of the

Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 684, 686, 693, relating to the enforcement of penalties by distress on ships, apply. By the Wireless Telegraphy (Foreign Ships) Regulations, 1908 (Stat. R. & O., 1908, p. 961), r. 7, unlicensed wireless telegraphy for the purpose of making, or receiving, signals of distress is exempted from penalty, and by the Wireless Telegraphy Order, 1908 (Stat. R. & O., 1908, p. 960), reg. 1, it is provided that a person on board a British ship which is registered in any British possession, other than the Isle of Man or Channel Islands, or in any British Protectorate, if acting under a licence from a competent authority of any such place, commits no offence.

(*d*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 3 (2), (3), (5); see also *ibid.*, ss. 7, 8 (evidence); 9 (person deemed to be in charge of a vessel), 12 (definitions). The offence is an indictable misdemeanour, punishable on conviction, if the act was wilful, by penal servitude for not exceeding five years or imprisonment with or without hard labour for not exceeding two years, or by a fine, or both; and if the act was due to culpable negligence only, by imprisonment without hard labour for not exceeding three months, or by a fine not exceeding £100, or both (*ibid.*, s. 3 (2)). Any person aiding and abetting is punishable as a principal (*ibid.*, s. 3 (5)). Further, any obstruction of an officer of a warship or specially commissioned vessel of His Majesty, or any neglect to comply with any order or direction of such officer, is an offence punishable on summary conviction by a fine not exceeding £50, or by imprisonment with or without hard labour for not exceeding two months (*ibid.*, s. 6 (1), (2)).

(*e*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 18. The punishment is a penalty not exceeding £20, or, in case of a continuing offence, a maximum penalty not exceeding £5 a day, to go to the body having control of the street or public road (*ibid.*); compare title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 255.

(*f*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 22 (5). The punishment is a daily penalty not exceeding £5, recoverable summarily (*ibid.*).

(*g*) *Ibid.*, s. 40. The expenses are recoverable as a penalty (*ibid.*).

(*h*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 13—15. The punishment is a penalty, recoverable summarily, not exceeding £5, and, in the case of a continuing offence, not exceeding 40s. a day, and the

master of any vessel engaged in laying or repairing a submarine cable, violation of any collision regulations, or interference with any fishing vessel, or the operations thereof, contrary to any regulations made for the protection of such vessel (*i*).

SECT. 2.
Protection
of Private
Rights.

SECT. 3.—*Protection of the Public Using the Telegraphs.*

770. A third class of penal provisions is intended to enforce the duties of telegraph undertakers to the public using the telegraphs. This group includes the following acts and omissions which are made statutory offences punishable as prescribed: on the part of any person employed by a telegraph company, the improper divulging to any person of the contents of any telegram (*k*), and on the part of any person having official connexion with the Post Office, or acting on behalf of the Postmaster-General, the disclosure or interception, improperly or contrary to duty, of the whole or any part of the contents of any telegraphic message, or message intrusted to the Postmaster-General for transmission (*l*); on the part of any person in the employ of any telegraph undertakers, the wilful or negligent omission to transmit or deliver, or delay in the transmission or delivery of, any telegram (*m*); and, on the part of any person whatever, the forgery, or wilful and unauthorised alteration of a telegram, or the uttering of such telegram knowing it to be forged or altered, or the transmission by telegraph, or the uttering, as a telegram, of any message or communication known not to be a telegram, whether there was any intention to defraud or not (*n*).

Disclosure of
messages.

magistrate has jurisdiction to make an order for the removal of the posts, wires, etc. (*ibid.*). As to such bye-laws, see p. 388, *post*. The Postmaster-General is exempt from these provisions; see *ibid.*

(*i*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 5, which makes the offences punishable in the manner prescribed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part XIII., and the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 6; see titles FISHERIES, Vol. XV., p. 628; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 359 *et seq.*

(*k*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 45; Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 11. Under the former provision the punishment is a penalty, recoverable summarily, not exceeding £20; under the latter the punishment is, on summary conviction, the like penalty; and on conviction on indictment, imprisonment with or without hard labour for not exceeding one year, or a fine not exceeding £100.

(*l*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 20; the punishment is imprisonment for not exceeding twelve calendar months (*ibid.*). The property in the message is to be laid in the Postmaster-General; and no value of such message need be alleged or proved, nor need the nature of the official's employment be particularised (*ibid.*, s. 21). As to the disclosure of the contents of a telegram in obedience to a subpoena or order of a court of justice, see pp. 369, 370, *ante*.

(*m*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 45. The punishment is a fine not exceeding £20, recoverable summarily (*ibid.*).

(*n*) Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 11; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 762; and, as to forgery generally, Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

Part X.—Delegated Legislation with Respect to Telegraphs.

SECT. 1.

Telegraph Regulations.

Telegraphs.

Postmaster-General.

Local authorities.

Telephones.

SECT. 1.—*Telegraph Regulations.*

771. For the purpose of carrying into effect statutory provisions relating to telegraphs, Parliament has confided to various public and local authorities the power and duty of subordinate or derivative legislation with respect to the several matters respectively mentioned below.

With reference to the conduct of telegraphic business, the Postmaster-General is authorised to frame regulations for the prevention of disclosure of the contents of telegrams (*o*), and for fixing the hours during which the offices shall be open, the terms upon which the telegraphs may be used, the charges to be made for the transmission of telegrams, and the conduct of telegraphic business generally (*p*).

As regards public safety and convenience, it is recognised in the Telegraph Acts (*q*) that any county council or urban sanitary authority may from time to time make regulations in relation to telegraphic lines to which any licensee of the Postmaster-General is to be subject in exercising the powers conferred on him by the licence (*r*); and any urban authority may make, alter, and repeal bye-laws, which, however, are not to affect the telegraphs of the Postmaster-General, for the prevention of danger and obstruction to the public from telegraphic posts, or from wires, or other telegraphic or telephonic apparatus placed over, along, or across any street, and for their inspection, and, if need be, prohibition (*s*).

772. With respect to telephones, inasmuch as a telephone is a species of statutory telegraph (*t*), all the powers above mentioned which have been conferred upon the Postmaster-General for the framing of regulations as to the conduct of telegraphic business generally involve a like power of subordinate or ancillary legislation

(*o*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 20.

(*p*) Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2. Numerous regulations have been issued hereunder, of which the following are now in force:—(i.) as to inland telegrams—Telegraph (Inland Written Telegram) Regulations, 1898 (Stat. R. & O. Rev., Vol. XIII., Telegraph, p. 11); Telegraph (Inland Written Telegram) Amendment (No. 1) Regulations, 1905 (Stat. R. & O., 1905, p. 1345); Telegraph (Inland Written Telegram) Amendment (No. 2) Regulations, 1906 (Stat. R. & O., 1906, p. 731); Telegraph (Inland Written Telegram) Amendment (No. 3) Regulations, 1910 (Stat. R. & O., 1910, p. 769); Telegraph (Inland Written Telegram) Amendment (No. 4) Regulations (Stat. R. & O., 1912, p. 1210); (ii.) as to foreign telegrams—Telegraph (Foreign Written Telegram) Regulations, 1900 (Stat. R. & O. Rev., Vol. XIII., Telegraph, p. 33); Telegraph (Foreign Written Telegram) Regulations, 1906 (Stat. R. & O., 1906, p. 735); Telegraph (Foreign Written Press Telegram) Regulations, 1906 (Stat. R. & O., 1906, p. 759); Telegraph (Foreign Written Press Telegram) Amendment (No. 1) Regulations, 1907 (Stat. R. & O., 1907, p. 1035). As to "spoken telegrams," or telephonic messages, see note (*v*), p. 389, *post*.

(*q*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*r*) Telegraph Act, 1892 (55 & 56 Vict. 59), s. 5 (2) (*b*).

(*s*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 13, 15.

(*t*) See p. 350, *ante*.

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Telegraph
Regula-
tions.

with reference to telephonic business. Accordingly, such of the Postmaster-General's regulations as relate to telephones specifically, purport, nevertheless, to have been issued under the authority of the Telegraph Acts (*u*) generally (*v*). There is one enactment, however, whereby the Postmaster-General, in relation to licences for the supply of public telephonic communication, *eo nomine*, is charged with the duty of auxiliary legislation, in so far as he is thereby authorised to make an order, prescribing the conditions under which competing licensees are to afford one another facilities for the transmission of telephonic messages between their respective systems in the same "exchange area" (*a*). Such an order has been made accordingly (*b*).

773. With respect to wireless telegraphy, the Postmaster-General has power to make regulations as to the manner of application and the fees payable for licences (*c*), and also as to the conditions under which any apparatus may be worked on a foreign ship whilst in territorial waters, and imposing penalties for the violation thereof, including the forfeiture of any such apparatus (*d*). Such regulations have been made, and they contain a provision that the working of any apparatus on board a foreign ship when in any harbour in the British Islands shall be subject also to any rules issued by the Admiralty (*e*).

Wireless
telegraphy.

774. With respect to submarine cables, certain provisions of merchant shipping legislation, whereby His Majesty is empowered, by Order in Council, on the joint recommendation of the Admiralty

Submarine
cables.

(*u*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*v*) See the Telephone Regulations, 1910 (Stat. R. & O., 1910, p. 770). In *ibid.*, r. 1, "telephone" is defined as "any transmitting or receiving instrument used or intended to be used at any office for the purpose of transmitting or receiving spoken messages or communications by means of electricity," and "telephonic message" as "a spoken message or communication transmitted by telephone." This regulation also defines the terms "office," "exchange," "exchange system," "subscriber," "caller," "call office," "trunk line," "branch line," "single period" etc. In the remaining regulations the charges and the conditions of user are dealt with.

(*a*) Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (5).

(*b*) Telegraph (Telephonic Intercommunication) Order, 1899 (Stat. R. & O. Rev., Vol. XIII., Telegraph, p. 31), which deals principally with "restricted inter-communication"; see *Swansea Corporation v. National Telephone Co., Ltd.* (1906), 75 L. J. (CH.) 407, C. A.

(*c*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (6).

(*d*) *Ibid.*, s. 3 (4).

(*e*) Wireless Telegraphy (Foreign Ships) Regulations, 1908 (Stat. R. & O., 1908, p. 961), r. 1 of which defines "territorial waters" as "such part of the sea adjoining the coasts of the British Islands as is deemed by international law to be within the territorial sovereignty of His Majesty," including "harbours," which expression, and the term "naval signalling," are also defined; *ibid.*, rr. 2, 3, prohibit violation of any rules of a wireless telegraph station and interference with any naval signalling station respectively; *ibid.*, r. 4, prohibits use of wireless apparatus without the permission of the Postmaster-General, or in breach of any Admiralty rules, as mentioned in the text; *ibid.*, r. 5, authorises the Postmaster-General to take over the control of any wireless telegraph apparatus or installation in cases of emergency; *ibid.*, r. 6, imposes penalties, being those imposed by the statute itself; and *ibid.*, r. 7, exempts from penalties the unlicensed use of wireless telegraph apparatus for making or receiving signals of distress.

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Telegraph
Regula-
tions.

and the Board of Trade, to make regulations for the prevention of marine collisions, and as to lights, fog signals, steering and sailing rules generally, extend to authorise regulations with reference to the relations between vessels engaged in laying or repairing cables and sea-fishing or other vessels (*f*).

SECT. 2.—*Validity of Telegraph Regulations.*

Intra vires.

775. In point of substance, the only condition of the validity of any regulation, rule, bye-law, or order purporting to be framed under parliamentary authority, is that it must not exceed the limits of the authority, or serve other purposes than those expressed in, or reasonably to be inferred from, the enactment from which alone the delegated legislation derives its vitality (*g*).

Formalities
and pro-
cedure.

776. The conditions precedent or subsequent to the validity, or the continued validity, of such regulations, in point of formalities and procedure, are prescribed in the several enactments (*h*). In some cases Parliament requires the consent or concurrence of certain authorities other than the authority to which the regulation-making powers are confided, such as that of the Treasury (where it is a question of public money or revenue), or of the Board of Trade, or Admiralty (*i*). In other cases publication is required to be made in a particular manner before, or within a prescribed period after, the issue of the regulations (*k*). In nearly every

(*f*) Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 5 (1), providing that certain provisions of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), now repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 745, Sched. XXII., and replaced by *ibid.*, ss. 418—424, shall extend to authorise regulations for carrying into effect the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), Sched., arts. V., VI.; see, further, title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 359 *et seq.*

(*g*) No question as to the validity, from this point of view, of any of the numerous regulations issued under the Telegraph Acts (see note (*m*), p. 349, *ante*) has yet arisen, or is likely to arise, inasmuch as the purposes which such regulations are to carry into effect and the authorities which are respectively to make them are in every case defined with sufficient precision. There is no provision in any enactment that any regulations are to be reasonable, as there had been in the special Acts of parliamentary telegraph companies incorporated before the commencement of the Telegraph Acts (see note (*m*), p. 349, *ante*), as, for instance, in the Electric Telegraph Company's Act, 1853 (16 & 17 Vict. c. cciii.), s. 66. The question of the reasonableness of a regulation framed under this provision was debated in *MacAndrew v. Electric Telegraph Co.* (1855), 17 C. B. 3. No such question can ever arise in the case of any regulation under the Telegraph Acts (see note (*m*), p. 349, *ante*), to which the only possible objection, in point of substance, could be either that the regulation is *ultra vires* or that it was not made by the proper authority.

(*h*) See pp. 388, 389, *ante*, and the text, *supra*.

(*i*) As to the Treasury's consent, in cases of regulations with respect to fees, see Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3 (5); Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1 (6). As to the Admiralty and the Board of Trade, see the enactments cited in note (*e*), p. 389, *ante*, note (*k*), *infra*.

(*k*) See, for instance, the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 13 (4), (5), (6), whereby it is provided that any proposed bye-laws, or any proposed alterations or repeals of existing bye-laws, must be submitted to, and approved by, the Board of Trade, and that reasonable notice thereof is to be served upon all persons interested in any telegraphic apparatus who may be affected thereby; whereupon any such person may lodge objections, and be

case it is a condition subsequent to the continued validity of such rules that they be laid before both Houses of Parliament within specified limits of time (*l*). Unless a particular form or manner is prescribed, a regulation may be made in any form or published in any manner. For instance, a condition printed at the back of a telegraph form may constitute a valid regulation if the statute says nothing to the contrary (*m*).

SECT. 2.
Validity of
Telegraph
Regula-
tions.

Part XI.—Financial Provisions of the Telegraph Acts.

777. In many of the Telegraph Acts (*n*), and in all the Telegraph (Money) Acts (*n*), there are provisions for raising money, either within specified limits, or generally, for telegraphic purposes authorised by Parliament, stating in each case how the money is to be provided, appropriated, and repaid. Since a statutory telegraph includes a telephone (*o*), it follows that every parliamentary authority to raise money for general telegraphic purposes involves an authority to raise money for telephonic purposes; but in some cases it is expressly directed that the fund authorised to be raised shall be devoted to such last-mentioned purposes exclusively (*p*).

Funds pro-
vided by
Parliament.

heard to support them before the Board of Trade, who may exempt any particular posts, wires, or apparatus, in certain circumstances, and for a limited period, from the operation of the bye-laws.

(*l*) Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 23; Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 21; Telegraph Act, 1885 (48 & 49 Vict. c. 58), s. 2.

(*m*) *MacAndrew v. Electric Telegraph Co.* (1855), 17 C. B. 3.

(*n*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 51; Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 4; Telegraph Act, 1869 (32 & 33 Vict. c. 73), ss. 13—19, 21; Telegraph (Money) Act, 1871 (34 & 35 Vict. c. 75); Telegraph (Money) Act, 1876 (39 & 40 Vict. c. 5); Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 1; Telegraph (Money) Act, 1896 (59 & 60 Vict. c. 40); Telegraph (Money) Act, 1898 (61 & 62 Vict. c. 33); Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 1; Telegraph (Money) Act, 1904 (4 Edw. 7, c. 3); Telegraph (Money) Act, 1907 (7 Edw. 7, c. 6); Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), ss. 1—5; Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56), s. 1; Telegraph (Money) Act, 1913 (3 & 4 Geo. 5, c. 24).

(*o*) See p. 350, *ante*.

(*p*) See Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 1, where it is recited that "it is expedient to raise money with a view to carry into effect the scheme of the Postmaster-General for the development of that part of the telegraphic system of the United Kingdom which is called the telephonic system, and in particular with a view to purchase and provide the main lines of telephonic communication," and thereupon it is enacted that "the Treasury may, with the above view, issue . . ."; Telegraph (Money) Act, 1907 (7 Edw. 7, c. 6), s. 1, empowering the Treasury to raise such sums, not exceeding a specified limit, as may be required by the Postmaster-General for the purpose of developing the telephonic system in accordance with estimates approved by the Treasury; Telephone Transfer Act, 1911 (1 & 2 Geo. 5, c. 26), s. 1 (1), whereby the Treasury is empowered to raise money "for the purpose of providing for the payment of the telephone purchase-money" (as to the meaning of which expression see *ibid.*, s. 9), and also (*ibid.*, s. 2) generally "with a view to the

PART XI.
Financial
Provisions
of the
Telegraph
Acts.

Borough
fund.

778. Any council of a borough, or of an urban district, having a licence from the Postmaster-General to provide a system of public telephonic communication, may defray the expenses of exercising the powers conferred by the licence, in the case of a borough, out of the borough fund or borough rate, and, in the case of an urban district, out of the general expenses rate, and for that purpose may borrow money in the prescribed manner; but, in the former case, the money is to be borrowed on the security of the borough fund or rate (a).

Part XII.—Telegraphy at Common Law.

SECT. 1.—*Rights and Liabilities of Telegraph Undertakers.*

General
principles.

779. Except in so far as protected or restricted by statute, or by any licence granted, or order or regulations made, pursuant to statutory authority, every person engaged in telegraphic business is subject to the ordinary law of the land. For example, if any such person opens or breaks up a street or another person's private land for the purpose of his intended works, or places or maintains a telegraph under or above such street or land, or interferes with the property, rights, duties or interests of any public or local authority, or landowner, or member of the public, so as to create an obstruction, nuisance or trespass, he is liable to the same extent, and in the same manner, as any other wrongdoer (b).

Streets.

A street is only vested by statute in a local or road authority to the extent of its area of user as a street; the authority owns only the surface, paving, or vesture of the land constituting the street, and so much of the soil below, and of the column of air above, as is required to enable it to discharge its duty of maintaining the street in proper repair for all ordinary street purposes (c). It follows that an unauthorised and unlicensed invasion of any subsoil, or stratum of air, which is outside this area of user as a street, for the purpose of

development of that part of the telegraphic system of the United Kingdom which is called the telephonic system"; Telephone Transfer Amendment Act, 1911 (1 & 2 Geo. 5, c. 56), s. 1; Telegraph (Money) Act, 1913 (3 & 4 Geo. 5, c. 24), s. 1, containing further powers of raising money "for the development of that part of the telegraphic system of the United Kingdom which is called the telephonic system."

(a) Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 2. As to the expenses of indemnifying the Postmaster-General against loss, see title POST OFFICE, Vol. XXII., p. 650. As to the meaning of "borough" and "urban district," see title LOCAL GOVERNMENT, Vol. XIX., pp. 293, 262; as to the meaning of "borough fund," see *ibid.*, p. 319; and of "borough rate," *ibid.*, p. 320; as to the meaning of "general expenses rate," see *ibid.*, p. 280. As to the borrowing powers of local authorities, see *ibid.*, pp. 282, 283, 317.

(b) *R. v. United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166, following *R. v. Longton Gas Co.* (1860), 29 L. J. (M. C.) 118 (gas pipes), and *R. v. Train* (1862), 2 B. & S. 640 (tram rails); *Attenborough & Son v. London etc. Telephone Co.*, [1884] W. N. 2.

(c) See, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XIV., pp. 57, 58, 59.

SECT. 1.
Rights and
Liabilities of
Telegraph
Under-
takers.

placing or maintaining telegraphic wires or works, is not a trespass, or a violation of any proprietary rights of any local authority, whatever else it may be (*d*). If, however, the local authority chooses to take the law into its own hands, as, for instance, by cutting the unauthorised telegraph or telephone wires, the unlicensed company, on whom the burden then rests of justifying its action, is placed in a corresponding difficulty, and having no rights either at common law or by statute, may be unable to discharge that burden, or prove a trespass (*e*). On the other hand, a non-statutory telegraph company is as much exempt from statutory restrictions and conditions as it is devoid of statutory privileges, and any body or person complaining of its alleged wrongful acts cannot, at one and the same time, claim to treat such company as a common law trespasser and also as a violator of the provisions of a telegraphic enactment which, *ex hypothesi* on the former basis, does not apply to it (*f*). If such a company, though not acting under the protection of any of the Telegraph Acts (*g*), is not violating any of them, it is entitled to all its common law rights of property, and subject to the corresponding liabilities (*a*). In like manner, independently of legislation, the owners of submarine cables may resort to all common law remedies for injury or damage thereto, or for nuisance, whether at common law, or under the Admiralty jurisdiction (*b*).

(*d*) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904, C. A. (overhead wires of a telephone company); followed in *Fareham Local Board and Fareham Electric Light Co. v. Smith* (1891), 90 L. T. Jo. 467 (overhead wires of an electric light company), and *Finchley Electric Light Co. v. Finchley Urban Council*, [1903] 1 Ch. 437, C. A., where it was further decided that the limited ownership of the local authority, as described in the text, is in no way extended or affected by the circumstance that their predecessors had an absolute ownership of the soil.

(*e*) *National Telephone Co., Ltd. v. St. Peter Port (Constables)*, [1900] A. C. 317, P. C.

(*f*) *Wandsworth Board of Works v. United Telephone Co.*, *supra*, at pp. 917, 918, 924, 928. Here the plaintiffs insisted that their consent, which had not been obtained, was a condition precedent to the placing of the telephonic wires over the street, pursuant to the Telegraph Act, 1868 (26 & 27 Vict. c. 112), s. 12, but it was held that they had no right to claim the benefit of that statute, which applied only to any company authorised by special Act to construct and maintain telegraphs (which admittedly the defendants were not), any more than the defendants had any right to avail themselves thereof for the purpose of excusing that which was alleged to be either a trespass or a nuisance.

(*g*) As to the Telegraph Acts, see note (*m*), p. 349, *ante*.

(*a*) Thus, in *National Telephone Co. v. Baker*, [1893] 2 Ch. 186, where the defendants had collected electrical energy on their land, and discharged it into the earth beyond their control, to the injury of the plaintiffs' property, it was held that the plaintiffs were entitled to rely on the common law doctrine of *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330 (see title NEGLIGENCE, Vol. XXI., p. 401), and, but for the fact that the defendants were held protected by the terms of a tramway provisional order, the plaintiffs would have succeeded in the action. See also *Eastern and South African Telegraph Co., Ltd. v. Cape Town Tramways Cos., Ltd.*, [1902] A. C. 381, P. C.

(*b*) Before the commencement of submarine cable legislation (see p. 375, *ante*) the owners of such cables were held entitled, in respect of injury to their cables by anchors, to common law relief, in *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. (N. S.) 759, and to admiralty relief in *The Clara Killam* (1870), L. R. 3 A. & E. 161. In *Eastern and South African Telegraph Co., Ltd. v. Cape Town Tramways Cos., Ltd.*, *supra*, which raised the same question of law as

SECT. 1.
Rights and
Liabilities of
Telegraph
Undertakers.

Effect of
Telegraph
Acts.

How far
agents.

780. All companies and persons subject to the Telegraph Acts (c), and other enactments relating to telegraphs, are subject also to the common law, except in so far as those statutes and enactments expressly, or by reasonable implication, substitute statutory for common law rights, remedies, and liabilities. Certain provisions of the Acts (c), indeed, *ex abundanti cautela*, expressly preserve these rights and liabilities (d).

SECT. 2.—*Relation between Telegraph Undertakers and their Customers.*

781. Apart from the Postmaster-General, who stands in a peculiar position (e), persons engaged in telegraphic business are the agents of the parties handing in signed messages for transmission, for the purpose of making a contract, with the necessary formalities (when required by statute) as to signature (f); but they are only agents for the transmission of a message in the terms in which such message is delivered to them by the sender (g). For any omission, delay, or negligence, in the duty of transmitting or delivering telegrams, they are liable to the sender (h), with whom there is a contractual privity, but not to the person to whom it is sent, with whom there is none (i). They are not common carriers, even if carriers at all of the telegrams transmitted (k); nor are such

National Telephone Co. v. Baker, [1893] 2 Ch. 186, the Privy Council recognised the right of the submarine cable company to rely upon the principle of *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330, though the peculiar circumstances of that case, in their opinion, were not such as to admit of its applicability.

(c) As to the Telegraph Acts, see note (m), p. 349, *ante*.

(d) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 18, 53; compare Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), ss. 3 (4), 10. As to how far there is an alternative remedy by statute or at common law, see *St. James and Pall Mall Electric Light Co., Ltd. v. R.* (1904), 73 L. J. (K. B.) 518; and title STATUTES, pp. 169, 170, *ante*. As to the liability for torts arising out of the performance of a statutory duty, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312, 313; and compare titles CORPORATIONS, Vol. VIII., pp. 388 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 464 *et seq.*

(e) Subject, in the case of the Postmaster-General, to those variations which arise out of his constitutional status; see p. 358, *ante*.

(f) *Godwin v. Francis* (1870), L. R. 5 C. P. 295; *McBlain v. Cross* (1871), 25 L. T. 804 (in both cases the message, as handed to the telegraph clerk for transmission, was duly signed by the sender); and see title CONTRACTS, Vol. VII., pp. 354, 368, 377.

(g) *Henkel v. Pape* (1870), L. R. 6 Exch. 7.

(h) For the measure of damages, see *Sanders v. Stuart* (1876), 1 C. P. D. 326, where the telegraph company negligently omitted to send a telegram in cypher, and it was held that the plaintiff was not entitled to recover for loss of commission on the order to which the telegram related, but only nominal damages. A telegraph company may by notice contract itself out of liability for mistakes in unrepeatable telegrams (*MacAndrew v. Electric Telegraph Co.* (1855), 17 C. B. 3 (where the company advised that important telegrams should be repeated and charged a higher rate for such telegrams)).

(i) *Playford v. United Kingdom Electric Telegraph Co.* (1869), L. R. 4 Q. B. 706; *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A.

(k) *Dickson v. Reuter's Telegram Co.*, *supra* (where BRAMWELL, L.J., at p. 7, expresses the view that they are not common carriers). In *MacAndrew v. Electric Telegraph Co.*, *supra*, it was assumed, but not decided, that they might be called carriers or bailees of the telegrams.

telegrams, in the case of a railway company engaged in the transmission thereof, traffic conveyed by the railway (*l*).

SECT. 3.
Telegraphic
and
Telephonic
Communi-
cations.

SECT. 3.—*Telegraphic and Telephonic Communications.*

782. In any branch of the law which involves the consideration of what is necessary to constitute a communication, an offer, an acceptance, or a publication, it is obvious that, as instruments by which these are commonly made or conveyed, telegraphs and telephones must play an important part. These questions fall within the titles of this work devoted to such subjects respectively (*m*).

In general.

783. Notice of an injunction or order of a court may be given by telegram (*n*). In this case, the proper course is to telegraph to an agent at the place where the person affected by the order is to be found, with instructions to effect the service personally, and not to send the notice direct; otherwise, if a writ of attachment is afterwards applied for, the respondent may resist the application on the ground that he *bonâ fide* believed the telegram to be a bogus message, or a trick, and, if he is believed, the application will fail (*o*). Similarly, a banker to whom a telegram is sent, which purports to come from a customer, is not bound to accept it, if unauthenticated, as a genuine and valid countermand of his *primâ facie* duty and authority to pay that customer's cheque, when presented, though he may reasonably postpone payment of the cheque so that inquiries may be made (*p*).

Notices.

SECT. 4.—*Telegraphs and Telephones as the Subject of Demise.*

784. An agreement for the supply of a telegraphic or telephonic service to a house may be so framed as to create the relation of landlord and tenant between the parties with reference to the wires and apparatus placed therein (*q*).

Hire of
fittings.

(*l*) *Cowes and Newport Rail. Co. v. Board of Trade* (1874), 43 L. J. (Q. B.) 242.

(*m*) As to offer and acceptance by telegram, see title CONTRACT, Vol. VII., pp. 352 *et seq.* As to variation by telegram of an offer, see *ibid.*, p. 354. As to the place where a contract by telegram is deemed to have been made, see *Cowan v. O'Connor* (1888), 20 Q. B. D. 640; as to defamatory communications by telegraph or telephone, see title LIBEL AND SLANDER, Vol. XVIII., p. 661.

(*n*) *Re Bryant* (1876), 4 Ch. D. 98.

(*o*) *Re Bishop, Ex parte Langley, Ex parte Smith* (1879), 13 Ch. D. 110, C. A. As to service of proceedings, see, generally, title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 169 *et seq.*

(*p*) *Curtice v. London City and Midland Bank, Ltd.*, [1908] 1 K. B. 293, C. A.; compare title BANKERS AND BANKING, Vol. I., p. 607.

(*q*) *Keith Prowse & Co. v. National Telephone Co.*, [1894] 2 Ch. 147; *National Telephone Co. v. Griffen*, [1906] 2 I. R. 115. It may be pointed out that there are no express statutory provisions exempting telegraph and telephone fittings from distress, as in the case of electric lighting, gas, or water fittings (see titles ELECTRIC LIGHTING AND POWER, Vol. XII., p. 615; GAS, Vol. XV., p. 335; WATER SUPPLY); but such fittings, if belonging to a telegraph or telephone company, are protected under the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53); see title DISTRESS, Vol. XI., pp. 143 *et seq.* As to the exemption of Crown property from distress, see *ibid.*, p. 133.

SECT. 5.

Rates on
Land
Occupied
for Tele-
graphic
Purposes.

How far
rateable.

SECT. 5.—*Rates on Land Occupied for Telegraphic Purposes.*

785. Any company or person who has the exclusive occupation of telegraphic wires or works is liable to pay rates in respect thereof; but exclusive enjoyment, without exclusive occupation, does not render the property rateable (*r*). An easement or right of way over land for telegraphic or telephonic posts or works is a rateable occupation of that land (*s*). It is expressly provided by the Telegraph Act, 1868 (*t*), that all land, property and undertakings purchased or acquired by the Postmaster-General thereunder shall be assessable and rateable in respect to local, municipal, and parochial rates, assessments, and charges, at sums not exceeding the rateable value at which such land, property, and undertakings were properly assessed or assessable at the time of such purchase or acquisition (*a*). This value is to be taken as the maximum, even where the Postmaster-General has let the property, and is no longer using it for telegraphic purposes (*b*).

SECT. 6.—*Income Tax on Telegraphic Undertakings.*

Business
in United
Kingdom.

786. Telegraphic business is a source of income, and therefore, so far as it is carried on within the United Kingdom, is chargeable with income tax (*c*). Where a submarine telegraph company's cables communicate with telegraphic lines in the United Kingdom of the Postmaster-General, who collects the total charges in this country, and, after deducting what is due to himself, hands over the balance to the company, such company is, to that extent, carrying on business in the United Kingdom, and is chargeable to the income tax on the balance of profits which it earns therein (*d*). Any person who uses, or lets off premises for use, in telegraphic business, comes within the exemption from liability to inhabited house duty on the ground of the trade user of the premises, telegraphy being a trade for this purpose (*e*).

SECT. 7.—*Telegraphic Addresses.*

Addresses.

787. There is no property in a telegraphic address, whether registered by arrangement with the Post Office or not, and any

(*r*) *Paris and New York Telegraph Co. v. Penzance Union* (1884), 12 Q. B. D. 552; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; and see, generally, title RATES AND RATING, Vol. XXIV., pp. 13, 16.

(*s*) *Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q. B. D. 267, C. A.; and see title RATES AND RATING, Vol. XXIV., p. 7.

(*t*) 31 & 32 Vict. c. 110.

(*a*) *Ibid.*, s. 22. The "land, property, and undertakings" referred to are those which the Postmaster-General is empowered to acquire by *ibid.*, s. 4; see p. 355, *ante*.

(*b*) *St. Gabriel, Fenchurch, Overseers v. Williams* (1885), 16 Q. B. D. 649.

(*c*) Under the Income Tax Act, 1842 (5 & 6 Vict. c. 35), Sched. D; see title INCOME TAX, Vol. XVI., p. 647.

(*d*) *Erichsen v. Last* (1881), 8 Q. B. D. 414, C. A.

(*e*) *Bank of India v. Wilson* (1877), 3 Ex. D. 108; and see Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 11 (now repealed); see also title INHABITED HOUSE DUTY, Vol. XVII., pp. 191, 192.

person having such an address cannot, merely as such, prevent others using it (*f*).

On the other hand, there is copyright in a book containing a collection of carefully selected words and figures for use as cyphers in telegraphy, for such a work obviously involves ingenuity, invention and labour (*g*).

SECT. 7.
Telegraphic
Addresses.
Codes.

(*f*) *Reuter's Telegram Co. v. Byron* (1874), 43 L. J. (CH.) 661; *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156.

(*g*) *Ager v. Peninsular and Oriental Steam Navigation Co.* (1884), 26 Ch. D. 637.

TENANCY.

See LANDLORD AND TENANT.

TENANT AT WILL.

See LANDLORD AND TENANT.

TENANT BY CURTESY.

See REAL PROPERTY AND CHATTELS REAL.

TENANT BY SUFFERANCE.

See LANDLORD AND TENANT.

TENANT FOR LIFE.

See INFANTS AND CHILDREN ; REAL PROPERTY AND CHATELS
REAL ; SETTLEMENTS.

TENANT IN COMMON.

See REAL PROPERTY AND CHATELS REAL.

TENANT IN TAIL.

See REAL PROPERTY AND CHATELS REAL.

TENANT RIGHT.

See AGRICULTURE ; REAL PROPERTY AND CHATELS REAL.

TENDER.

See ADMIRALTY; BUILDING CONTRACTS, ENGINEERS, AND
ARCHITECTS; CONTRACT; SALE OF GOODS.

TENDER OF AMENDS.

See PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

TENEMENT.

See COPYHOLDS; LANDLORD AND TENANT; REAL PROPERTY
AND CHATTELS REAL.

TENURE.

See CONSTITUTIONAL LAW; COPYHOLDS; REAL PROPERTY AND
CHATTELS REAL.

TERM.

See LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL;
SETTLEMENTS.

TERRITORIAL FORCE.

See ROYAL FORCES.

TERRITORIAL WATERS.

See CONSTITUTIONAL LAW; COURTS; FISHERIES; WATERS AND WATERCOURSES.

TESTAMENTARY EXPENSES.

See ESTATE AND OTHER DEATH DUTIES; EXECUTORS AND ADMINISTRATORS; WILLS.

TESTATORS.

See WILLS.

TESTATUM.

See DEEDS AND OTHER INSTRUMENTS.

THAMES.

See WATERS AND WATERCOURSES.

THEATRES AND OTHER PLACES OF ENTERTAINMENT.

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Part I.—Theatres.

SECT. 1.—Theatre Licences.

SUB-SECT. 1.—Places Requiring a Licence.

Places requiring letters patent.

788. Every house or other place (a) of public (b) resort (c) had or kept (d) for the public performance of stage plays (e) requires either the authority of letters patent (f) or a licence (g).

(a) As to structural requirements, see pp. 405, 406, *post*.
(b) Under the Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 20, dealing with an occasional licence, a “public dinner or ball” is not less “public” because power is retained to exclude improper persons. If the dinner is solely for the promoter and his friends, the public not being admitted, it is private. Whether it is public or private is a question of fact (*Maloney v. Lingard* (1898), 42 Sol. Jo. 193); compare the decisions as to a “public place” cited in title GAMING AND WAGERING, Vol. XV., pp. 291 *et seq*.
(c) A place to which the public resort in fact, though not of right, is a “place of public resort” within a municipal bye-law for the prevention of betting (*Kitson v. Ashe*, [1899] 1 Q. B. 425); see also Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 36 (6)); and title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 429, 430. A booth used by strolling players is not a place of public resort (*Davys v. Douglas* (1859), 4 H. & N. 180), nor a tenement had or kept under the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 2 (*Fredericks v. Howell* (1862), 1 H. & C. 381). A theatre or place of amusement does not come within the definition of a “shop” in the Shops Act, 1911 (1 & 2 Geo. 5, c. 54), by reason only of the sale of programmes and catalogues and other similar sales (*ibid.*, s. 14).
(d) “Habitual” having or keeping is not necessary (*Shelley v. Bethell* (1883), 12 Q. B. D. 11; *Marks v. Benjamin* (1839), 5 M. & W. 565). Where a man hires an unlicensed room for a few nights and performs

(e), (f), (g) For notes (e), (f), (g), see p. 403, *post*.

A music and dancing licence (*h*) is not sufficient for the production of stage plays (*i*). The Lord Chamberlain (*k*) grants licences, with special conditions and subject to special rules, to music-halls (*l*). A theatre licence may be required though the house or other place is not expressly used as a theatre, and though money is not taken at the doors (*m*).

A recreation room managed and conducted under the authority of a Secretary of State or of the Admiralty does not require any licence when kept or used for the public performance of stage plays (*n*).

SECT. 1.
Theatre
Licences.

Lord Chamberlain and music-halls.

Naval and military recreation rooms.

SUB-SECT. 2.—*Authority for Grant of Licence.*

789. All theatres, not being patent theatres, within the parliamentary boundaries of the cities of London and Westminster and the boroughs of Finsbury, and Marylebone, the Tower Hamlets, Lambeth, Southwark, New Windsor, and Brighton require the Lord Chamberlain's licence (*o*).

Lord Chamberlain.

790. Beyond the limits of the Lord Chamberlain's jurisdiction the authority to grant licences within its area is the county council (*p*).

Local authority.

stage plays, a conviction cannot be obtained under the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 2; but he may be convicted under *ibid.*, s. 11, for acting or presenting, or causing, permitting, or suffering to be acted or presented, a part of a stage play (*R. v. Strugnell* (1865), L. R. 1 Q. B. 93).

(*e*) As to what is a stage play, see pp. 413, 414, *post*. As to the sale of intoxicating liquors in theatres, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 106, 107.

(*f*) As to the granting of "letters patent," see *Ex parte O'Reily* (1790), 1 Ves. 112; *Calcraft v. West* (1845), 2 Jo. & Lat. 123; see, generally, title CONSTITUTIONAL LAW, Vol. VII., p. 17.

(*g*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 2. As to licences, see pp. 415 *et seq.*, *post*.

(*h*) As to music and dancing licences, see pp. 415 *et seq.*, *post*.

(*i*) *Levy v. Yates* (1838), 3 Nev. & P. (Q. B.) 249; *Day v. Simpson* (1865), 18 C. B. (N. S.) 680.

(*k*) As to the Lord Chamberlain, see title CONSTITUTIONAL LAW, Vol. VII., pp. 107, 108.

(*l*) The conditions are—(1) the licence is an annual one; (2) the usual theatre licence prohibition of smoking in the auditorium is waived by the Lord Chamberlain; (3) no performance is to contain fewer than six distinct numbers, which are to appear on the programme; (4) the act-drop is to be lowered between each number; (5) if the conditions are broken, the stage play licence will not be renewed; (6) an applicant who has given the London County Council an undertaking that no intoxicating drinks shall be sold or consumed on the premises must not apply for an excise licence under the Lord Chamberlain's stage play licence; (7) all sketches require the Lord Chamberlain's licence. The Lord Chamberlain requires a written undertaking from each applicant that he will observe conditions (3) to (6) inclusive (letter from the Lord Chamberlain dated the 6th January, 1912 (*Times*, 9th January)).

(*m*) *Gregory v. Tuffs* (1833), 6 C. & P. 271; see also *Bellis v. Beale* (1797), 2 Esp. 592. The Albert Hall requires a theatre licence for the production of stage plays (*Royal Albert Hall v. London County Council* (1911), 27 T. L. R. 362).

(*n*) Army (Annual) Act, 1889 (52 & 53 Vict. c. 3), s. 7; see, further, title ROYAL FORCES, Vol. XXV., p. 98.

(*o*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 3.

(*p*) *Ibid.*, s. 5; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7.

SECT. 1.
Theatre
Licences.

Oxford and
Cambridge.

The county council may delegate its authority either wholly or subject to conditions and restrictions to the justices in petty sessions or to a committee of the county council or to a district council (*q*).

Within fourteen miles of Oxford or Cambridge licences or rules for the management of theatres are devoid of authority without the consent of the university authorities (*r*).

Concurrent
jurisdiction.

791. In those places where the Sovereign occasionally resides, not being the cities and boroughs above mentioned, both the Lord Chamberlain and the local authority may grant licences; but the licences granted by the local authority are inoperative during the period of the Sovereign's actual residence therein, and only theatres with the Lord Chamberlain's licence may be opened during such period (*a*).

SUB-SECT. 3.—*Grant of Licence.*

Conditions.

792. A licence is granted only to the actual and responsible manager of the theatre, and he must, together with two sureties, bind himself under penalties to observe all rules (*b*) for the regulation of his theatre which may be in force during the continuance of the licence (*c*).

A licence may be refused without any reason for the refusal being given, and there is no appeal from the decision (*d*). The granting of a licence may be made subject to conditions (*e*).

Provisional
licence.

793. The London County Council (*f*) may grant a provisional licence for premises about to be constructed, or in course of construction, within the Metropolis (*g*). A provisional licence has no force till confirmed by the licensing authority. If satisfied that no

As to the powers and duties transferred to county councils from justices, generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 368 *et seq.*

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 28 (2); see title MAGISTRATES, Vol. XIX., pp. 569, 570. The Local Government Board on 11th November, 1889, advised the justices of Norwich that, in the opinion of the Board, the town council of a county borough is competent to delegate to the borough justices in petty sessions any power or duty transferred to the town council under this provision.

(*r*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 10.

(*a*) *Ibid.*, s. 3.

(*b*) *Ibid.*, ss. 8, 9. For a form of application for a licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 13.

(*c*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 7.

(*d*) *Ex parte Harrington* (1888), 4 T. L. R. 435, C. A.

(*e*) In *R. v. Yorkshire (West Riding) County Council*, [1896] 2 Q. B. 386, followed in *Manchester Palace of Varieties, Ltd. v. Manchester Corporation* (1898), 62 J. P. 425, the county council was held justified in making the grant of a licence conditional upon an undertaking not to apply for an excise licence under the Excise Act, 1835 (5 & 6 Will. 4, c. 39), s. 7; but see *R. v. Sheerness Urban District Council* (1898), 62 J. P. 563, C. A.; see title INTOXICATING LIQUORS, Vol. XVIII., p. 67. For a form of bond for observance of rules attached to a licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 17.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7.

(*g*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 13.

objection can be made to the character of the holder of a provisional licence the licensing authority must confirm the provisional licence on the production by the applicant of a certificate from the London County Council showing that the premises have been completed in accordance with the rules and regulations of the county council (*h*).

SECT. 1.
Theatre
Licences.

794. Where the county council has not delegated its licensing authority, members of the council who oppose the granting of a licence must not be represented by counsel at the hearing of the application (*i*) and also sit as judges in the same cause (*j*).

Opposition by
members of
the authority.

SECT. 2.—Structural Requirements.

795. In the case of duly licensed theatres (whether licensed by letters patent or otherwise) within the Metropolis (*k*) which were duly licensed before the 22nd July, 1878 (*l*), the London County Council (*m*) may require structural defects to be remedied, where such defects cause special danger from fire and can in the opinion of the council be remedied at moderate cost (*n*).

Powers of
London
County
Council.

The order must be in writing (*o*), and when one such order has

(*h*) See p. 406, *post*.

(*i*) A meeting of a county council is not a court within the meaning of the rule by which defamatory statements made in the course of the proceedings before a court are absolutely privileged. The only privilege attaching to such statements is the ordinary privilege which applies to a communication made without express malice on a privileged occasion (*Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q. B. 431, C. A.). As to privilege generally, see title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.*, 685 *et seq.*

(*j*) *R. v. London County Council, Ex parte Akkersdyk, Ex parte Fermentia*, [1892] 1 Q. B. 190. But a county council in determining applications for licences is acting judicially, and is bound by the same principles as are binding on justices in determining questions which came before them for judicial decision (*ibid.*). See also *Re Empire Theatre, R. v. London County Council* (1894), 71 L. T. 638; *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch. D. 366, 379, C. A.; and title MAGISTRATES, Vol. XIX., pp. 553, 554.

(*k*) As to structural requirements outside the administrative county of London, see p. 406, *post*.

(*l*) The date of the passing of the Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40. As to the area of the administrative county of London, see title METROPOLIS, Vol. XX., pp. 393 *et seq.*

(*n*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 11; see title METROPOLIS, Vol. XX., pp. 470 *et seq.*, 491. Where a "dangerous structure order" is made by a magistrate at the instance of the London County Council requiring a lessee to take down and secure certain walls of his theatre, the theatre is "closed by order of a superior authority," within the meaning of a clause in the lease suspending payment of rent in such an event (*Lennox v. Curzon, Scott v. Lennox* (1906), 22 T. L. R. 611, C. A.). As to dangerous structure orders, see title METROPOLIS, Vol. XX., pp. 493, 494.

(*o*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 11. The penalty for non-compliance is £50, and £5 a day for every day after a reasonable time for compliance has elapsed (*ibid.*). This provision relates entirely to defects of structure, and not to defects arising from want of repair or from the mode of control or management (*St. James's Hall Co. v. London County Council*, [1901] 2 K. B. 250, *per* CHANNELL, J., at p. 254).

SECT. 2.
Structural
Require-
ments.

Appeal.

Fire regula-
tions.

been made and complied with no further order can be made under this statute (*p*).

If notice of appeal against the order is given to the London County Council, the matter is referred to an arbitrator appointed by the First Commissioner of Works (*q*).

796. The London County Council may (*r*) from time to time make, alter, vary, and amend regulations for the protection from fire of theatres, howsoever licensed (*s*), and whether licensed or not (*t*). A copy of such regulations must be open to inspection by all persons, without charge, at the offices of the London County Council and a printed authenticated copy must be obtainable at a cost of not more than 5s. by every person applying for it (*u*).

A certificate in writing under seal of compliance with the regulations must be obtained by every person having or keeping open any such house, room, or other place of public resort under a penalty of £50 a day (*w*).

Local
authorities.

797. Where premises, wherever situate, are used as a place of public entertainment and have no urinal belonging or attached to them, the local authority (*x*) in certain districts (*a*) may by notice require the owner to provide and maintain proper and sufficient urinals in a suitable position (*b*).

The notice must be in writing, and failure to comply with it renders the owner liable for each offence to a penalty not exceeding 20s. and to a daily penalty not exceeding 10s. (*c*).

SECT. 3.—Closing Orders.

Occasions for
suspending
licences.

798. The Lord Chamberlain may on public occasions, or if a riot or misbehaviour takes place, suspend his licence, or, in the case

(*p*) *St. James's Hall Co. v. London County Council*, [1901] 2 K. B. 250.

(*q*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 11.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40. As to the powers of the London County Council as regards fire protection, see, generally, title METROPOLIS, Vol. XX., pp. 488 *et seq.*

(*s*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 12. This refers, however, only to places licensed for the first time after the passing of this Act.

(*t*) *R. v. Hannay*, [1891] 2 Q. B. 709.

(*u*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 12.

(*w*) *Ibid.*

(*x*) Local authority means an urban sanitary authority, an urban district council, or a rural district council (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13). As to such authorities, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*, 329 *et seq.*

(*a*) *I.e.*, where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 44, has been applied by order of the Local Government Board; see titles LOCAL GOVERNMENT, Vol. XIX., p. 387; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 44; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 599.

(*c*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 44.

of a patent theatre, order it to be closed, and the house thereupon becomes an unlicensed house (*d*). Rules for ensuring order and decency at theatres licensed by them must be made by local authorities, and they may suspend their licences on proof of riot or breach of the rules (*e*), in which event the house becomes an unlicensed house (*e*).

SECT. 3.
Closing
Orders.

SECT. 4.—*Offences in Respect of Theatres.*

799. Every person who for hire (*f*) acts or presents, or causes (*g*), permits or suffers to be acted or presented, (1) any part of any stage play in an unlicensed place (*h*), or (2) an unlicensed part of any stage play in any theatre, whether licensed or not (*i*), commits an offence; in the first case he is liable to a fine not exceeding £10 for every day he offends (*h*), and in the second case every licence, if any, by or under which the theatre was opened becomes absolutely void (*i*).

Acting
unlicensed
play or in
unlicensed
place.

Every actor who acts in any theatre where money or reward is charged for the admission of any person to the theatre to see a stage play, or where the stage play is presented on premises where excisable liquor may be sold, is deemed to be acting for hire (*k*).

800. All penalties are recoverable in the High Court or summarily before two justices (*l*). There is an appeal to quarter sessions from any order of any justices (*m*). After payment of the expenses of the prosecution any residue of any penalty is to be paid to the Crown (*n*).

Penalties.

In any proceedings for keeping an unlicensed theatre, or for acting for hire in an unlicensed theatre, upon proof that such theatre is used for the public performance of stage plays, the burden of proof is on the accused to show the due licensing, and until that is proved the theatre is to be deemed to be unlicensed (*o*).

Burden of
proof.

(*d*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 8. As to what may constitute a riot, see p. 410, *post*.

(*e*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 9.

(*f*) The acting is "for hire," whether payment is made at the door or any other place (*Fredericks v. Payne* (1862), as reported 32 L. J. (M. C.) 14, *per* BRAMWELL, J., at p. 16).

(*g*) That a person is the acting manager of a theatre and pays the salaries of performers and dismisses them is sufficient proof that he caused the performances; if he caused the performances, it is immaterial whether he did so as the agent of others or not (*Parsons v. Chapman* (1831), 5 C. & P. 33).

(*h*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 11. Strolling players may be convicted under *ibid.* for acting or presenting, or causing or permitting to be acted or presented, a stage play not licensed (*Fredericks v. Payne* (1862), 1 H. & C. 584; *Tarling v. Fredericks* (1873), 28 L. T. 814).

(*i*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 15.

(*k*) *Ibid.*, s. 16; compare *Farndale v. Bainbridge* (1898), 42 Sol. Jo. 192. As to performers generally, see pp. 410 *et seq.*, *post*.

(*l*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 19; as to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to the illegal detention of a person convicted under the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 2, see *Leary v. Patrick* (1850), 15 Q. B. 266.

(*m*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 20.

(*n*) *Ibid.*, s. 21.

(*o*) *Ibid.*, s. 17.

SECT. 4.
Offences in
Respect of
Theatres.

Special pro-
vision in
metropolis.

801. The Commissioner of Metropolitan Police (*p*) may, by order in writing, authorise a superintendent of the Metropolitan Police, with such constables as he may think necessary, to enter any house or room kept or used for stage plays or dramatic entertainments, into which admission is obtained by payment of money and which is not a licensed theatre, at any time when it is open for the reception of persons resorting thereto, and to take into custody all persons found there without lawful excuse (*q*). The penalty for keeping, using, or knowingly letting any house or other tenement (*r*) for the purpose of being so used as an unlicensed theatre is a fine not exceeding £20, or not more than two months' imprisonment with or without hard labour; the penalty for performing or being in such unlicensed theatre without lawful excuse is a fine not exceeding 40s. (*s*).

A conviction under this provision does not exempt any owner, keeper, or manager of such house, room, or tenement from any liability for keeping a disorderly house or for a nuisance occasioned thereby (*t*).

Theatre
queue.

802. A theatre queue may be a nuisance, and the persons causing the queue to assemble may be restrained by injunction (*u*).

SECT. 5.—*Rights of the Public.*

SUB-SECT. 1.—*Right of Admission.*

Right as
to seat.

803. Members of the public who are admitted to a theatre are mere licensees (*w*), and their rights depend upon the contract, if any, under which they have been admitted (*x*). A member of the public who has paid for admission to any part of a theatre is entitled, on finding no room in that particular part, to demand the return of his money, although the theatre bills expressly state that no money will be returned (*y*). He has no right, however, to occupy a seat in any other part of the theatre; if he does so the proprietor may remove him, using no more force than is necessary (*a*).

Letting
boxes.

804. The right of admission to a theatre is not necessarily confined to admission on a single occasion. The proprietor of a theatre may let a box in his theatre, with the exclusive right of

(*p*) As to the Commissioner of Metropolitan Police, see title POLICE, Vol. XXII., pp. 469 *et seq.*

(*q*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 46. As to the arrest of offenders, legal proceedings etc. under this and the amending Acts, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 291, 304; POLICE, Vol. XXII., pp. 498, 499, 504, 506.

(*r*) A portable booth used by strolling players is not a "tenement" within this provision (*Fredericks v. Howie* (1862), 1 H. & C. 381).

(*s*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 46.

(*t*) *Ibid.* As to disorderly houses, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541 *et seq.*

(*u*) *Barber v. Penley*, [1893] 2 Ch. 447; *Lyons, Son & Co. v. Gulliver* (1913), 29 T. L. R. 428.

(*w*) Or invitees; see title NEGLIGENCE, Vol. XXI., pp. 385, 386.

(*x*) As to the position of a licensee or invitee, see, generally, *ibid.*, p. 388; title TRESPASS, pp. 860, 861, *post*.

(*y*) *Lewis v. Arnold* (1830), 4 C. & P. 354.

(*a*) *Ibid.*

occupying it, for a period, subject, if he himself is a lessee, to any restrictions imposed by his own lease (*b*). In this case the relation between the parties is that of landlord and tenant, and the proprietor is not entitled to enter the box or to interfere with it except for the purpose of repairing it or for any other purpose mentioned in the agreement of letting (*c*), whilst, on the other hand, the lessee of the box may be liable to be rated in respect of it (*d*).

SECT. 5.
Rights of
the Public.

805. The right of free admission to a theatre for a specified period may be reserved to the vendor (*e*) or lessor (*f*) on a sale or lease of a theatre, or it may be granted to any person by the proprietor (*g*). In this case the person possessing the right has no interest in land, but is merely a licensee for the period specified (*h*), and his exact position depends upon the terms of the particular instrument creating the right (*i*). In the absence of any provision to the contrary (*k*), the right does not bind an assignee (*l*) or sub-lessee (*m*) of the proprietor; and it applies only to the theatre existing at the date of the instrument and not to a theatre subsequently built on the same site (*n*).

Free
admission.

SUB-SECT. 2.—*Right to Express Opinion.*

806. An audience has the right to express, by applause or hisses, the sensations which naturally present themselves at the moment, and its unbiassed free opinions of the merits of the performers (*o*), but has no right to make such a prodigious noise as to prevent others from hearing what is going forward on the stage (*p*).

Hissing.

(*b*) *Croft v. Lumley* (1858), 6 H. L. Cas. 672 (where a covenant not to grant away, assign, or dispose of the stalls or boxes in an opera house for any longer period than one year or season was held not to be broken by a sub-lease of boxes for one year commencing from a future date, or by a further sub-lease, made during the continuance of the first sub-lease, to continue for one year commencing on the expiry of the first sub-lease). For forms of covenant to charge specified prices of admission, and not to reduce prices, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 276, 304.

(*c*) *Leader v. Moody* (1875), L. R. 20 Eq. 145.

(*d*) *R. v. St. Martin's-in-the-Fields (Inhabitants)* (1842), 3 Q. B. 204 (local Act).

(*e*) *Scott v. Howard* (1881), 6 App. Cas. 295; compare *Helling v. Lumley* (1858), 3 De G. & J. 493, C. A.

(*f*) *Coleman v. Foster* (1856), 1 H. & N. 37.

(*g*) *Flight v. Glossop* (1835), 2 Bing. (N. C.) 125 (lender).

(*h*) *Taylor v. Waters* (1816), 2 Marsh. 551; compare *Flight v. Glossop*, *supra*; and see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 239; LANDLORD AND TENANT, Vol. XVIII., pp. 338, 339.

(*i*) Compare *Dawney v. Chatterton* (1875), 45 L. J. (Q. B.) 293, C. A., where the right was conferred by statute.

(*k*) See *Helling v. Lumley*, *supra*.

(*l*) *Flight v. Glossop*, *supra*; *Malone v. Harris* (1859), 11 I. Ch. R. 33.

(*m*) *Coleman v. Foster*, *supra*.

(*n*) *Scott v. Howard*, *supra*.

(*o*) *Clifford v. Brandon* (1810), 2 Camp. 358. In a note to this case it is stated that Macklin, the famous comedian, indicted for a conspiracy to ruin him several persons who were, on Lord Mansfield's direction, found guilty; see also *Gregory v. Brunswick (Duke)* (1843), 6 Man. & G. 205.

(*p*) *Clifford v. Brandon*, *supra*.

SECT. 5.
Rights of
the Public.

If any body of men go to a theatre with the intention of hissing an actor, or even damning a piece, it amounts to a conspiracy, and persons to the number of three or more who execute such a purpose by tumult or disorder may be guilty of a riot (q).

SECT. 6.—Performers.

Principles
applicable.

807. The ordinary law of contract (r) applies to theatrical contracts, except in so far as varied or modified by theatrical usage; for instance, to be enforceable, the contract must be certain (s), it must not be illegal (t), and, whether for personal service (u) or not (w), it is subject to the ordinary rules of avoidance arising from impossibility of performance (x).

Construction
of theatrical
contracts.

808. The construction of theatrical contracts, their performance, and the remedies for the breach thereof are in general governed by the rules applicable to other contracts (y). There are, however,

(q) *Gregory v. Brunswick (Duke)* (1843), 6 Man. & G. 295. As to riot generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 471; see also p. 406, *ante*.

(r) See title CONTRACT, Vol. VII., pp. 327 *et seq.* As to the employment of children in public entertainments or in dangerous performances, see title INFANTS AND CHILDREN, Vol. XVII., pp. 152 *et seq.*; Children (Employment Abroad) Act, 1913 (3 Geo. 5. c. 7).

(s) *Loftus v. Roberts* (1902), 18 T. L. R. 532, C. A. (agreement to employ "at a West End salary to be mutually agreed between us": no binding contract); *Wade v. Robert Arthur Theatres Co.* (1907), 24 T. L. R. 77; see title CONTRACT, Vol. VII., p. 346, note (b).

(t) *De Begnis v. Armistead* (1833), 10 Bing. 107 (contract to conduct unlicensed theatre); *Ewing v. Osbaldiston* (1837), 2 My. & Cr. 53 (contract to conduct unlicensed theatre); *Gallini v. Laborie* (1793), 5 Term Rep. 242 (contract to dance at unlicensed theatre); *Gray v. The Oxford, Ltd.* (1905), 21 T. L. R. 664 (affirmed on appeal on another point (1906), 22 T. L. R. 684, C. A.); *Scott v. Macnaughton* (1908), *Times*, 25th November (contracts to perform "sketches" or stage-plays at music-halls not having necessary licence).

(u) See title CONTRACT, Vol. VII., p. 431; *Robinson v. Davison* (1871), L. R. 6 Exch. 269 (contract to play at a concert on a particular day; breach arising from illness of performer excused); *Harvey v. Tivoli, Manchester, Ltd.* (1907), 23 T. L. R. 592 (contract with troupe of three performers avoided by death of one).

(w) See *Glinseretti v. Rickards* (1907), *Times*, 26th January, C.A. (contract by music-hall artist for his troupe to perform; contract not avoided by death of member of troupe; compare *Harvey v. Tivoli, Manchester, Ltd.*, *supra*). The contract is not, on the part of the proprietor of the theatre, a personal contract; thus, where the contract is made with proprietors in partnership, the death of one of the proprietors does not terminate the engagement (*Phillips v. Alhambra Palace Co.*, [1901] 1 K. B. 59); nor is the engagement affected by the sale of the theatre by mortgagees under a power of sale, though the contract provides for its termination on the happening of some "unforeseen calamity" (*ibid.*). Similarly, the manager of a theatre who contracts to allow the production of a play on a certain date is liable in damages if the theatre is not then ready owing to a contractor not having finished his work in time (*Hardie v. Balmain* (1902), 18 T. L. R. 539, C. A.), even though the cause of unreadiness is the reconstruction of the theatre in compliance with the requirements of a local authority, and the agreement contains a clause avoiding the contract in the event of the theatre being closed through fire, death in the Royal Family, "or any other cause whatsoever" (*ibid.*).

(x) See title CONTRACT, Vol. VII., pp. 426 *et seq.*

(y) As to construction of contracts, see titles CONTRACT, Vol. VII.,

certain matters peculiar to theatrical contracts which have been the subject of judicial decision.

The term "re-engagement" has no definite legal meaning, and what is "re-engagement" as distinguished from "fresh engagement" is a question for the jury (*z*).

An agreement to pay commission on all future engagements at a named music-hall is not terminated by the music-hall being pulled down and rebuilt (*a*).

Failure through temporary illness to attend rehearsals for six days before the commencement of an engagement in accordance with the terms of an agreement has been held not to justify rescission by the employer (*b*), but a failure to attend final rehearsals and the first few performances of an opera may so go to the root of the consideration as to justify rescission (*c*).

Inability to perform the part for which the actor (*d*) has been engaged is a ground for dismissal, unless arising from illness or other temporary cause (*e*).

Failure of an actor to send in "bill matter" as provided by the contract is a ground for damages, but not for cancellation of the contract (*f*).

809. Where a manager engages an actor for a definite period the court may, it seems, infer a condition that the actor is not to appear elsewhere, and that he is to have reasonable employment (*g*), Obligation to employ.

pp. 509 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.* As to the performance of contracts, see title CONTRACT, Vol. VII., pp. 410 *et seq.* As to remedies for breach of contract, see titles CONTRACT, Vol. VII., p. 441; DAMAGES, Vol. X., pp. 301 *et seq.*; INJUNCTION, Vol. XVII., pp. 197 *et seq.*; SPECIFIC PERFORMANCE, pp. 1 *et seq.*, *ante.* As to penalties and liquidated damages, see title DAMAGES, Vol. X., pp. 328 *et seq.*

(*z*) *Robey v. Arnold* (1898), 14 T. L. R. 220, C. A.; *Arnold v. Stratton* (1898), 14 T. L. R. 537, C. A. As to the meaning of "completion of the engagement," see *London Music-Hall, Ltd. v. Austin* (1908), *Times*, 16th December; and note (*r*), p. 413, *post*.

(*a*) *Auckland and Brunetti v. Collins* (1898), 14 T. L. R. 348; see also *Sales v. Crispi* (1913), 29 T. L. R. 491 (dissolution of partnership by commission agents).

(*b*) *Bettini v. Gye* (1876), 1 Q. B. D. 183. The employer's remedy is an action for damages (*ibid.*).

(*c*) *Poussard v. Spiers* (1876), 1 Q. B. D. 410.

(*d*) As to the meaning of "actor," see *Thomas v. Gatti (A. & S.), Ltd.* (1906), *Times*, 1st and 2nd February ("Gibson girl"). An opera singer paid by the performance may, nevertheless, be a "servant" within the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1) (*b*) (*Re Winter German Opera, Ltd.* (1907), 23 T. L. R. 662).

(*e*) *Harley v. Henderson* (1884), *Times*, 18th and 19th February; see also the cases cited in note (*u*), p. 410, *ante*.

(*f*) *Wade v. Waldon*, [1909] S. C. 571; and see *Elen v. London Music Hall, Ltd.* (1906), *Times*, 31st May, 1st June. It has been held that to put the names of performers on the "bill" in the wrong order is capable of being defamatory (*Russell v. Notcutt* (1896), 12 T. L. R. 195, C. A.; compare *Elen v. London Music Hall, Ltd.*, *supra*); but see *Renard v. Carl Rosa Opera Co.* (1906), *Times*, 15th February.

(*g*) *Fechter v. Montgomery* (1863), 33 Beav. 22 (plaintiff engaged defendant, a prominent provincial actor, to appear in London for a period of two years; after five months without employment, during which his salary was paid, the defendant entered into a contract with another manager: the court, holding that the defendant's action was reasonable,

SECT. 6.
Performers.

but a manager cannot be expected to give every actor whom he engages a part in every play he produces (*h*).

An option exercisable by a manager to retain an actor's services after employment at a rising annual salary for a fixed period implies, where no further salary is mentioned, employment at the salary paid during the last year of the fixed period (*i*).

Restraint of
trade.

810. A contract by a dramatist not to write dramatic pieces for the proprietors of any other than a particular theatre, or by an actor not to act elsewhere, is not void as a contract in restraint of trade (*k*).

An agreement by an actor to perform at a particular theatre is not, it seems, enforceable by injunction unless it contains a negative clause prohibiting him from performing elsewhere (*l*), but the employer is left to his other remedies (*m*). A stipulation that the actor is not to "act, sing, or appear publicly at any other theatre or place of entertainment without special permission" is a sufficient negative restraining clause (*n*), but a contract to perform at one theatre exclusively is not (*o*).

refused an interlocutory injunction); see *Grant v. Maddox* (1846), 15 M. & W. 737.

(*h*) *Grimston v. Cunningham*, [1894] 1 Q. B. 125. Nor is a person engaged as understudy to a principal performer entitled as of right to play the part if the principal is absent (*Newman v. Gatti* (1907), 24 T. L. R. 18, C. A.).

(*i*) *Wade v. Robert Arthur Theatres Co.* (1907), 24 T. L. R. 77. Under an engagement for a week, salary is payable at the end of the week only, even though in the contract provision is made for its apportionment in certain circumstances (*Mapleson v. Sears* (1911), 105 L. T. 639; see title MASTER AND SERVANT, Vol. XX., p. 84).

(*k*) *Morris v. Colman* (1812), 18 Ves. 437; see also *Tivoli, Manchester, Ltd. v. Colley* (1904), 20 T. L. R. 437 (contract not to appear within twenty miles of Manchester, within six months of a week's engagement, without consent: held not unreasonable); *Mapleson v. Bentham* (1871), 20 W. R. 176, C. A. (opera singer engaged to sing for the whole of the London season, which ended in August, and nowhere else in Great Britain "pendant l'année": interlocutory injunction to restrain him singing after August refused); *London Music-Hall, Ltd. v. Austin* (1908), *Times*, 16th December. As to contracts void as being in restraint of trade, see titles MASTER AND SERVANT, Vol. XX., pp. 88, 90; TRADE AND TRADE UNIONS, pp. 525 *et seq.*, 530 *et seq.*, 548 *et seq.*, *post*.

(*l*) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, C. A., overruling *Montague v. Flockton* (1873), L. R. 16 Eq. 189. An *interim* injunction which would prevent the actor from earning his livelihood should not be granted (*Palace Theatre, Ltd. v. Clensy and Hackney and Shepherd's-Bush Empire Palaces, Ltd.* (1909), 26 T. L. R. 28, C. A., *per* VAUGHAN WILLIAMS, L.J.). As to the granting of injunctions in the case of contracts for personal service, generally, see title INJUNCTION, Vol. XVII., pp. 242 *et seq.*, 245, 246.

(*m*) See *Whitwood Chemical Co. v. Hardman*, *supra*, *per* LINDLEY, L.J., at p. 425.

(*n*) *Lumley v. Wagner* (1852), 1 De G. M. & G. 604, overruling *Kemble v. Kean* (1829), 6 Sim. 333, and *Kimberley v. Jennings* (1836), 6 Sim. 340; followed in *Grimston v. Cunningham*, *supra*. As to such a clause being implied, see *Fechter v. Montgomery* (1863), 33 Beav. 22. A contract not to perform before or during her "engagement at any theatre, music-hall, club, concert, or place of entertainment" has been held not to debar an actress from performing, without remuneration, on Sunday at a club (*Kelly v. London Pavilion, Ltd.*, *Kelly v. New Tivoli, Ltd.*, *Kelly v. Oxford, Ltd.* (1897), 77 L. T. 215).

(*o*) *Davis v. Foreman*, [1894] 3 Ch. 654; followed in *Kirchner & Co. v.*

811. Theatrical usages, like other usages (*p*), apply to contracts only where both parties were aware, or must be presumed to have been aware, of the existence of the usage and where the usage is certain, universal, reasonable, and not opposed to the general law (*q*).

SECT. 6.
Performers.
Theatrical
usages.

There is a usage that the engagement of an actor for three years means three theatrical seasons (*r*); that the proprietor of a theatre may within reasonable limits fix what is to be the length of the season (*s*); and that prominent artists are to be "starred" on a music-hall bill (*t*). Attempts have failed to establish a usage among theatrical persons that a "tour" means three weeks (*a*); that an acting manager has a right to a private box or to give free orders for admission (*b*); or that piano manufacturers lend pianos to lessees of theatres (*c*).

When an actress is called upon to resume a part which she has previously acted with success she is entitled to reasonable notice to learn the part; reasonable notice in such a case is proportionate to the reputation she has acquired (*d*).

Part II.—Stage Plays.

SECT. 1.—Definition.

812. Whether a particular entertainment is a stage play is a question of fact (*e*). A stage play is described for certain purposes (*f*)

What is
included.

Gruban, [1909] 1 Ch. 413; see, however, *Doherty v. Allman* (1878), 3 App. Cas. 709, per Lord CAIRNS, L.C., at p. 719. The contrary was assumed in *Gaiety Theatre Co. v. Loftus (Cissy)* (1893), *Times*, 11th August, but the point was not argued.

(*p*) See, generally, title CUSTOM AND USAGES, Vol. X., pp. 249 *et seq.*

(*q*) *White v. Henderson* (1885), 2 T. L. R. 119, per GROVE, J., at p. 121.

(*r*) *Grant v. Maddox* (1846), 15 M. & W. 737; compare *Mapleson v. Bentham* (1871), 20 W. R. 176; and see *Fechter v. Montgomery* (1863), 33 Beav. 22. As to the meaning of "completion of the engagement" in a contract providing for a series of performances of a week each at considerable intervals, and containing a clause restraining the artist from performing within a certain area for a period of eight months prior to the completion of the engagement, see *London Music-Hall, Ltd. v. Austin* (1908), *Times*, 16th December.

(*s*) *Montague v. Flockton* (1873), L. R. 16 Eq. 189, not overruled on this point by *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, C. A.; see, further, title CUSTOM AND USAGES, Vol. X., pp. 287, 288.

(*t*) *Elen v. London Music Hall, Ltd.* (1906), *Times*, 31st May, 1st June.

(*a*) *Wyatt v. Phipps* (1896), 40 Sol. Jo. 781.

(*b*) *Lacy v. Osbaldiston* (1837), 8 C. & P. 80.

(*c*) *Chappell & Co., Ltd. v. Harrison* (1910), 103 L. T. 594; see, further, title CUSTOM AND USAGES, Vol. X., p. 288.

(*d*) *Graddon v. Price* (1827), 2 C. & P. 610.

(*e*) *Wigan v. Strange* (1865), L. R. 1 C. P. 175.

(*f*) Namely, for the purposes of the Theatres Act, 1843 (6 & 7 Vict. c. 68) (*ibid.*, s. 23). As to the wearing of naval or military uniforms in stage plays, see title ROYAL FORCES, Vol. XXV., p. 99.

SECT. 1.

Definition.

as including tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage (*g*), or any part thereof. This description does not apply to any theatrical representation in any booth or show allowed by the proper authority in any lawful fair, feast, or customary meeting (*h*).

A dialogue in costume (*i*), or a performance in which the actions of persons performing beneath the stage are shown to the audience by means of mirrors, is a stage play (*k*). A ballet depicting by gestures war, peace, and reconciliation may be a stage play (*l*).

SECT. 2.—*Licensing of Plays.*

Procedure.

813. The Lord Chamberlain (*m*) is the licensing authority for stage plays for Great Britain. One copy of every new stage play, or new act, scene or other part added to any old stage play, must be sent to him at least seven days before the first acting or production. The copy sent to the Lord Chamberlain must specify the theatre and time intended for the first presentation and be signed by the master or manager of the theatre. Until the expiration of the seven days the new play or new addition to the old play must not be acted or presented (*n*).

Offences.

814. Every person who for hire (*o*) acts, presents, or causes to be acted or presented, any stage play, or part thereof, before it has been allowed by the Lord Chamberlain, or which has been disallowed by him, or which has been prohibited by him, is liable on conviction to a fine not exceeding £50 (*p*).

(*g*) These words must be construed to mean entertainments such as those before expressed, namely, tragedy etc., which are all of a dramatic character (*Wigan v. Strange* (1865), L. R. 1 C. P. 175, *per* WILLES, J., at p. 184). "Tumbling" was held not to be an "entertainment of the stage" within the meaning of stat. (1736) 10 Geo. 2, c. 28 (repealed) (*R. v. Handy* (1795) 6 Term Rep. 286).

(*h*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 23. As to licences, see pp. 402 *et seq.*, *ante*; as to fairs generally, see title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*

(*i*) *Thorne v. Colson* (1861), 25 J. P. 101.

(*k*) *Day v. Simpson* (1865), 18 C. B. (N. S.) 680.

(*l*) *Wigan v. Strange*, *supra*. A "dramatic piece" within the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 2 (repealed), may exist without words and be entitled to protection. An idea or plot *plus* the manual or physical actions may be such a "dramatic piece" (*Tate v. Fullbrook* (1907), 23 T. L. R. 715).

(*m*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 107, 108.

(*n*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 12.

(*o*) See p. 407, *ante*.

(*p*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 15. As to the method of recovering penalties and appeal, see pp. 407, 408, *ante*; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541, 542.

Part III.—Music and Dancing and Other Public Entertainments.

SECT. 1.—Places for which a Licence is Required.

815. The law relating to music and dancing licences varies as it relates to places—

- (1) In the cities of London and Westminster and within twenty miles thereof, excluding the administrative county of Middlesex (*a*) ;
- (2) In the administrative county of Middlesex (*b*) ;
- (3) In the rest of England and Wales.

816. Any house, room, garden, or other public place (*c*) kept or used for public dancing, music, or other public entertainment of the like kind, requires to be licensed if situated in the cities of London or Westminster, or within twenty miles thereof (*d*), including the administrative county of Middlesex (*e*), and if not so licensed is a disorderly house (*f*).

Elsewhere in England or Wales no licence is required, except under the provisions of a local Act, or unless the local authority has adopted the Public Health Acts Amendment Act, 1890 (*g*), Part IV. (*h*), whereupon any house, room, garden, or other public place, kept or used for public dancing, singing, music, or other public entertainment of the like kind, requires to be licensed (*i*), and if not so licensed is a disorderly house (*j*).

A licence is required where music, singing, and dancing entertainment is provided in a tent pitched on waste land hired for the occasion (*k*).

SECT. 1.

Places
for which
Licence is
Required.

The law in
different
parts of the
country.

Places
requiring
licence.

(*a*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36). Nothing in the Act is to affect the Theatres Royal at Drury Lane and Covent Garden, the King's Theatre, Haymarket, or any performances carried on under letters patent or licence of the Crown or the Lord Chamberlain's licence (*ibid.*, s. 4).

(*b*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15). The powers conferred by this Act are in addition to, and not in derogation of, any of the powers of licensing already vested in the Middlesex County Council (*ibid.* s. 2 (14)).

(*c*) As to the meaning of "public place," see note (*e*), p. 402, *ante*.

(*d*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2.

(*e*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (1).

(*f*) A house may be a "disorderly house" within the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), although in fact there is no disorder (*R. v. Wolfe* (1849), 13 J. P. 428; *Green v. Botheroyd* (1828), 3 C. & P. 471; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541 *et seq.*). As to the wearing of naval or military uniforms in a music-hall or circus performance, see title ROYAL FORCES, Vol. XXV., p. 99.

(*g*) 53 & 54 Vict. c. 59.

(*h*) As to adoption, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

(*i*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (1).

(*j*) *Patrick v. Wood* (1905), 4 Adam, 648.

(*k*) *Farndale v. Bainbridge* (1898), 42 Sol. Jo. 192 (where no money was charged for admission, but money was solicited during the entertainment);

SECT. 1.

Places
for which
Licence is
Required.

"Keeping"
and "using."

A public-house (*l*) in which is provided a piano to be gratuitously played by the customers for their own amusement, there being no charge for admission, is not a room kept or used for public singing or music (*m*).

817. The music and dancing in any entertainment must form a substantial part of the entertainment and not be merely subsidiary (*n*), but a place may be kept for two purposes, one requiring a licence and the other not (*o*), thus, a skating rink where music is performed while skating is proceeding requires a licence (*p*), although rinking is not dancing (*p*). It is not necessary to public dancing that the dancing should be by the public (*q*). An ordinary dancing class does not require a licence (*r*), and a tight-rope or other performance in a circus with rhythmic movements does not require a dancing licence (*s*).

Occasional
user.

Knowledge of the use to which the house or other place is put must be brought home to the defendant; and the user must be more than occasional, a single entertainment or temporary use not being sufficient to justify a conviction (*t*).

A room used temporarily for dancing during a festival (*a*), or a room used for a lecture together with incidental music (*b*), does not require a licence.

Exclusive
users.

Where a licence is otherwise required, it is immaterial that the house is not kept exclusively for dancing, music, or singing (*c*), or that the dancing, music, or singing was upon public-house premises (*d*). In the case of dancing, music, or singing in a public-house (*e*) a licence is required though no money is charged for admission (*f*).

Notices to
be posted
over entrance.

818. All places licensed within twenty miles of London and

compare *Patrick v. Wood* (1905), 4 Adam, 648, where a piano set up out of doors on a portable platform was held to be within the words "other like place of public entertainment" of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 397.

(*l*) As to the meaning of public-house, see titles INNS AND INNKEEPERS, Vol. XVII., pp. 304, 305; INTOXICATING LIQUORS, Vol. XVIII., p. 8.

(*m*) *Brearley v. Morley*, [1899] 2 Q. B. 121.

(*n*) *Gregory v. Tavernor* (1833), 6 C. & P. 280; *Hall v. Green* (1853), 9 Exch. 247; *Quaglieni v. Matthews* (1865), 6 B. & S. 474; *Syers v. Conquest* (1873), 37 J. P. 342; *Fay v. Bignell* (1883), Cab. & El. 112.

(*o*) *Hall v. Green*, *supra*.

(*p*) *R. v. Tucker* (1877), 2 Q. B. D. 417, C. C. R.

(*q*) *Marks v. Benjamin* (1839), 5 M. & W. 565.

(*r*) *Bellis v. Burghall* (1788), 2 Esp. 722.

(*s*) *Quaglieni v. Matthews*, *supra*.

(*t*) *Shelley v. Bethell* (1883), 12 Q. B. D. 11; *Marks v. Benjamin*, *supra*; *Gregory v. Tuffs* (1833), 6 C. & P. 271; *Syers v. Conquest*, *supra*; *R. v. Rosenthal*, *R. v. Strugnell* (1865), 30 J. P. 101; *R. v. Strugnell* (1865), L. R. 1 Q. B. 93; but see *Clarke v. Searle* (1793), 1 Esp. 25.

(*a*) *Shutt v. Lewis* (1804), 5 Esp. 128; *Gregory v. Tuffs*, *supra*; *Gregory v. Tavernor*, *supra*.

(*b*) *Baxter v. Langley* (1868), L. R. 4 C. P. 21.

(*c*) *Bellis v. Beal* (1797), 2 Esp. 592; *Gregory v. Tuffs*, *supra*.

(*d*) *Green v. Botheroyd* (1828), 3 C. & P. 471.

(*e*) As to the meaning of public-house, see titles INTOXICATING LIQUORS, Vol. XVIII., p. 8; INNS AND INNKEEPERS, Vol. XVII., pp. 304, 305.

(*f*) *Gregory v. Tuffs*, *supra*; *Archer v. Willingrice* (1802), 4 Esp. 186; *Frailing v. Messenger* (1867), 31 J. P. 423.

Westminster, excluding the administrative county of Middlesex (*g*), require to have conspicuously posted over the entrance the words "Licensed pursuant to Act of Parliament of the twenty-fifth of King George the Second" (*h*); in the case of places licensed elsewhere the words "Licensed in pursuance of Act of Parliament," with the addition of words showing the purpose (*i*) for which the place is licensed, are substituted (*j*).

SECT. 1.
Places
for which
Licence is
Required.

819. No place licensed for public music, dancing, or singing within twenty miles of London and Westminster (*k*) or in Middlesex (*l*) may be kept open for such purposes before the hour of noon unless under an occasional licence of exemption (*m*).

Hours of
closing.

820. Recreation rooms, wherever situate, managed and controlled under the authority of a Secretary of State or of the Admiralty may be used for public dancing, music, and entertainments of a like kind without a licence (*n*).

Naval and
military
recreation
rooms.

SECT. 2.—*Authorities for Grant of Licences.*

821. The authorities for the grant and renewal of licences are, in the cities of London and Westminster and within twenty miles thereof (*o*), and in the administrative county of Middlesex (*p*), the county council; and elsewhere in England or Wales, the authority provided by the local Act, if any, which may be in force in the district (*q*), or if there is no local Act, and the Public Health Acts Amendment Act, 1890 (*r*), has been adopted, the licensing justices (*s*).

Licensing
authorities.

(*g*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (12) (now repealed), which repealed as regards the administrative county of Middlesex the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 3.

(*h*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 3.

(*i*) Namely, for music, or for music and dancing.

(*j*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (6); Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (6).

(*k*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 3, as amended by Public Entertainments Act, 1875 (38 & 39 Vict. c. 21), s. 1.

(*l*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (7).

(*m*) Such an occasional licence of exemption may be granted under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 57; see title INTOXICATING LIQUORS, Vol. XVIII., p. 97.

(*n*) Army (Annual) Act, 1889 (52 & 53 Vict. c. 3), s. 7; see title ROYAL FORCES, Vol. XXV., p. 98.

(*o*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2, as amended by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3. The London County Council has issued regulations dealing with applications for and other matters relating to licences, dated the 27th July, 1897; see title METROPOLIS, Vol. XX., p. 394.

(*p*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15).

(*q*) For examples of local Acts, see *Hoffman v. Bond* (1875), 40 J. P. 5 (Cardiff); *R. v. Oldham Licensing Justices, Ex parte Mellor* (1909), 73 J. P. 390 (Oldham).

(*r*) 53 & 54 Vict. c. 59.

(*s*) *Ibid.*, s. 51. As to the adoption of this Act, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364. As to the licensing justices, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 21 *et seq.*

SECT. 2.
**Authorities
 for Grant
 of Licences.**

Public
 swimming
 baths.

822. A public swimming bath, when closed for swimming, may be let for music and dancing, provided that a licence is obtained (*t*). In districts where the authorities above mentioned have jurisdiction, the licence must be obtained from them (*a*); in any other district the licence must be obtained from the county council of the county in which the district is situate (*b*).

SECT. 3.—*Grant and Renewal of Licences.*

SUB-SECT. 1.—*Music and Dancing Licences.*

Scope of
 licences.

823. Music and dancing licences may be granted separately (*c*) and subject to conditions (*d*). A music licence does not authorise singing or dancing (*e*).

Middlesex.

824. In the administrative county of Middlesex a licence is in force for one year, or such less time as the council, on granting the licence, determines (*f*). It may, however, be revoked at any time on breach of any of its terms or conditions (*g*).

Fourteen days' notice of intention to apply for a licence or for transfer of a licence must be given to the clerk to the council and to the superintendent of police (*h*). No notice, however, need be given of an application for renewal of an existing licence (*i*), and the council may grant a licence for fourteen days or less notwithstanding that proper notice has not been given (*k*).

Public Health
 Acts Amend-
 ment Act,
 1890.

825. In districts where the Public Health Acts Amendment Act, 1890 (*l*), has been adopted (*m*), the licensing justices may, by a

(*t*) Baths and Washhouses Act, 1899 (62 & 63 Vict. c. 29), s. 2; Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59) (London); see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 498.

(*a*) Baths and Washhouses Act, 1899 (62 & 63 Vict. c. 29), s. 2 (*a*): by *ibid.*, s. 3, in districts where the Act is in force, a licence under the Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2 (see p. 417, *ante*), may be granted at any annual licensing meeting of the council authorised to grant such a licence, or at any other meeting of such council duly convened on fourteen days' notice. A similar provision applies to the administrative county of London (Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59), s. 3).

(*b*) Baths and Washhouses Act, 1899 (62 & 63 Vict. c. 29), s. 2 (*a*).

(*c*) *Brown v. Nugent* (1872), L. R. 7 Q. B. 588, Ex. Ch.

(*d*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (9); Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (9); *Ex parte Richards* (1904), 68 J. P. 536 (where it was held that the justices might grant a licence for a room in connexion with a public-house, with a condition that a charge of at least 3*d.* per head must be made for admission, and that the charge for admission should not be returned in the form of refreshments).

(*e*) *Brown v. Nugent*, *supra*.

(*f*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (2).

(*g*) *Ibid.*, s. 2 (9).

(*h*) *Ibid.*, s. 2 (4).

(*i*) *Ibid.*, s. 2 (10).

(*k*) *Ibid.*, s. 2 (11).

(*l*) 53 & 54 Vict. c. 59.

(*m*) See titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

majority, grant and from time to time transfer a licence (*n*). The licence is in force for one year, or such shorter period as the justices, on granting the licence, determine (*o*). It may, however, be revoked on breach of any of its terms or conditions (*p*).

Fourteen days' notice of intention to apply for a licence or for the transfer of a licence must be given to the clerk to the justices and the chief officer of police of the police district (*q*). No notice, however, need be given of an application for a renewal of an existing licence (*r*); and the justices in petty sessions may grant a licence for fourteen days or less notwithstanding that proper notice has not been given (*s*).

826. Where a local Act is in force, the licensing authority must comply with its provisions and have no power to vary them (*t*). Where no period of duration is fixed by the local Act, the licensing authority may grant a licence for one year only (*a*).

827. Where the necessary provisions are in force (*b*), an urban authority may make bye-laws for the prevention of danger from whirligigs and swings when such whirligigs and swings are driven by steam power, and for the prevention of danger from the use of firearms in shooting ranges and galleries (*c*).

SUB-SECT. 2.—*Cinematograph Licences.*

828. A cinematograph exhibition, using inflammable (*d*) films, must not be given unless the regulations made by the Secretary of State (*e*) are complied with and the premises licensed (*f*).

The county council, which is the licensing authority (*g*), may grant its licence on such terms and conditions (*h*), subject to the

SECT. 3.
Grant and
Renewal of
Licences.

Local Acts.

Whirligigs,
swings, and
shooting
galleries.

Necessity for
licence.

(*n*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (2), (3).

(*o*) *Ibid.*, s. 51 (2).

(*p*) *Ibid.*, s. 51 (9). A licensed place is only to be opened on the days and during the hours stated in the licence (*ibid.*, s. 51 (7)).

(*q*) *Ibid.*, s. 51 (4).

(*r*) *Ibid.*, s. 51 (10).

(*s*) *Ibid.*, s. 51 (11).

(*t*) *R. v. Oldham Licensing Justices, Ex parte Mellor* (1909), 73 J. P. 390 (where the statute provided that licences might be granted at special sessions convened on fourteen days' notice, and a rule made by the justices, who were the licensing authority, that applications must only be made at the general annual licensing meeting, was held to be invalid).

(*a*) *Hoffman v. Bond* (1875), 40 J. P. 5.

(*b*) See titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

(*c*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 38; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 391.

(*d*) Apparently the word is not limited to films which are inflammable only whilst being used in a cinematograph (*Victoria Pier (Folkstone) Syndicate, Ltd. v. Reeve* (1912), 76 J. P. 374).

(*e*) Regulations of the Secretary of State, 20th December, 1909 (Stat. R. & O., 1909, p. 11), and 18th February, 1910 (Stat. R. & O., 1910, p. 28).

(*f*) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 1.

(*g*) The borough council in a county borough (*ibid.*, s. 6), and, when the premises are licensed by him, the Lord Chamberlain (*ibid.*, s. 7), have the same powers as a county council.

(*h*) Conditions requiring the premises not to be opened on Sundays,

SECT. 3.
Grant and
Renewal of
Licences.

regulations of the Secretary of State, as the council determines, and may, without prejudice to any other powers of delegation it may possess, delegate any of its powers to the justices in petty session (*i*).

A licence is for one year or such shorter period as the council, on the grant of the licence, determines (*k*), and any licence may be transferred by the council (*l*).

Seven days' notice in writing must be given to the county council and to the chief officer of police of the police area (*m*) in which the premises are situate of intention to apply for a licence or transfer, but no notice is required for a renewal (*n*).

Fees.

829. The fees payable on the grant, renewal, or transfer of a licence are to be fixed by the council. The maximum fee for the grant or renewal for one year is £1, or, where the licence is for less than one year, 5s. per month, the total not to exceed the maximum of £1; for a transfer the fee is 5s. (*o*).

Penalties.

830. If the owner of a cinematograph uses or allows it to be used, or if the occupier of any premises allows the premises to be used, in contravention of the statutory provisions, or the regulations or conditions made thereunder, regulating the user thereof, the penalties are, on summary conviction, a fine not exceeding £20, and, in the case of a continuing offence, £5 a day, and the licence, if any, may be revoked by the county council (*p*).

Entry by
constable.

A constable or other officer appointed for the purpose by the council may at all reasonable times enter any premises, whether licensed or not, in which he has reason to believe that a cinematograph exhibition is being or is about to be given (*q*). The penalty for preventing or obstructing the entry of such constable or other officer is, on summary conviction, a fine not exceeding £20 (*r*).

Occasional
user.

831. Premises only used exceptionally or occasionally for cinematograph exhibitions, and not on more than six days in any one year, need no licence, provided the occupier gives notice in writing to the county council and the chief officer of police (*m*) seven days before the intended exhibition and complies with the regulations and conditions of the Secretary of State and the county council (*r*).

Christmas Day and Good Friday are not *ultra vires* (*London County Council v. Bermondsey Bioscope Co., Ltd.*, [1911] 1 K. B. 445).

(*i*) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 5; see title MAGISTRATES, Vol. XIX., pp. 569, 570. The justices have no power of stating a case (*Huish v. Liverpool Justices* (1913), *Times*, 22nd October).

(*k*) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 2 (2).

(*l*) *Ibid.*, s. 2 (3).

(*m*) "Police area" and "chief officer of police" mean respectively the City of London and Commissioner of City Police, the Metropolitan Police District and Commissioner of Metropolitan Police, a county and its chief constable, a borough and its chief constable, a town, not a borough, having separate police under a local Act and the officer having command of the police, the Tyne under the Tyne Improvement Commissioners and the officer having command of the police (*ibid.*, s. 2 (6); Police Act, 1890 (53 & 54 Vict. c. 45), s. 33, Sched. III.).

(*n*) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 2 (4).

(*o*) *Ibid.*, s. 2 (5).

(*p*) *Ibid.*, s. 3.

(*q*) *Ibid.*, s. 4.

(*r*) *Ibid.*, s. 7 (2).

832. No licence is required if the exhibition is to be given in a building or structure of movable character, if the owner of the building or structure—

SECT. 3.
Grant and
Renewal of
Licences.

(1) has been granted a licence in respect of the building or structure by the council of the county in which he ordinarily resides; and

Where no
licence
required.

(2) has given two days' notice in writing to the county council and the chief officer of police in the area in which it is proposed to give the exhibition; and

(3) complies with the regulations of the Secretary of State and with the conditions imposed by the county council and notified in writing to the owner (s).

An exhibition given in a private dwelling-house to which the public are not admitted is not subject to the provisions of the Cinematograph Act, 1909 (t).

Private
house.

833. Where a cinematograph show is accompanied by music whilst the pictures are on the screen the necessity of a music licence depends upon whether the music is merely a subsidiary part of the entertainment or not (a).

Music in
cinemato-
graph shows.

SECT. 4.—*Structural Requirements as to Places of Public Resort.*

834. Every building outside the administrative county of London in a district in which the Public Health Acts Amendment Act, 1890 (b), has been adopted (c), used as a place of public resort (d), must be substantially constructed to the satisfaction of the urban authority and be supplied with sufficient entrances and exits which, whilst the building is in use, must be kept unobstructed to such extent as the urban authority requires. An authorised official may at any reasonable time enter and inspect such building (e).

Entrances
and exits.

(s) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 7 (3).

(t) *Ibid.*, s. 7 (4).

(a) *Gregory v. Tavernor* (1833), 6 C. & P. 280; *Hall v. Green* (1853), 9 Exch. 247; *Quaglieni v. Matthews* (1865), 6 B. & S. 474; *Syers v. Conquest* (1873), 37 J. P. 342; *Fay v. Brignell* (1883), Cab. & El. 112. As to music licences, see p. 415, *ante*.

(b) 53 & 54 Vict. c. 59.

(c) See titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364. As to urinals, see p. 406, *ante*. As to the administrative county of London, see p. 405, *ante*; and title METROPOLIS, Vol. XX., p. 393.

(d) "Place of public resort" under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), means a building used or constructed or adapted to be used, either ordinarily or occasionally, as . . . a theatre, public hall, public concert room, public ball room, public lecture room or public exhibition room, or as a public place of assembly for persons admitted thereto by tickets or payment, or used or constructed, or adapted to be used, either ordinarily or occasionally, for any other public purpose; it does not include a private dwelling-house used occasionally or exceptionally for any such purpose (*ibid.*, s. 36 (6)).

(e) *Ibid.*, s. 36 (3). As to the provisions relating to the safety of children at entertainments, see title INFANTS AND CHILDREN, Vol. XVII., p. 173. Non-observance of these provisions is punishable on summary conviction for the first offence by a fine of £50, and for each subsequent offence by a fine of £100 (Children Act, 1908 (8 Edw. 7, c. 67), s. 121); and as to revocation of licence, see title INFANTS AND CHILDREN, Vol. XVII., p. 173.

SECT. 5.

Sunday
Entertain-
ments.Admission
for reward.Place of
public
worship.SECT. 5.—*Sunday Entertainments.*

835. No house, room, or other place may be used on Sunday for public entertainment or amusement (*f*), or for publicly debating upon any subject, to which persons are admitted for money (*g*), or by tickets sold for money, or where refreshments are sold for a greater price than the normal price, or persons subscribe to the entertainment expenses and receive admittance tickets (*h*).

A hall, duly registered as a place of public worship, where meetings are held at which sacred music and addresses are given, no charge being made except for reserved seats, and the object of the meetings being not pecuniary gain, but genuine religious worship, is not within the statutory prohibition (*i*).

SECT. 6.—*Offences.*SUB-SECT. 1.—*Licensing Offences.*Under the
Disorderly
Houses Act,
1751.

836. Any place kept for public singing, dancing or music in the cities of London and Westminster and within twenty miles thereof, exclusive of the administrative county of Middlesex, without a licence is a disorderly house (*k*). In addition to being punishable criminally (*l*), the keeper is liable to forfeit £100 to any person suing for it (*m*). Only one forfeiture is incurred, though there may have been several performances on different days (*n*).

Under the
Music and
Dancing
Licences
(Middlesex)
Act, 1894.

A breach of a condition in the licence relating to the hours of opening and closing, or to the placing of the prescribed inscription over the entrance (*o*), forfeits the licence, which must be revoked by the justices at the next sessions, and must not be renewed (*p*), nor a new licence be granted to the same person either directly or indirectly (*q*).

(*f*) An aquarium where marine animals are exhibited and orchestral music performed, the public being admitted on payment, is within the statutory prohibition (*Warner v. Brighton Aquarium Co.* (1875), L. R. 10 Exch. 291; *Terry v. Brighton Aquarium Co.* (1875), L. R. 10 Q. B. 306).

(*g*) The fact that a charge is made for a reserved seat is not incompatible with the admission being free. The statute speaks of admission, not to a seat, but to the entertainment (*Williams v. Wright* (1897), 13 T. L. R. 551, *per* COLLINS, J., at p. 552).

(*h*) Sunday Observance Act, 1780 (21 Geo. 3, c. 49). As to Sunday observance generally, see title TIME, pp. 442 *et seq.*, *post*.

(*i*) *Baxter v. Langley* (1868), L. R. 4 C. P. 21. The form of worship used is immaterial (*ibid.*).

(*k*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 2. As to the issue of search warrants and arrest under this provision, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 291, 310, 311, 412.

(*l*) See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541, 542.

(*m*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), ss. 2, 13. Proceedings must be taken within six calendar months after the commission of the offence (*ibid.*, s. 14).

(*n*) *Garrett v. Messenger* (1867), L. R. 2 C. P. 583 (where however, the performances took place within the same licensing period).

(*o*) See pp. 416, 417, *ante*.

(*p*) Disorderly Houses Act, 1751 (25 Geo. 2, c. 36), s. 3.

(*q*) *Ibid.*

837. Any place kept or used for public dancing, singing, music, or other public entertainment of the like kind in the administrative county of Middlesex without a licence is a disorderly house, and the person occupying or rated as occupying it is liable to a penalty of £5 for each day that it remains a disorderly house (*r*). Any constable authorised by warrant under the hand of one Middlesex justice may enter any such place and apprehend every person found therein (*s*).

SECT. 6.
Offences.
Entry by
constables.

838. A failure to affix and keep up the inscription (*t*), or to observe the days and hours of opening and closing stated in the licence, renders the holder liable to a penalty not exceeding £20, and in the case of a continuing offence to a daily penalty of £5 (*a*).

Penalties.

839. Any place kept or used for public dancing, singing, music, or other public entertainment of the like kind, in a district in which the Public Health Acts Amendment Act, 1890 (*b*), is in force, without a licence is a disorderly house (*c*); and the person occupying or rated as occupying it is liable to a penalty not exceeding £5 for each day that it remains a disorderly house (*d*).

Under the
Public Health
Acts Amend-
ment Act,
1890.

A failure to affix and keep up the prescribed inscription (*e*), or to observe the days and hours of opening and closing stated in the licence, renders the holder of the licence liable to a penalty not exceeding £20, and in the case of a continuing offence to a daily penalty not exceeding £5 (*f*).

SUB-SECT. 2.—*Sunday Entertainments.*

840. The keeper (*g*) of any place opened or used for public entertainment, amusement, or debate on Sunday, contrary to the statutory provisions in that behalf (*h*), is liable to forfeit to a common informer (*i*)

Penalties for
keeping place
used or open
for Sunday
entertain-
ment.

(*r*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (5); see p. 415, *ante*.

(*s*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (5).

(*t*) See pp. 416, 417, *ante*.

(*a*) Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), s. 2 (8), (9). As to revocation of the licence, see p. 418, *ante*.

(*b*) 53 & 54 Vict. c. 59; see titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

(*c*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (5).

(*d*) *Ibid.* As to *ibid.*, s. 36, relating to the provision of ample means of ingress and egress, and imposing penalties for failure to do so, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 429, 430.

(*e*) See p. 417, *ante*.

(*f*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51 (8), (9). As to revocation of the licence, see p. 418, *ante*.

(*g*) The agent for the owner of a hall let for the delivery of lectures is not a keeper (*Reid v. Wilson and Ward*, *Reid v. Wilson and King*, [1895] 1 Q. B. 315, C. A. (solicitor acting as agent for the liquidator of a company)).

(*h*) See p. 422, *ante*.

(*i*) The general current of authorities seems to show that a corporation cannot sue for penalties as a common informer, unless expressly empowered by statute to do so (*St. Leonard's, Shoreditch (Guardians) v. Franklin*

SECT. 6. £200 for every such offence; and is also punishable as the keeper of
 Offences. a disorderly house (*k*).

Chairman. Any person acting as manager of such an entertainment or as chairman of such debate is liable to forfeit £100 to a common informer, and every doorkeeper, servant, or other person issuing or collecting tickets or receiving money from persons admitted to the same is liable to forfeit £50 (*l*). A person who acts as the chairman of a lecture to which the public are admitted on payment of small sums, but who has no control over the lecturer, is not liable as the chairman of a public debate, nor is he liable as a person managing or conducting such entertainment or amusement, nor as a master of ceremonies (*m*).

Penalty for advertising. The penalty for advertising or printing any advertisement of such public entertainment, amusement, or debate is £50 for each offence (*n*). The recovery of a penalty by a friendly informer is no bar to the recovery of the penalty by a different informer (*o*).

Time within which action must be brought. **841.** An action may be brought to recover the penalties as a debt, but the action must be brought within six months (*p*). The Crown may remit any penalty either wholly or in part (*q*).

Part IV.—Billiards.

SECT. 1.—When a Licence is Required.

Necessity for licence. **842.** Every house, room, or place kept for public (*r*) billiard playing, or where a public billiard table (*s*) is kept, at which persons are admitted to play, requires a billiard licence (*t*), unless such house, room, or place is specified in a publican's licence (*a*).

SECT. 2.—Grant of Licence.

Granted by justices. **843.** Billiard licences are granted and renewed by the justices at the annual licensing meeting or any adjournment thereof (*b*);

(1878), 3 C. P. D. 377, *per* Lord COLERIDGE, C.J., at p. 381; see also *Harrison's Case* (1777), 1 Leach, 180; *Weavers' Co. v. Forrest* (1746), 2 Stra. 1241; but see *Cole v. Coulton* (1860), 2 E. & E. 695, unless the offence is one against the public (*Allman v. Harcastle* (1903), 67 J. P. 440).

(*k*) Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 1; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 54.

(*l*) Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 1.

(*m*) *Reid v. Wilson and Ward*, *Reid v. Wilson and King*, [1895] 1 Q. B. 315, C. A.

(*n*) Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 3.

(*o*) *Girdlestone v. Brighton Aquarium* (1879), 4 Ex. D. 107, C. A.; but see *Barrett v. Johnson* (1836), 2 Jo. Ex. Ir. 197.

(*p*) Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 5.

(*q*) Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80), s. 1; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 545, note (*e*).

(*r*) As to the meaning of "public," see notes (*b*), (*c*), p. 402, *ante*.

(*s*) This includes a bagatelle board, or instrument used in any game of the like kind (Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 11).

(*t*) *Ibid.*

(*a*) *Ibid.*; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52; see title INTOXICATING LIQUORS, Vol. XVIII., p. 8.

(*b*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10. As to the annual

and transfers of billiard licences may be granted at the transfer sessions of the licensing justices (c).

The justices have an absolute discretion as to granting or refusing a billiard licence, and there is no appeal against their decision (d).

SECT. 2.
Grant of
Licence.

844. Persons applying for a billiard licence or applying for the transfer of a billiard licence must give the same notices as are required by persons intending to apply for a licence for the sale of intoxicating liquors or as near thereto as circumstances admit; when applying for a renewal no notice is required (e). Notices.

SECT. 3.—Offences.

SUB-SECT. 1.—Keeping Table without Licence.

845. Every person keeping a public billiard table (f) for public use without a licence, and not having a publican's licence (g), is liable to be proceeded against as a keeper of a common gaming house (h); he is also liable on conviction before a magistrate or two justices to pay not more than £10 for every day on which such billiard table has been used, or he may be imprisoned, with or without hard labour, for not more than one calendar month (i). Penalties.

Every person holding a licence for billiards other than a publican's licence (k) must put and keep up the words "licensed for billiards" legibly printed in some conspicuous place near the door and on the outside of the house specified in the licence; if he fails to do so he is liable to the same penalties as for keeping an unlicensed billiard room (l). Inscription on outside of house.

SUB-SECT. 2.—Offences against Tenor of Licence.

846. Offences against the tenor of a billiard licence are punishable by a fine not exceeding for the first offence £40, and for subsequent offences £20 (m). Penalties.

An offence is committed against the tenor of a billiard licence where the holder of such licence, whether a publican's licence (n) or What constitutes an offence.

licensing meeting, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 21 *et seq.*

(c) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10. As to transfer sessions, see title INTOXICATING LIQUORS, Vol. XVIII., p. 23.

(d) *R. v. Devonshire Justices* (1857), 21 J. P. 773; *Ex parte Chamberlain* (1857), 4 Jur. (N. S.) 477.

(e) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10. As to the notices required, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 39 *et seq.*

(f) For the definition, see note (s), p. 424, *ante*.

(g) See note (a), p. 424, *ante*.

(h) See title GAMING AND WAGERING, Vol. XV., pp. 289 *et seq.*

(i) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 11, as amended by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), Schedule.

(k) See note (a), p. 424, *ante*.

(l) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 11.

(m) *Ibid.*, s. 12; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 138 *et seq.*

(n) See note (a), p. 424, *ante*.

SECT. 3.
Offences.

a billiard licence, permits any person to play billiards between the hours of 1 a.m. and 8 a.m. on any day, or at all on Sundays, Christmas Day, Good Friday, or any public fast or thanksgiving day (*o*), or where the holder of a publican's licence (*p*) allows any persons to play billiards when his premises are not allowed by law to be open for the sale of wine, spirits, or beer (*a*).

Play after
closing hours.

Although guests staying on licensed premises are entitled to be supplied with beer, wine or spirits after the closing hours of the premises for the sale of liquor (*b*), the holder of a publican's licence may be convicted on information of an offence against the tenor of his licence if he allows guests staying on his licensed premises to play billiards after the closing hours of his premises for the sale of liquor, because such playing of billiards does not come within the exceptions relating to the sale of liquor after closing hours (*c*).

Players con-
suming beer.

The holder of a billiard licence which provides that the holder shall not knowingly allow the consumption of excisable liquors by persons resorting to his house for the purpose of playing billiards commits no offence against the tenor of such licence by allowing the consumption of beer (*d*), since beer is not an excisable liquor (*e*).

SUB-SECT. 3.—*Appeal against Conviction.*

Appeals.

847. There is an appeal to the next general or quarter sessions upon summary conviction (*f*). The convicting justices may bind over the witnesses to attend at the hearing of the appeal, and such witnesses are to be paid by the county. In case the appeal fails, the appellant must repay the witnesses' fees to the county (*g*).

SECT. 4.—*Entry by Constables.*

Right of
entry.

848. All constables and officers may, when and as often as they think fit, enter any house, room, or place where a public billiard table is kept (*h*). It is an offence against the tenor of his licence if any licensed person (*i*) refuses to admit or does not admit such constable into such house, room, or place (*k*).

(*o*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 13.

(*p*) This does not include a beerhouse-keeper who has a billiard licence (*Bent v. Lister* (1888), 52 J. P. 389).

(*a*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 13.

(*b*) See title INTOXICATING LIQUORS, Vol. XVIII., p. 94.

(*c*) *Ovenden v. Raymond* (1876), 34 L. T. 698.

(*d*) *Jones v. Whittaker* (1870), L. R. 5 Q. B. 541.

(*e*) *R. v. Lancashire* (1857), 7 E. & B. 839.

(*f*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 20, as amended by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), Schedule; see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*g*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 20, applying the Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 22 (repealed).

(*h*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 14.

(*i*) Whether holding a publican's licence (as to which see note (*a*), p. 424, *ante*), or a billiard licence under the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10.

(*k*) *Ibid.*, s. 14.

Part V.—Racecourses.

SECT. 1.—*When a Licence is Required.*

SECT. 1.

When
Licence is
Required.

849. Every place within ten miles of Charing Cross where it is desired to hold a horse race must be licensed (*l*). A horse race for this purpose means any race in which a horse runs in competition with any other horse or against time for any prize of whatever nature or kind, or for any bet or wager, and at which more than twenty persons are present (*m*).

Within ten
miles of
Charing
Cross.

850. The licence is granted by the county council of the district in which the place for which a licence is desired is situated, and is valid for twelve months from the 25th March following the date of application (*n*).

Licensing
authority.

The application is to be made in the same manner as for a music and dancing licence granted by the county council (*o*).

SECT. 2.—*Unlicensed Races.*SUB-SECT. 1.—*Civil Liability.*

851. Every horse race held in a place required by the Racecourses Licensing Act, 1879 (*p*), to be licensed which is unlicensed is to be deemed to be a nuisance, and any person injured or inconvenienced thereby has all rights and remedies against all persons taking part in such horse race, and against the owners, lessees, and occupiers of the land or place, as if the horse race were a nuisance at common law (*q*).

Nuisance.

SUB-SECT. 2.—*Criminal Liability.*

852. Any person who takes part in any horse race held in contravention of the Racecourses Licensing Act, 1879 (*p*), is liable, on summary conviction (*r*), to a fine of £10, or imprisonment not exceeding two months (*s*).

Punishable
on summary
conviction.

The owner, lessee, or person in possession or occupation of any land or place where any horse race is held in contravention of the Racecourses Licensing Act, 1879 (*p*), is guilty of a misdemeanour and liable to a fine of not less than £5 nor more than £25, or to imprisonment for not less than one month nor more than three months (*t*).

(*l*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), s. 2.

(*m*) *Ibid.*, s. 1; see title GAMING AND WAGERING, Vol. XV., pp. 286, 287.

(*n*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), ss. 3, 4, as amended by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (v.).

(*o*) See p. 418, *ante*.

(*p*) 42 & 43 Vict. c. 18.

(*q*) *Ibid.*, s. 7; see titles GAMING AND WAGERING, Vol. XV., p. 287; NUISANCE, Vol. XXI., pp. 547 *et seq.*

(*r*) See title MAGISTRATES, Vol. XIX., p. 589.

(*s*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), s. 5.

(*t*) *Ibid.*

THEFT.

See CRIMINAL LAW AND PROCEDURE.

THELLUSSON ACT.

See PERPETUITIES.

THIRD PARTY PROCEDURE.

See PRACTICE AND PROCEDURE.

THIRTY-NINE ARTICLES.

See ECCLESIASTICAL LAW.

THISTLES.

See AGRICULTURE.

THREATS.

See CRIMINAL LAW AND PROCEDURE; PATENTS AND INVENTIONS;
TRADE MARKS, TRADE NAMES, AND DESIGNS.

THRESHING-MACHINES.

See AGRICULTURE.

THRIFT FUND.

See CLUBS.

TIDAL WATERS.

See FISHERIES; WATERS AND WATERCOURSES.

TIMBER.

See AGRICULTURE; LANDLORD AND TENANT; REAL PROPERTY
AND CHATELS REAL; SETTLEMENTS.

TIME.

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Part I.—The Calendar and Divisions of Time.

SECT. 1.—*The Calendar.*

Calendar
statutory.

853. The English calendar, which is part of the common law, is established by statute, being attached to the Book of Common Prayer (*a*).

SECT. 2.—*The Calendar Year.*

Length and
divisions of
year.

854. The common year begins on the 1st January and consists of 365 days. It is divided into twelve unequal parts, called calendar months. In ordinary years the month of February contains twenty-eight days: in leap year the same month contains twenty-nine days, and thus the total number of days in that year is increased to 366. Leap year occurs once in every four years, the year so designated being that of which the number is divisible by four, subject, however, to this exception, that the centennial year is leap year only when it is a multiple of 400 (*b*).

(*a*) Stat. (1662) 14 Car. 2, c. 4, s. 2; Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23); *R. v. Dyer* (1703), 6 Mod. Rep. 41; *Brough v. Parkings* (1703), 2 Ld. Raym. 992; *Tutton v. Darke*, *Nixon v. Freeman* (1860), 5 H. & N. 647. It follows that judicial notice is taken of the day on which a feast mentioned in the calendar falls. As to the Book of Common Prayer, see title ECCLESIASTICAL LAW, Vol. XI., pp. 349 *et seq.*

(*b*) The calendar as it now exists was established by the Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23), amended by the Calendar Act, 1751 (25 Geo. 2, c. 30), whereby the following three changes were introduced:—The year was, from the beginning of the year 1752, made to begin on the 1st January instead of beginning on the 25th March; the system of intercalation was altered by the introduction of the exception mentioned in the text, *supra*; and eleven days were suppressed, the day which would have been the 3rd September, 1752, being made the 14th. The necessity for these changes arose in the

In any period of a year which begins on the 29th February or on any prior day not before the next preceding first day of March there must be 366 days. Any child born on the 29th February or on any earlier day not before the next preceding first day of March must live 366 days before the anniversary of his birthday arrives. In a period of one calendar month which includes the last day of February there must be twenty-nine or twenty-eight days, according as the year is or is not leap year (c).

SECT. 2.
The
Calendar
Year.
Leap year.

following way. Previously to 1582 the year was regulated throughout Christendom by the Julian Calendar. The problem being to adjust the civil year, consisting of so many complete days, to the solar year, consisting of the same number of days and something less than six hours in addition, and to preserve the same interval between the beginning of the year and the equinox, the system of intercalating a day in which the extra hours should be absorbed was devised. In every fourth year according to the Julian Calendar a day was interposed between the 24th and 25th days of February. The sixth day before the calends of March was made to consist of two days: "*id biduum pro uno die habetur.*" This system of intercalation was in course of time discovered to be erroneous. It had the effect of making the year unduly long, so that, whereas in the year when the calendar was introduced the spring equinox fell on the 25th day of March, and in the year 325, the date of the Council of Nicæa, on the 21st of March, by the year 1582 it had come to fall on the 11th day of the same month. To restore the equinox to the position in the year which it occupied in the year 325, to rectify the error and to provide against its recurrence in the future, it was ordained by Pope Gregory XIII. that ten days should be suppressed, and that the number of intercalations in every 400 years should be reduced by three. The Gregorian Calendar was adopted in every country in Christendom, including Scotland, but excepting England and the countries in which the Orthodox or Greek Church was recognised. The consequence was that during the seventeenth century and the first half of the eighteenth there was an entire want of harmony between the system prevailing in England and that prevailing in the greater part of Europe. From the date when the Gregorian Calendar was introduced there was a difference of ten days between an English and a Continental almanac, and that difference was increased to eleven days when the eighteenth century began. The legislation of 1750, having for its object the assimilation of the English calendar to the calendar recognised in other parts of Europe, necessarily followed the lines of the Gregorian reform. The English calendar is now the Gregorian Calendar. The ecclesiastical year still begins on the 25th March; see *R. v. Swyer* (1830), 10 B. & C. 486, 488, note (a). All feast days, whether movable or fixed, are dated according to the new style (Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23), s. 3; compare Calendar Act, 1751 (25 Geo. 2, c. 30), s. 2). As to when references to feast days in tenancy agreements are to be construed according to the old style, see title LANDLORD AND TENANT, Vol. XVIII., pp. 446, note (t), 471, note (l). By the Michaelmas Term Act, 1750 (24 Geo. 2, c. 48), the day for the swearing and admission of the Lord Mayor of London was changed from the 29th October to the 9th November.

(c) *R. v. Worminghall (Inhabitants)* (1817), 6 M. & S. 350 (where service beginning on the 13th October in the year before leap year and ending on the 11th October next succeeding was held not to be a service for one year, though it had lasted for 365 days). According to the Roman theory regarding the intercalated day, the anniversary of the birthday of a child born in leap year on the 24th or 25th February would in a common year fall on the 24th February, and so St. Matthias' Day is, in the Church of Rome, still kept in leap year on the 25th, not as in common years on the 24th February. The calendar in this respect was altered on the revision of the Prayer Book in 1662. The Statute De Anno Bissextili (1256), 40 Hen. 3 (21 Hen. 3 in Ruffhead), whereby the Roman theory of intercalation was adopted, was repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59).

SECT. 3.

The
Financial
and Other
Conven-
tional
Years.Financial
year.SECT. 3.—*The Financial and Other Conventional Years.*

855. The term “year,” besides noting the solar year of the calendar, may also mean any like period of time running from a date arbitrarily fixed by statute, contract, or otherwise.

For all matters connected with the public revenue the year means the twelve calendar months ending on the 31st March. That is the meaning of the term “financial year” when used in any Act of Parliament passed after the year 1889, with reference to the Consolidated Fund, or money provided by Parliament, or to the Exchequer or to Imperial taxes or finance (*d*).

It is with reference to the year so computed that the public accounts are made up, the budget is prepared, and the supplies are voted (*e*).

The same year ending with the 31st March is fixed as the local financial year (*f*).

For the purposes of assessment to income tax or the inhabited house duty in England, the year is defined as running from the 6th April to the following 5th April (*g*).

Savings bank
year.

856. A “savings bank year” means, in the case of a trustee savings bank, the twelve months ending on the 20th November, and,

(*d*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 22; see title PARLIAMENT, Vol. XXI., pp. 769, 770. As to the issue of Treasury Bills in any financial year, see title REVENUE, Vol. XXIV., pp. 547, 548.

(*e*) The 31st March is the date fixed by the Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94), s. 2, as the date up to which the annual finance accounts should be made. The history of the financial year before that time is as follows. From the earliest times on record the yearly accounts of public receipt and expenditure were made up to Michaelmas. The financial year ended on the 29th September till the year 1752, when, in consequence of the change of style, the 10th October was substituted; the other quarter days were the 5th January, the 5th April, and the 5th July. Just before the end of the eighteenth century a change was introduced with the view of establishing a uniform system with regard to the several branches of revenue and expenditure. It was then arranged that the year should end with the 5th January, and the first annual accounts on that system were for the year which ended on the 5th January, 1801. That is the date fixed by stat. (1802) 42 Geo. 3, c. 70 (now repealed). In 1832 another change was made, for, whereas previously the budget had been made up for the year ending 5th January, Lord Althorp presented his budget for the year ending 5th April, 1833, and at the same time supplies were taken up to the 31st March, 1833. There were thus three different terminations to the financial year, the 5th April, the 31st March, and the 5th January, which, being fixed by statute for the purpose of the financial accounts, could not be altered without legislation. This anomalous state of things was terminated by the Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94), and thenceforward the financial year has uniformly terminated on the 31st March; see Parliamentary Papers on Public Income and Expenditure, printed by order of the House of Commons, 29th July, 1869, Part II., Appendix 13. As to the granting of supply, see title PARLIAMENT, Vol. XXI., pp. 768 *et seq.*

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 73; see title LOCAL GOVERNMENT, Vol. XIX., pp. 243, 357, note (*c*), 363.

(*g*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48; see titles INCOME TAX, Vol. XVI., p. 676; INHABITED HOUSE DUTY, Vol. XVII., p. 188. The year for land tax assessments runs from 25th March (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48); see title LAND TAX, Vol. XVIII., p. 315.

in the case of the Post Office savings bank, the like period ending on the 31st December (*h*).

857. For the purposes of the Education Acts (*i*) a “school year” is defined as the period for which an annual parliamentary grant is paid or payable (*k*).

858. By the terms of a contract any date may be fixed for the beginning of a year, and, in the absence of any express definition of the term, it may appear from the contract that a period beginning or not beginning on the 1st January, as the case may be, was intended (*l*).

859. The term may even be used to denote a season or part of a year (*m*).

The expression “in any one year” or “in each year” may refer to the calendar year or to any period of twelve calendar months, according to the context in which the expression is used (*n*).

SECT. 4.—*Terms and Sitzings of Public Bodies.*

SUB-SECT. 1.—*Law Courts.*

860. The four terms into which the legal year was formerly divided are no longer recognised except in those cases in which

(*h*) Government Annuities Act, 1882 (45 & 46 Vict. c. 51), s. 14. As to the Post Office savings bank, see title BANKERS and BANKING, Vol. I., pp. 579 *et seq.*; as to trustee savings banks, see *ibid.*, pp. 576 *et seq.*

(*i*) As to the Education Act, see title EDUCATION, Vol. XII., p. 6, note (*r*).

(*k*) Elementary Education Act, 1891 (54 & 55 Vict. c. 56), s. 10; see title EDUCATION, Vol. XII., pp. 31, 49, 50.

(*l*) Contracts of hiring are frequently made from a quarter day to the corresponding day of the next year; a hiring from one Whit Sunday to the next, though Whit Sunday is a movable feast and so the period may be less than 365 days, is deemed a hiring for a year (*R. v. Newstead (Inhabitants)* (1770), Burr. S. C. 669); but a hiring from Monday after Michaelmas, which fell on a Saturday, till next Michaelmas Day, was held not to be a hiring for a year (*R. v. Standon Massey (Inhabitants)* (1809), 10 East, 576); compare title MASTER and SERVANT, Vol. XX., p. 76, note (*o*).

(*m*) *Grant v. Maddox* (1846), 15 M. & W. 737 (where, in regard to an agreement to perform in a theatre for three years, evidence was admitted to show that “year” meant the season in which the theatre was open); *R. v. Swyer* (1830), 10 B. & C. 486 (where the three years mentioned in a charter were held to mean the three terms during which three successive mayors might hold office); and see titles CONTRACT, Vol. VII., p. 511; THEATRES and OTHER PLACES of PUBLIC ENTERTAINMENT, p. 413, *ante*.

(*n*) *Cathcart v. Hardy* (1814), 2 M. & S. 534 (absence of a spiritual person from his benefice for more than a certain time in one year means, for the purpose of stat. (1802) 43 Geo. 3, c. 84 (now repealed), absence for more than that time during the twelve calendar months preceding the suit); *Bartlett v. Kirwood* (1853), 2 E. & B. 771 (Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 120, defining a year as the period ending on the 31st December); compare title ECCLESIASTICAL LAW, Vol. XI., pp. 430, 431. On the other hand, where a director was to receive a certain sum by way of remuneration “in each year” (*Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775), or where, under the Companies Act, 1862 (25 & 26 Vict. c. 89) (now repealed), a general meeting was to be held once at least in every year, it was held that a calendar year was contemplated (*Gibson v. Burton* (1875), L. R. 10 Q. B. 329); compare title COMPANIES, Vol. V., p. 249. A bequest to servants of a year’s wages does not include those whose wages were paid by the week or month (*Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1, 4, C. A.; *Blackwell v. Pennant* (1852), 9 Hare, 551).

SECT. 3.

The
Financial
and Other
Conven-
tional
Years.

School year.

Contract.

Usage.

“In any
one year.”

Sittings.

SECT. 4.
Terms and
Sittings of
Public
Bodies.

reference is made to them in statutes as measures of time (*o*). Instead of terms there are now four sittings of the Court of Appeal and of the High Court in London and Middlesex (*p*)—the first, Michaelmas sitting, beginning on the 12th October and ending on the 21st December; the second, Hilary sitting, beginning on the 11th January and ending on the Wednesday before Easter; the third, Easter sitting, beginning on the Tuesday after Easter week and ending on the Friday before Whit Sunday; and the fourth, Trinity sitting, beginning on the Tuesday after Whitsun week and ending on the 31st July (*q*).

Vacations.

The vacations are likewise four in number—the Long Vacation, beginning on the 1st August and ending on the 11th October; the Christmas Vacation, beginning on the 24th December and ending on the 6th January; the Easter Vacation, beginning on Good Friday and ending on Easter Tuesday; and the Whitsun Vacation, beginning on the Saturday before Whit Sunday and ending on the Tuesday after Whit Sunday (*r*).

The days above mentioned are included in the several sittings and vacations respectively (*s*).

Offices open.

The offices of the Supreme Court are open throughout the year except on Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter week, Whit Monday, the first Monday in August, Christmas Day and the next working day, and all days appointed to be kept as days of general fast, humiliation or thanksgiving, and the King's birthday (*t*).

SUB-SECT. 2.—Universities.

Oxford.

861. For the purposes of the University of Oxford the year is

(*o*) Terms are still observed in the Inns of Court for some purposes; thus a student must keep the requisite number of terms before he can be called to the Bar; see title BARRISTERS, Vol. II., p. 364.

(*p*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 26. By stat. (1697) 9 Will. 3, c. 15, s. 2, repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), reference is made to the terms as fixing the time within which an award shall be set aside. That rule was saved by the proviso to the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 26, and the time could not be extended until special provision was made for the case in R. S. C., Ord. 64, rr. 7, 14; see *College of Christ v. Martin* (1877), 3 Q. B. D. 16, C. A.; *Re Oliver and Scott's Arbitration* (1889), 43 Ch. D. 310; and title ARBITRATION, Vol. I., pp. 462 *et seq.*

(*q*) R. S. C., Ord. 63, r. 1.

(*r*) *Ibid.*, r. 4. As to vacation orders, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 218.

(*s*) R. S. C., Ord. 63, r. 5. As to the intervals between the sittings not included in any vacation, see *ibid.*, r. 15.

(*t*) *Ibid.*, r. 6. During the sittings the hours of the offices of the Supreme Court are from 10 a.m. to 4 p.m. on all days except Saturday, and on Saturday to 1 p.m. During the vacations the same offices are open from 10 a.m. till 2 p.m., except on Saturday, when the closing hour is 1 p.m. In the Summons and Orders Department the hours are 10.30 a.m. till 4.30 p.m., except in vacation time, when the closing hour is 2.30 p.m., and on Saturdays, when it is 1.30 p.m. (*ibid.*, rr. 8, 9). In the Crown Office and Associates Department the hours are 11 a.m. to 5 p.m., except on Saturdays and in vacation time, when the offices are open from 11 a.m. to 2 p.m. (R. S. C., Ord. 63, r. 9). For the official referees during the sittings the hours are at least from 10 a.m. to 4 p.m., except on Saturdays, when 1 p.m. is substituted (R. S. C., Ord. 63, r. 16); see *Yearly Supreme Court Practice*, 1914, pp. 1025, 1026.

divided into four terms—Michaelmas Term, beginning on the 10th October and ending on the 17th December; Hilary or Lent Term, beginning on the 14th January and ending on the day before Palm Sunday; Easter Term, beginning on the Wednesday after Easter and ending on the Friday before Whit Sunday; and Trinity or Act Term, beginning on the day before Whit Sunday and ending on the Saturday after the first Tuesday in July (*u*).

SECT. 4.
Terms and
Sittings of
Public
Bodies.
Cambridge.

In the University of Cambridge there are three terms, containing at least 227 days, that is to say, Michaelmas Term, beginning on the 1st October; Lent Term, beginning on the 8th January and ending not later than the Thursday before Easter; and the Easter Term, which may begin on the Tuesday after Easter or a later day, and ends on the 24th June (*v*).

SECT. 5.—*Quarters and Quarter Days.*

862. For some purposes, and especially in the relations of landlord and tenant, the year is divided into four quarters, the four usual quarter days being the four feast days—Lady Day (25th March), Midsummer Day (24th June), Michaelmas Day (29th September), and Christmas Day (25th December) (*w*).

Mode of
division.

The half-quarter days are the 2nd February, the 9th May, the 11th August, and Martinmas, the 11th November.

SECT. 6.—*Month.*

863. The term “month” is used in several senses. It may mean one of the twelve unequal parts into which the calendar year is divided; it may mean the period which, beginning on any day of a calendar month other than the first, ends on the day next before the corresponding day of the next month; or it may denote a lunar month, that is to say, a period consisting of twenty-eight days.

Lunar and
calendar
months.

A six months’ tenancy may mean a tenancy for 168 days or a tenancy for half a year or 182 days (*a*).

As a general rule, and in the absence of anything to indicate an intention to the contrary, where the term “month” is used in a contract or in a statute enacted before the year 1850, it is taken to mean a lunar month (*b*). The question whether it was intended to use the word in another sense must be decided according to the ordinary rules of construction; it may be shown that in a particular

(*u*) Statuta et Decreta Universitatis Oxoniensis, tit. 1.

(*v*) Statutes of the University of Cambridge, A, ch. 1. As to the universities generally, see title EDUCATION, Vol. XII., pp. 90 *et seq.*

(*w*) As to the commencement, duration and determination of tenancies, see title LANDLORD AND TENANT, Vol. XVIII., pp. 445 *et seq.* As to when *ibid.*, pp. 446, note (*t*), 471, note (*l*).

(*a*) *Catesby’s Case* (1606), 6 Co. Rep. 61 b, 62 a. A “twelve-month” means the whole year; compare title PRISONS, Vol. XXIII., p. 258. As to a half-year’s notice, see title LANDLORD AND TENANT, Vol. XVIII., pp. 445, 446.

(*b*) *Lacon v. Hooper* (1795), 6 Term Rep. 224; *Re Humphreys, Ex parte Humphreys* (1833), Mont. & B. 413. A stipulation for so many months’ notice of determination of a tenancy means, in the absence of evidence

SECT. 6.

Month.

place, business, or trade the word has acquired a secondary meaning (c).

City of
London.

864. An exception from the general rule obtains in regard to mercantile transactions in the City of London; according to the custom there prevailing a month is in such transaction deemed to be a calendar month (d).

Ecclesiastical
usage.

865. In ecclesiastical matters the general rule in favour of the lunar month does not prevail. Primarily the computation has to be made according to the calendar, and thus a six months' notice is taken to mean six calendar months (e).

Statutory
meaning.

866. In the construction of statutes, the presumption in favour of the lunar month is reversed, it being provided by statute that, unless the contrary intention appears, the term "month" used in every statute after the year 1850 is to mean calendar month (f).

In several other statutes similar provision has been made with regard to the construction to be put on the term for the purposes

showing a contrary intention, so many lunar months' notice (*Rogers v. Kingston-on-Hull Dock Co.* (1864), 11 L. T. 42). In *R. v. Chawton (Inhabitants)* (1841), 1 Q. B. 247, the lease being given for six months and so on from six months to six months until either party should give six calendar months' notice, it was held that the context showed that the lease was intended to be for calendar months. In *Lang v. Gale* (1813), 1 M. & S. 111, from the conditions of sale it appeared that calendar months were intended. Calendar months were taken to be intended in *Biddulph v. St. John and Keeffe* (1805), 2 Sch. & Lef. 521; *Dowling v. Foxall* (1809), 1 Ball & B. 193; *Hipwell v. Knight* (1835), 1 Y. & C. (ex.) 401, 419. On the other hand, the general rule in favour of lunar months was upheld in *Simpson v. Margitson* (1847), 11 Q. B. 23 (action by agent for commission claimed in respect of sale of land); *Crooke v. M'Tavish* (1828), 1 Bing. 307 (construction of a statute); *Tullet v. Linfield* (1764), 3 Burr. 1455 (the expression "a month to plead"); *Walcot v. Botfield* (1854), 2 Eq. Rep. 758 (provision in a will for residence for six months); *Hutton v. Brown* (1881), 45 L. T. 343 (hire of chattels at a weekly rate for twenty-six months); see also titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 437; MASTER AND SERVANT, Vol. XX., p. 151; SALE OF GOODS, Vol. XXV., pp. 152, 153.

(c) *Bruner v. Moore*, [1904] 1 Ch. 305; compare title CUSTOM AND USAGES, Vol. X., p. 288.

(d) *Turner v. Barlow* (1863), 3 F. & F. 946 (where the contract related to work to be done by the defendant as an engraver, and it was held that the transaction was not a mercantile one, and that accordingly the general rule applied). The exception does not extend to commercial documents elsewhere than in the City (*Bruner v. Moore*, *supra*). In *Webb v. Fairmaner* (1838), 3 M. & W. 473, commented on in *Simpson v. Margitson* (1847), 11 Q. B. 23, it was apparently assumed that calendar months were intended; see *Re an Indenture etc., Marshall (Sir Herbert) & Sons, Ltd. v. Brinsmead (John) & Sons, Ltd.* (1912), 106 L. T. 460; see also titles CUSTOM AND USAGES, Vol. X., p. 265; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 437.

(e) *Catesby's Case* (1606), 6 Co. Rep. 61 b; and see *Franco v. Alvares* (1746), 3 Atk. 342, 346; *Bluck v. Rackham* (1846), 5 Moo. P. C. C. 305, 508. This computation is that with which the Church is supposed to be most familiar; see *Cathcart v. Hardy* (1814), 2 M. & S. 534; and compare title ECCLESIASTICAL LAW, Vol. XI., pp. 430, 431.

(f) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. The year 1850 is named because in that year a similar enactment, stat. (1850) 13 & 14 Vict. c. 21 (now repealed), generally known as Lord Brougham's Act, was passed; see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 43; MASTER AND SERVANT, Vol. XX., p. 151.

of the particular enactment (*g*), as also in the Rules of the Supreme Court in reference to judgments, orders or other documents forming part of any legal proceedings in which time is limited by months (*h*).

SECT. 6.
Month.
—

867. When the period prescribed is a calendar month running from any arbitrary date, and not coinciding with any particular month in the calendar, the period cannot exceed in length the number of days in the month in which it starts; and where the second of the two months in which the period falls is a month containing fewer days than those contained in the first month, the number of days in the period may be less than that of those in the first month (*i*). Such a period can never extend into a third month (*j*).

Calendar
month.

SECT. 7.—*Week.*

868. A week is properly the time between midnight on Saturday and the same hour on the next succeeding Saturday, but the term is also applied to any period of seven successive days (*k*).

Different
meanings.

SECT. 8.—*Day.*

869. The term “day” is, like the terms “year” and “month,” used in more senses than one (*l*). A day is properly the period of

Different
meanings.

(*g*) For instance, by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (4), in regard to bills of exchange; the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 12 (1), in regard to sentences of imprisonment; see titles **BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS**, Vol. II., pp. 476, 478; **PRISONS**, Vol. XXIII., p. 258.

(*h*) R. S. C., Ord. 64, r. 1.

(*i*) For instance, such period beginning on any day in April must contain thirty, not thirty-one, days. A period of a month which begins on the 28th or any later day in January must in the ordinary year terminate on the 28th February.

(*j*) *Migotti v. Colwill* (1879), 4 C. P. D. 233, C. A. (a sentence of imprisonment for one calendar month pronounced on the 31st October ends on the 30th November; a bill of exchange dated the 29th January and payable in one calendar month is, apart from days of grace, payable on the 28th February, or, if it be leap year, on the 29th). When a calendar month's notice of action is required and is given on the 28th April, action may be commenced on the 29th May (*Freeman v. Read* (1863), 4 B. & S. 174); see titles **BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS**, Vol. II., pp. 476, 478; **MASTER AND SERVANT**, Vol. XX., p. 151; **PRISONS**, Vol. XXIII., p. 258.

(*k*) It is so defined in the Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 19. As to the “period of at least one week” fixed by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, see title **MASTER AND SERVANT**, Vol. XX., p. 177, note (*a*). In the Unemployment Insurance Regulations made by the Board of Trade, dated 6th May, 1912 (Stat. R. & O., 1912, p. 1002) (under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55)), the term “week” means “any six consecutive days, whether separated by a Sunday or not, or, in relation to a workman who when in employment is employed on Sundays, any seven consecutive days”; see title **WORK AND LABOUR**; and compare title **LANDLORD AND TENANT**, Vol. XVIII., p. 447. As to the meaning of “weekly earnings” under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), see title **MASTER AND SERVANT**, Vol. XX., pp. 205 *et seq.*

(*l*) As to the meaning of “lay day,” “running day,” and “working day,”

SECT. 8.

Day.

Last day of
period.

time which begins with one and ends with the next midnight. It may also denote any period of twenty-four hours (*a*), and again it may denote the period between sunrise and sunset (*b*).

870. Subject to certain exceptions, the general rule is that, when an act may be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed up to the last moment of the last day of that period. Hence, a notice required to be given within so many days from or before a given date must be at the latest given on the last of such days (*c*). Similarly, when an act may be done only on the expiration of a given period, it cannot be done at any time before midnight of the last day (*d*).

see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 122, 123. As to fractions of a day, see p. 454, *post*.

(*a*) In *Cornfoot v. Royal Exchange Assurance Association*, [1904] 1 K. B. 40, C. A., the question was whether the policy of insurance on a ship for thirty days after arrival in port covered an accident which occurred in the afternoon of the 1st September, the ship having arrived on the 2nd August; and it was held that, as it could not have been meant that the ship should remain uninsured during the first twenty-four hours, it must have been intended that the period should run from the moment of the arrival till the corresponding moment of the thirtieth day; see also *Mercantile Marine Insurance Co. v. Titherington* (1864), 5 B. & S. 765; *Yeoman v. R.*, [1904] 2 K. B. 429, C. A. (charterparty). On the other hand, in *The Katy*, [1895] P. 56, C. A., where fourteen running days (Sundays and holidays excluded) were allowed for loading and unloading, and the ship arrived in her port of discharge and was cleared by 10 a.m. on Saturday, it was held that the intention was to give the charterer so many entire days, and that therefore he was not bound to begin the discharge or count the lay days till the Monday. In the Unemployment Insurance Regulations, reg. 2, the term "day" means "any period of twenty-four hours but does not include any part of a day being a Sunday, except in relation to a workman who when in employment is employed on Sundays" ([1912] W. N., Part II., 194); see title WORK AND LABOUR. As to the meaning of "clear" days, see pp. 448, 449, *post*.

(*b*) For the purpose of distress the day ends with sunset, and any distraint of goods after sunset and before sunrise is illegal (*Tutton v. Darke, Nixon v. Freeman* (1860), 5 H. & N. 647); see title DISTRESS, Vol. XI., p. 149. So also for the purpose of the Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 12, and the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 34, the definition of night being the complement of the definition of day; in the Larceny Act, 1861 (24 & 25 Vict. c. 96), night is similarly defined; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 668; GAME, Vol. XV., p. 233, note (*t*). For the purposes of the Larceny Act, 1861 (24 & 25 Vict. c. 96), night is deemed to commence at 9 p.m. and to end at 6 a.m. of the ensuing day. By the South Metropolitan Gaslight and Coke Co.'s Act, 1869 (32 & 33 Vict. c. cxxx.), a day is defined as running from 9 a.m.; see *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A. In the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9, and the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141, "day" is defined as the period between 6 a.m. and 9 p.m.

(*c*) *Elliott v. Popular Playhouses, Ltd.* (1909), *Times*, 1st April; *Chambon v. Heighway* (1890), 54 J. P. 520; *Steedman v. Hakim* (1888), 22 Q. B. D. 16, C. A.

(*d*) *Page v. More* (1851), 15 Q. B. 684. For instance, when seven days' notice to quit is required in order to determine a tenancy, a notice given on Monday, although given before noon, requiring the tenant to quit on the next Monday at noon is not good (*Weston v. Fidler* (1903), 47 Sol. Jo. 567; and see title LANDLORD AND TENANT, Vol. XVIII., p. 447).

Thus, the rule that twenty-one days' residence in a parish shall be required before an irregular Scottish marriage can be solemnised (*e*) is not satisfied by a residence which begins on the early morning of the first of the month and ends on the 21st day of the same month at noon (*f*).

SECT. 8.

Day.SECT. 9.—*Hour.*

871. An hour may mean any one of the twenty-four parts of a day or any period of sixty minutes. Different meanings.

872. Apart from statute or special convention, the hour of the day has to be ascertained by reference to the sun in the particular place. At a given moment, therefore, the time is different in different places. The hour at which a court is fixed to sit means *primâ facie* the hour at the locality where the particular court is to sit, and not Greenwich time (*g*). Local time.

873. For the purpose of statutes, deeds or other legal instruments, it is provided by statute that expressions referring to time shall, unless the contrary is expressed, be taken to refer to Greenwich and not to local time (*h*). Regard must be had to this enactment in applying the numerous statutes (*i*) in which certain hours of the day are specified within which acts may or may not be done. It is apprehended that Greenwich, and not local, time must be considered in fixing the hour or day of an event with regard to which provision is made in an instrument such as a policy of insurance, and that on the other hand the statutory rule should not be applied in a case where the instrument was executed or the event was expected to happen or did happen in a foreign country. Greenwich time.

874. It has been held that "sunset" is not an expression referring to time within the meaning of the enactment in question (*k*). Sunset.

(*e*) Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96).

(*f*) *Lawford v. Davies* (1878), 4 P. D. 61.

(*g*) *Curtis v. March* (1858), 3 H. & N. 866 (failure to appear when the judge took his seat at 10 a.m. (according to Greenwich time) constituted no default, since according to the local time it was some minutes short of ten).

(*h*) Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9).

(*i*) As, for instance, Employment of Children Act, 1903 (3 Edw. 7, c. 45); Factory and Workshop Acts, 1901 (1 Edw. 7, c. 22), and 1907 (7 Edw. 7, c. 39); Marriage Act, 1886 (49 & 50 Vict. c. 14); Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); see titles INFANTS AND CHILDREN, Vol. XVII., pp. 150 *et seq.*; FACTORIES AND WORKSHOPS, Vol. XIV., pp. 433 *et seq.*; HUSBAND AND WIFE, Vol. XVI., p. 302; INTOXICATING LIQUORS, Vol. XVIII., p. 89.

(*k*) *Gordon v. Cann* (1899), 80 L. T. 20 (where the obligation imposed by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85, to light a carriage used on the road an hour after sunset was in question, and it was held that regard must be had to the actual hour of sunset at the particular place); compare *Curtis v. March* (1858), 3 H. & N. 866 (Night Poaching Act, 1828 (9 Geo. 4, c. 69)).

Part II.—Holidays.

SECT. 1.

Holidays
at Common
Law and
by Statute.

Meaning of
"holiday."

SECT. 1.—*Holidays at Common Law and by Statute.*

875. The term "holidays" used in the larger sense includes the common law holidays, Sundays, Good Friday, and Christmas Day, and the statutory holidays, of which the chief are those established by the Bank Holidays Act, 1871 (*l*), and the Holidays Extension Act, 1875 (*m*), and by statutes and rules relating to legal procedure (*n*).

The following days, apart from the common law holidays, are appointed to be kept in all banks and custom houses, bonding warehouses, and docks as close holidays :—

Easter Monday.

The Monday in Whitsun week.

The first Monday in August.

The 26th day of December, if not a Sunday, and when the 26th of December falls on a Sunday the 27th of December.

Power is also given to appoint by royal proclamation as a bank holiday any day which may be appointed as a day of public fast or thanksgiving (*o*).

SECT. 2.—*Sundays.*

SUB-SECT. 1.—*General Rule as to Observance of Sunday.*

Acts done on
Sunday.

876. Sunday is *dies non juridicus*, a day on which no judicial act ought to be done (*a*).

Generally, however, the common law does not prohibit the doing on a Sunday of any act which otherwise is lawful or render void the act so done (*b*).

(*l*) 34 & 35 Vict. c. 17.

(*m*) 38 & 39 Vict. c. 13.

(*n*) As to holidays in the Royal Courts of Justice, see p. 436, *ante*.

(*o*) Bank Holidays Act, 1871 (34 & 35 Vict. c. 17); Holidays Extension Act, 1875 (38 & 39 Vict. c. 13). In the Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 19, "bank holiday" is used as including any public holiday or day of public rejoicing or mourning. As to compulsory holidays in factories and workshops, see title FACTORIES AND SHOPS, Vol. XIV., pp. 496, 507, 508; as to the effect of holidays on the computation of weekly earnings under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), see title MASTER AND SERVANT, Vol. XX., p. 206.

(*a*) *Ashmole v. Goodwin* (1699), 2 Salk. 624; *Mackalley's Case* (1611), 9 Co. Rep. 65 b, 66 b (where an inquisition was held bad on its appearing that the inquest was held on Sunday). Ministerial acts may be lawfully executed on the Sunday (*ibid.*); see title MAGISTRATES, Vol. XIX., p. 635; and compare title DISTRESS, Vol. XI. p. 149. Subject to the provisions of the Sunday Observance Act, 1677 (29 Car. 2, c. 7), this is still the law. A writ of summons dated on a Sunday is a nullity, and the court takes notice of the fact that it was dated on that day (*Hanson v. Shackleton* (1835), 4 Dowl. 48 (citing the following passage from *Shepherd's Abridgment*, Vol. III., p. 181 :—"If any part of the proceedings in a suit of law be entered and recorded to be done on Sunday, it makes the whole void"); *Taylor v. Phillips* (1802), 3 East, 155). The taking of sureties and commitment to prison in default are judicial acts which cannot be done on Sunday (*R. v. Ramsay* (1867), 16 W. R. 191; *Taylor v. Phillips*, *supra*); see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 115.

(*b*) *Drury v. Defontaine* (1808), 1 Taunt. 131; *Begbie v. Levi* (1830),

SECT. 2.
Sundays.
Statutory
prohibition.

877. The exercise on Sunday by tradesmen, artificers, workmen, labourers, or others of their ordinary calling is, subject to certain exceptions (*c*), prohibited by statute (*d*). The effect of the statute is to render unenforceable by the tradesman or other person any contract made by him on a Sunday in the ordinary course of his business (*e*), whether the same be made in public or not. The workman who has contracted to do and has done work on a Sunday can claim no lien for his remuneration in respect of it (*f*). Such a contract is, however, enforceable by the other party to it when it appears that he was ignorant that the person with whom he dealt was a tradesman acting in the ordinary exercise of his calling (*g*).

878. The statute has received a strict interpretation, and the expression "or others" has been construed in accordance with the *ejusdem generis* rule. A person who does not carry on the business of buying and selling things is not a tradesman; a man who does not make anything is not an artificer; a man who is not employed to work for another is not a workman or labourer within the Construction of the statute.

1 Cr. & J. 180; *Rawlins v. West Derby Overseers* (1846), 2 C. B. 72; compare title MASTER AND SERVANT, Vol. XX., p. 90.

(*c*) See p. 444, *post*.

(*d*) Sunday Observance Act, 1677 (29 Car. 2, c. 7). The penalty is 5s. for each offence, and forfeiture of any goods exposed for sale (*ibid.*, s. 1); in default of distress the offender is to be set in the stocks for two hours (*ibid.*, s. 2; see *R. v. Barton* (1849), 13 Q. B. 389); *quare*, whether repealed by Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 3). Only one penalty can be incurred on the same day (*Crepps v. Durden* (1777), 2 Cowp. 640; 1 Smith, L. C., 11th ed., p. 651); see also *Connor v. Quest* (1906), 96 L. T. 28; *Billingham v. Menhinick* (1909), 73 J. P. 384. Proceedings must be taken within ten days after the commission of the offence (Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 4). The consent in writing of the chief officer of the police district in which the offence was committed, or of two justices or of a stipendiary magistrate having jurisdiction in the place where the offence was committed, must also be obtained: the justices or stipendiary magistrate signing the consent cannot adjudicate (Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87), s. 1); see title MAGISTRATES, Vol., XIX., p. 590. As to the prohibition in specific cases, see titles FACTORIES AND SHOPS, Vol. XIV., p. 490; FOOD AND DRUGS, Vol. XV., pp. 46, 47; INTOXICATING LIQUORS, Vol. XVIII., pp. 87 *et seq.*; THEATRES AND OTHER PLACES OF ENTERTAINMENT, pp. 422 *et seq.*, *ante*.

(*e*) *Fennell v. Ridler* (1826), 5 B. & C. 406; *Smith v. Sparrow* (1827), 4 Bing. 84. On the other hand, a contract made on a Sunday is valid if in making it the party is not acting in the ordinary course of his business (*Drury v. Defontaine* (1808), 1 Taunt. 131, 135 (sale of goods); *R. v. Whitnash (Inhabitants)* (1827), 7 B. & C. 596 (hire of services); *Peate v. Dicken* (1834), 1 Cr. M. & R. 422 (attorney making himself liable on behalf of his client, not exercising ordinary calling); *Scarfe v. Morgan* (1838), 4 M. & W. 270 (farmer letting out a stallion not carrying on a trade); *Norton v. Powell* (1842), 4 Man. & G. 42 (tradesman giving a guarantee to another tradesman on behalf of a traveller); see title MASTER AND SERVANT, Vol. XX., p. 90; and compare title CONTRACT, Vol. VII., pp. 402, 403.

(*f*) *Scarfe v. Morgan*, *supra*; see title LIEN, Vol. XIX., p. 4.

(*g*) *Blossome v. Williams* (1824), 3 B. & C. 232. As to the case in which the verbal contract is complete on Sunday but the terms of the Statute of Frauds (29 Car. 2, c. 3) are satisfied on a subsequent day, see also *Smith v. Sparrow*, *supra*; *Beaumont v. Brengeri* (1847), 5 C. B. 301; as to the liability of a person who has bought a thing on Sunday and kept it, see *Williams v. Paul* (1830),

SECT. 2.
Sundays.

statute; accordingly a farmer (*h*), or a solicitor (*i*), or a barber (*j*), or the driver of a stage-coach (*k*), or a soldier engaged in enlisting men for the army (*l*), does not come within the statute (*m*).

SUB-SECT. 2.—*Work Permitted on Sundays for Public Convenience.*

Works of
necessity.

879. The statutory prohibition does not apply to works of necessity and charity, to the preparation of food for such persons as otherwise cannot be provided for, and to the selling of milk before 9 a.m. and after 4 p.m. (*n*).

Public
convenience.

Express provision is also made in several statutes for cases in which public convenience requires that work shall be done on Sunday. These include the statutes relating to bread (*o*), hackney carriages (*p*), the supply of water (*q*) and gas (*r*) in the Metropolis, railways (*s*), drugs (*t*), and intoxicating liquors (*u*).

6 Bing. 653, doubted in *Simpson v. Nicholls* (1838), 3 M. & W. 240; see title CONTRACT, Vol. VII., pp. 402, 403.

(*h*) *R. v. Silvester* (1864), 10 Jur. (N. S.) 360; *R. v. Cleworth* (1864), 4 B. & S. 927. An agricultural labourer, however, is within the statute (*R. v. Silvester, supra*); see title AGRICULTURE, Vol. I., p. 294.

(*i*) *Peate v. Dickson* (1834), 1 Cr. M. & R. 422.

(*j*) *Palmer v. Snow*, [1900] 1 Q. B. 725.

(*k*) *Sandiman v. Breach* (1827), 7 B. & C. 96; *Ex parte Middleton* (1824), 3 B. & C. 164; see title CONTRACT, Vol. VII., p. 403, note (*f*).

(*l*) *Wolton v. Gavin* (1850), 16 Q. B. 48, 64 ("the statute applies to persons carrying on trades and occupations of a civil nature and could not have in contemplation the military service of the country").

(*m*) As to the *ejusdem generis* rule, see title STATUTES, p. 145, *ante*.

(*n*) Sunday Observance Act, 1677 (29 Car. 2, c. 7). As to the proviso, see *R. v. Cox* (1759), 2 Burr. 786; *Crepps v. Durden* (1777), 2 Cowp. 640; 1 Smith, L.C., 11th ed., p. 651 (baking of rolls held to be within the statute); *R. v. Younger* (1793), 5 Term Rep. 449 (baking of dinners for poor people held to be within the proviso); *Bullen v. Ward* (1905), 74 L. J. (K. B.) 916 (chipped potatoes). Consequent on the decision in *R. v. Younger, supra*, special legislation for the relief of bakers was introduced for the Metropolis, the Act now in force being the Bread (London Act, 1822 (3 Geo. 4, c. cvi.); see *R. v. Mead*, [1902] 2 K. B. 212 (where it was held that the prosecution was not affected by the Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87)); *R. v. Bros* (1901), 85 L. T. 581; see title FOOD AND DRUGS, Vol. XV., pp. 46, 47.

(*o*) See note (*n*), *supra*; and title FOOD AND DRUGS, Vol. XV., pp. 46, 47.

(*p*) London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), s. 37. As to hackney carriages generally, see title STREET AND AERIAL TRAFFIC, pp. 292 *et seq.*, *ante*.

(*q*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 6, requiring supply for domestic use on every day of the week. As to water supply generally, see title WATER SUPPLY.

(*r*) Gaslight and Coke and Other Gas Companies Act Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), s. 7; see *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A. As to the right of an examiner to test gas on Sundays, see title GAS, Vol. XV., p. 352, note (*u*).

(*s*) Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 10. In *Stallard v. Great Western Rail. Co.* (1862), 2 B. & S. 419, it was held that the company were bound to deliver up on Sunday luggage which had been left in the cloak-room on Saturday.

(*t*) See title FOOD AND DRUGS, Vol. XV., p. 46.

(*u*) See title INTOXICATING LIQUORS, Vol. XVIII., pp. 88 *et seq.*

SECT. 3.—*Observance of Sundays and Holidays in Regard to Particular Matters.*

SECT. 3.
Observance
of Sundays
and
Holidays in
Regard to
Particular
Matters.
—
Prohibited
acts.

880. The following are the principal instances in which acts which are otherwise lawful are prohibited by statute on Sundays or other holidays (*w*):—

The assembly of persons for sport out of their own parishes on the Lord's Day, as well as bull-baiting or other unlawful pastimes practised by persons within their parishes, is prohibited (*a*).

Carriers and drovers are forbidden to ply their trade (*b*) and butchers to kill or sell meat on Sunday (*c*).

Service of any writ or process (*d*) is prohibited on a Sunday, Good Friday or Christmas Day (*e*), except in the case of arrest for indictable offences (*f*); but ordinarily the service of a notice is not rendered void by its being effected on a Sunday (*g*).

No meeting of any corporation, ecclesiastical or civil, or any

(*w*) As to the provisions relating to Sunday and holiday observance in respect of markets and fairs, see title *MARKETS AND FAIRS*, Vol. XX., pp. 16, 17; distress for rent, see title *DISTRESS*, Vol. XI., p. 149; intoxicating liquors, see title *INTOXICATING LIQUORS*, Vol. XVIII., pp. 87 *et seq.*, 125, note (*d*); *Pletts v. Beattie*, [1896] 1 Q. B. 519; game, see title *GAME*, Vol. XV., p. 209 (birds such as snipe or woodcock, which are not game within the statutory definition (see *ibid.*, pp. 208, 209), may be shot with impunity on Sunday); factories and workshops, see title *FACTORIES AND SHOPS*, Vol. XIV., pp. 490, 508; theatres and places of public entertainment, see titles *CRIMINAL LAW AND PROCEDURE*, Vol. IX., pp. 544, 545; *THEATRES AND OTHER PLACES OF ENTERTAINMENT*, pp. 406, 422 *et seq.*, *ante*; billiard saloons, see title *THEATRES AND OTHER PLACES OF ENTERTAINMENT*, pp. 425, 426, *ante*; pawnbrokers, see title *PAWNS AND PLEDGES*, Vol. XXII., p. 255; writs of execution, see title *EXECUTION*, Vol. XIV., p. 7.

(*a*) Sunday Observance Act, 1625 (1 Car. 1, c. 1); compare titles *ANIMALS*, Vol. I., p. 412; *CRIMINAL LAW AND PROCEDURE*, Vol. IX., pp. 544, 545; *GAMING AND WAGERING*, Vol. XV., pp. 284 *et seq.*

(*b*) Stat. (1627) 3 Car. 1, c. 2, imposing a penalty of 20s.; Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 2, imposing a penalty of 20s., and a penalty of 5s. on persons travelling by water (repealed as to the Thames by stat. (1827) 7 & 8 Geo. 4, c. lxxv., s. 1).

(*c*) Stat. (1627) 3 Car. 1, c. 2, imposing a penalty of 6s. 8d.; compare the Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 2. As to slaughter-houses generally, see title *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., pp. 553 *et seq.* As to Sunday being a reasonable time for the seizure of an article intended for food, see *Small v. Bickley* (1875), 39 J. P. 422.

(*d*) This includes a notice of appeal against an affiliation order under the Bastardy Acts (*R. v. Middlesex Justices* (1848), 3 New Sess. Cas. 152; followed in *Milch v. Frankau & Co.*, [1909] 2 K. B. 100); see titles *BASTARDY*, Vol. II., pp. 449 *et seq.*; *PRACTICE AND PROCEDURE*, Vol. XXIII., p. 170.

(*e*) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 6; R. S. C., Ord. 67, r. 12; compare titles *EXECUTION*, Vol. XIV., p. 7; *PRACTICE AND PROCEDURE*, Vol. XXIII., p. 115.

(*f*) See title *CRIMINAL LAW AND PROCEDURE*, Vol. IX., p. 309.

(*g*) *R. v. Leominster (Inhabitants)* (1862), 2 B. & S. 391 (notice of removal of a pauper under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 79; see title *POOR LAW*, Vol. XXII., p. 599); and see titles *ELECTIONS*, Vol. XII., p. 205; *LANDLORD AND TENANT*, Vol. XVIII., p. 446, note (*a*); and compare title *BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS*, Vol. II., p. 466. As to the computation of periods including Sundays, see p. 453, *post*.

SECT. 3.
Observance
of Sundays
and
Holidays in
Regard to
Particular
Matters.

public company may be held on Sunday, and every matter transacted at such a meeting is void (*h*).

The sale of methylated spirits between 10 p.m. on Saturday and 8 a.m. on the following Monday is prohibited (*i*).

Part III.—Computation of Time.

SECT. 1.—*In General.*

Days
included or
excluded.

881. When a period of time running from a given day or event to another day or event is prescribed by law or fixed by contract, and the question arises whether the computation is to be made inclusively or exclusively of the first-mentioned or of the last-mentioned day, regard must be had to the context and to the purposes for which the computation has to be made (*k*). Where there is room for doubt, the enactment or instrument ought to be so construed as to effectuate and not to defeat the intention of Parliament or of the parties, as the case may be (*l*). Expressions such as “from such a day” or “until such a day” are equivocal, since they do not make it clear whether the inclusion or the exclusion of the day named may be intended (*m*). As a general rule, however, the effect of defining a period in such a manner is to exclude the first day and to include the last day (*n*).

SECT. 2.—*Period Fixed for Duration of Interest or Benefit.*

Duration of
benefit.

882. Where by any instrument some interest or benefit is secured for a certain time, as in a lease for years or letters patent

(*h*) Sunday Observance Act, 1833 (3 & 4 Will. 4, c. 31); see, further, p. 451, *post*.

(*i*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 26; see title REVENUE, Vol. XXIV., p. 661.

(*k*) As to the construction of statutes generally, see title STATUTES, pp. 126 *et seq.*, 177 *et seq.*, 180 *et seq.*, *ante*; as to the construction of contracts generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

(*l*) *Pugh v. Leeds (Duke)* (1777), 2 Cowp. 714; *Lester v. Garland* (1808), 15 Ves. 248; *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, C. A. As to the calculation of the duration of contracts of service, see title MASTER AND SERVANT, Vol. XX., pp. 92 *et seq.*; *Re Humphreys, Ex parte Humphreys* (1833), Mont. & B. 413; *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 538, C. A.; as to time in respect of the right to bring an action, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 77 *et seq.*

(*m*) *R. v. Stevens and Agnew* (1804), 5 East, 244; *Wilkinson v. Gaston* (1846), 9 Q. B. 137; *Dakins v. Wagner* (1835), 3 Dowl. 535; *Lester v. Garland, supra*; approved in *Re North, Ex parte Hasluck, supra*.

(*n*) *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, C. A.; *Sickness and Accident Assurance Association v. General Accident Assurance Corporation* (1892), 19 R. (Ct. of Sess.) 977; *Isaacs v. Royal Insurance Co.* (1870), L. R. 5 Exch. 296, 300; *Goldsmiths' Co. v. West Metropolitan Rail. Co.*, [1904] 1 K. B. 1, 4, C. A., approving *Russell v. Ledsam* (1846), 14 M. & W. 574, 582; *Sheffield Corporation v. Sheffield Electric Light Co.* (1898), 77 L. T. 616; *Kerr v. Jeston* (1842), 1 Dowl. (N. S.) 538; *Bellhouse v. Mellor* (1859), 4 H. & N. 116; *sub nom. Backhouse v. Mellor*, 28 L. J. (EX.) 141; *Pugh v. Leeds (Duke), supra*; *Lester v. Garland, supra*; *Re Hanson, Ex parte Foster* (1887), 56 L. T. 573; *Re Maud* (1891), 8 Morr. 144; *Radcliffe v. Bartholomew*, [1892]

availing for a certain period, the rule is that *prima facie* the day of the date of the instrument (o) being the date on which it was delivered or issued, or the day on which the deed is delivered (a), is included in the term (b).

From the context, however, it may appear that the anniversary of the initial day, and not the initial day itself, was intended to be included (c). An indication to this effect is afforded by a provision in a lease that rent is to be paid on the usual quarter days, since it is presumed that rent is intended to be paid during the continuance of the term (d).

883. In the case of a tenancy terminable by notice the day to be specified in the notice to quit given by a landlord must depend on the method of computation adopted. According as the day from which a tenancy from year to year has to run is included or excluded in the year, so the day before the anniversary of that day or the anniversary of that day is the last day of the tenancy (e).

884. The benefit of a protection order expressed to be given until a day for which a meeting of creditors is convened must clearly be intended to cover that day (f).

SECT. 2.
Period
Fixed for
Duration of
Interest or
Benefit.

Period
terminable
by notice.

Protection
order.

1 Q. B. 161. Both days must be included if the word "inclusive" is added (*Sickness and Accident Assurance Association v. General Accident Assurance Corporation* (1892), 19 R. (Ct. of Sess.) 977). As to "clear" days, see pp. 448, 449, *post*.

(o) The expressions "day of the date hereof" and "the date hereof" mean the same thing (*Pugh v. Leeds (Duke)* (1777), 2 Cowp. 714; *Watson v. Pears* (1809), 2 Camp. 294; *Williams v. Nash* (1859), 28 Beav. 93). As to the presumption as regards the date of execution of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 445, 446.

(a) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 382.

(b) *Clayton's Case* (1585), 5 Co. Rep. 1 a (in regard to a lease, dated the 26th May, to have and to hold for three years from henceforth, the deed not being delivered till the 20th June, it was held that, as this day was included in the term, so the 19th June of the third year was the last day of the term); as to the construction of instruments executed on a day subsequent to that named therein, see, further, *Steele v. Mart* (1825), 4 B. & C. 272; *Browne v. Barton* (1847), 5 Dow. & L. 289; *Pugh v. Leeds (Duke)* (1777), 2 Cowp. 714, where the deed was delivered on the date named in it, and would have been void, as not being a lease in possession, unless construed as taking effect on the day of its date; *Wilkinson v. Gaston* (1846), 9 Q. B. 137, 142; *Doe d. Cox v. Day* (1809), 10 East, 427. In *Pugh v. Leeds (Duke)*, *supra*; *Doe d. Cox v. Day*, *supra*; and *Russell v. Ledsam* (1845), 14 M. & W. 574, where the efficacy of renewed letters patent depending on the date when prior letters came into force was in question, the decision was based on the principle *ut res magis valeat quam pereat*; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 456, 457.

(c) As to insurance policies, see title INSURANCE, Vol. XVII., p. 383; and see *Pugh v. Leeds (Duke)*, *supra*, per Lord MANSFIELD, C.J., at p. 721.

(d) *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Sandill v. Franklin* (1875), L. R. 10 C. P. 377 (by agreement dated the 20th December, 1872, property was let for a year and so on from year to year at an annual rent, the first payment to be made on the 25th March, 1873; it was held that the term began on the 26th December); as to a lease dated on a day subsequent to that on which the term actually began, see *Simner v. Watney* (1911), 28 T. L. R. 162, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 456, 457.

(e) *Sidebotham v. Holland*, [1895] 1 Q. B. 378 (where a notice to quit on the 19th May, being the day on which the tenancy began, was held good); see title LANDLORD AND TENANT, Vol. XVIII., pp. 445 *et seq.*, 449.

(f) *Bellhouse v. Mellor* (1859), 4 H. & N. 116; *sub nom. Backhouse v. Mellor*, 28 L. J. (EX.) 141; compare *Ammerman v. Digges* (1861), 12

SECT. 2.
Period
fixed for
Duration of
Interest or
Benefit.

Accumulations.

Exclusion of
last day.

885. In the same way the period of twenty-one years from the testator's death during which the will directs that the income of property passing under it shall be accumulated includes the whole of the anniversary of the date of death (g).

SECT. 3.—*Period on Expiration of which an Act may be Done.*

886. When a period is fixed before the expiration of which an act may not be done the person for whose benefit the delay is prescribed has the benefit of the entire period, and accordingly in computing it the day from which it runs as well as the day on which action is taken against him must be excluded (h).

On the other hand, in computing the ten days required for the notice of an appeal to the sessions, it has been held that, while the day of service should be excluded, the first day of the sessions should be included (i).

"Clear days."

887. In many statutes (k), statutory rules (l) and bye-laws (m)

I. C. L. R., Appendix, i. (in a letter of licence from creditors to a debtor "for and during a year from the date thereof" the day of the date should be excluded in calculating the year).

(g) *Gorst v. Lowndes* (1841), 11 Sim. 434.

(h) *Blunt v. Heslop* (1838), 8 Ad. & El. 577; *Browne v. Black*, [1912] 1 K. B. 316, C. A. (by the Solicitors Act, 1843 (6 & 7 Vict. c. 73), it is provided that no attorney shall commence an action for costs until after the expiration of one month or more after he shall have delivered his bill or sent the same by post: held that both days must be excluded, the expression "or more" being equivalent to "at least"). On the other hand, in *Re Starkey, Ex parte Farquhar* (1826), Mont. & M. 7, it was held that in counting the two months between the day on which a mortgage was executed and that on which a commission in bankruptcy issued, the former day should be included; see also *R. v. Shropshire Justices* (1838), 8 Ad. & El. 173, 175; *Mitchell v. Foster* (1840), 12 Ad. & El. 472; *Young v. Higgon* (1840), 6 M. & W. 49 (in these cases the intending plaintiff had to give notice of action so many days at least before commencing his action), overruling *R. v. Adderley* (1780), 2 Doug. (K. B.) 463, and *Castle v. Burditt* (1790), 3 Term Rep. 623; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204, following *Young v. Higgon, supra*; *Roberts v. Stacey* (1810), 13 East, 21; *Zouch v. Empsey* (1821), 4 B. & Ald. 522 (requirement of fourteen days' notice at least to creditors before motion to discharge debtor); *Chambers v. Smith* (1843), 12 M. & W. 2 (stat. (1832) 2 & 3 Will. 4, c. 39); *Freeman v. Read* (1863), 4 B. & S. 174 (Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 4, requiring one calendar month's notice before action); compare titles DISTRESS, Vol. XI., p. 182; MASTER AND SERVANT, Vol. XX., pp. 150, 151, 180, 181, 239.

(i) *R. v. West Riding of Yorkshire Justices* (1833), 4 B. & Ad. 685, followed in *R. v. Cumberland Justices* (1835), 4 L. J. (M. C.) 72; *Connelly v. Bremner* (1886), L. R. 1 C. P. 557 (time given to plead); *Liffin v. Pitcher* (1842), 1 Dowl. (N. S.) 767 (ten days given to sign judgment); *Weeks v. Wray* (1868), L. R. 3 Q. B. 212 (order giving leave to proceed on expiration of three days after service; the only point decided was that the first day should be excluded). Where justices, on an information laid at special sessions under statute, have made an order for payment of money by parties who had notice of such intended information, the time for appealing against the order runs from the date of the order, not from the date of service (*R. v. Derbyshire Justices* (1845), 7 Q. B. 193); compare title MAGISTRATES, Vol. XIX., pp. 643 *et seq.*

(k) *R. v. Herefordshire Justices* (1820), 3 B. & Ald. 581 (ten clear days' notice of appeal to the sessions required); *Zouch v. Empsey, supra*; *R. v. Shropshire Justices, supra*; *Young v. Higgon, supra*;

(l), (m) For notes (l), (m), see p. 449, *post*.

the intention to exclude both days and to give the person affected a clear interval of time between the two is put beyond all doubt by the insertion of words such as "clear days" or so many days "at least" (*n*).

SECT. 3.
Period on
Expiration
of which
an Act may
be Done.

SECT. 4.—*Period within which an Act must be Done.*

888. The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him. This rule is especially reasonable in the case in which that person is not necessarily cognisant of the act or event (*o*); and further in support of it there is the consideration that, in case the period allowed was one day only, the consequence of including that day would be to reduce to a few hours or minutes the time within which the person affected should take action (*p*).

Exclusion of
first day.

889. In view of these considerations the general rule is that, as well in cases where the limitation of time is imposed by the act of a party as in those where it is imposed by statute, the day from which the time begins to run is excluded; thus, where a period is fixed within which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is excluded in the computation (*q*), and many other

Statutory
period.

(in these last three cases the expression "at least" was in question); *Chambers v. Smith* (1843), 12 M. & W. 2 (not less than fifteen days held to mean fifteen clear days); followed in *R. v. Turner*, [1910] 1 K. B. 346, 359; *Re Prangle* (1836), 4 Ad. & El. 781; *R. v. Middlesex Justices* (1845), 3 Dow. & L. 109; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854; *Watson v. Eales* (1857), 23 Beav. 294 (both days excluded in computing time between date of notice to pay calls and that of forfeiture of shares on default); *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, 488, C. A. (day of notice of company's meeting and day of meeting excluded); *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204 (day of meeting at which resolution is passed and day of confirmatory meeting alike excluded; compare the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 230); *R. v. Pownall*, [1893] 2 Q. B. 158 (Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 7 (now repealed); County Court Rules, 1903, Ord. 55.

(*l*) *R. S. C.*, Ord. 64, r. 12; County Court Rules, 1903, Ord. 55.

(*m*) As to bye-laws made by local authorities, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*

(*n*) See, for instance, Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14, with reference to bills payable at a fixed period after date or sight; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 141; *R. S. C.*, Ord. 16, r. 49; contrast *ibid.*, Appendix A, Form No. 1.

(*o*) *Lester v. Garland* (1808), 15 Ves. 248, 256; see *Blunt v. Heslop* (1838), 8 Ad. & El. 577, 580; and compare title PRACTICE AND PROCEDURE, Vol. XXIII., p. 124.

(*p*) *Pellew v. Wonford (Inhabitants)* (1829), 9 B. & C. 134; followed in *R. v. West Riding of Yorkshire Justices* (1833), 4 B. & Ad. 685, and *Webb v. Fairmaner* (1838), 3 M. & W. 473, 477.

(*q*) *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161; *Hardy v. Ryle* (1829), 9 B. & C. 603, overruling *Clarke v. Davey* (1820), 4 Moore (C. P.), 465; compare *Gelmini v. Moriggia*, [1913] 2 K. B. 549; see also titles LIMITATION OF ACTIONS, Vol. XIX., p. 45; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 456, 569; MASTER AND SERVANT, Vol. XX., pp. 151, 180, 181; RAILWAYS AND CANALS, Vol. XXIII., p. 741

SECT. 4.

Period
within
which an
Act must
be Done.

instances may be cited (r). In particular, the rule of excluding the day from which the period runs has been applied in construing the statutory provision whereby the fact that goods seized by the sheriff are allowed to remain in his hands for twenty-one days constitutes an act of bankruptcy on the part of the owner, the date of the seizure being omitted in the computation (s).

Contractual
period.

890. Where a period is fixed by contract within which work is to be done or goods delivered, the day from which the period is made to run is generally excluded, and therefore the corresponding day at the end of the period is included (a).

Period under
will.

891. Similarly, where a testator has by his will imposed on a person who is to take a benefit under it the performance of some condition within a limited time, the day of the testator's death is not included in the computation (b).

Murder.

892. In computing the period of a year and a day with reference to a charge of murder, it is clearly established that the day on which the hurt was done should be included (c).

(r) *Ex parte Fallon* (1793), 5 Term Rep. 283 (enrolment of annuity); *Williams v. Burgess* (1840), 12 Ad. & El. 635 (filing of warrant of attorney within twenty-one days after execution); *Re Higham* (1840), 9 Dowl. 203 (award to be made within two calendar months after appointment of umpire); *Gibson v. Musket* (1841), 3 Scott (N. R.), 429; *Watson v. Pears* (1809), 2 Camp. 294; *Williams v. Nash* (1859), 28 Beav. 93 (payment of stamp duty on letters patent within three years; as to the time for such payments now, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 181, 182); *Goldsmiths' Co. v. West Metropolitan Railway*, [1904] 1 K. B. 1 (exercise of power of compulsory acquisition of land within three years from the passing of the Act of Parliament); *Tiverton and North Devon Rail. Co. v. Loosemore* (1884), 9 App. Cas. 480, 499, followed in *Great Western Railway v. Midland Railway*, [1908] 2 Ch. 455 (where a similar limit of time is imposed by statute for the exercise of statutory powers in the construction of a railway the company may notwithstanding, on acquiring a right to the land, construct the railway under their common law powers after the expiration of the period so limited). As to the time within which proceedings must be taken, see titles LIMITATION OF ACTIONS, Vol. XIX., pp. 33 *et seq.*; PRACTICE AND PROCEDURE, Vol. XXIII., pp. 123, 124, 133, 135; and compare title RAILWAYS AND CANALS, Vol. XXIII., p. 630.

(s) *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, C. A. (Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 23.

(a) *Webb v. Fairmaner* (1838), 3 M. & W. 473 (sale of goods on the 5th October to be paid for in two months; writ issued on the 5th December held to be premature); compare title SALE OF GOODS, Vol. XXV., pp. 152, 153. As to time in relation to contracts generally, see title CONTRACT, Vol. VII., pp. 412 *et seq.* As to policies of insurance, see *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, C. A.; *Sickness and Accident Assurance Association v. General Accident Assurance* (1892), 19 R. (Ct. of Sess.) 977; title INSURANCE, Vol. XVII., pp. 381 *et seq.*, 554 *et seq.*

(b) *Lester v. Garland* (1808), 15 Ves. 248; *Miller v. Wheatley* (1891), 28 L. R. Ir. 144 (where a devise was made to A. with a condition of defeasance on his failing to assume the testator's name within one year of his death and the name was assumed on the anniversary of that date). As to the time for payment of legacies generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 262 *et seq.*

(c) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 571. Other

893. The fact that the last day of a prescribed period is a Sunday or other holiday does not generally give the person who is called upon to act an extra day; it is no excuse for his omission to do the act on some prior day (*d*).

894. The general rule does not hold good where the effect of it would be to render performance of the act impossible. This would be the case if it happened that the whole period during which the act could be done consisted of holidays, in which case the act may lawfully be done on the next possible day (*e*).

Again, the general rule does not hold good where the last day is a Sunday and the act to be done is one the performance of which on a Sunday is prohibited by the Sunday Observance Act, 1677 (*f*), or where the act to be done has to be done, not by the party only, but by the court or by the party in conjunction with the court. In such cases the act may, when the last day limited for the performance of it happens to be a day when the court or its office is closed, be done on the next practicable day (*g*).

895. By various Acts of Parliament and statutory rules provision is made for cases in which the day or the last day on which an act may be done falls on a Sunday or other holiday and for the exclusion of such days in the computation of prescribed periods.

When the day prescribed for the meeting of a corporation or public company happens to be a Sunday, it is provided that the

SECT. 4.
Period
within
which an
Act must
be Done.

Sundays and
holidays.
Exceptions
to general
rule.

Special
provisions.

cases in which the rule of a year and a day prevailed are mentioned in *Constable's (Sir Henry) Case* (1602), 5 Co. Rep. 106 a, 107 b; see also 1 Hawk. P. C. 162.

(*d*) *Mesure v. Britten* (1796), 2 Hy. Bl. 617; *R. v. Middlesex Justices* (1844), 7 Jur. 396; *Rouberry v. Morgan* (1854), 9 Exch. 730; *Peacock v. R.* (1858), 4 C. B. (N. S.) 264; *Ex parte Simpkin* (1859), 2 E. & E. 392; *Déchêne v. Montreal City*, [1894] A. C. 640, P. C. In all these cases the period limited for the doing of an act by one of the parties to a legal proceeding expired on a Sunday or other nonjuridical day, and it was held that the doing of the act could not be postponed till the next day; compare title COUNTY COURTS, Vol. VIII., p. 620. In *Child v. Edwards*, [1909] 2 K. B. 753, it was held that distress levied on Monday in respect of rent which fell due on the preceding Sunday was lawfully levied; see titles DISTRESS, Vol. XI., pp. 123, 149; LANDLORD AND TENANT, Vol. XVIII., p. 471, note (*p*).

(*e*) *Mayer v. Harding* (1867), L. R. 2 Q. B. 410 (where a case stated had to be lodged in the Queen's Bench within three days after it was received from the magistrates, and it was received on Good Friday); *Waterton v. Baker* (1868), L. R. 3 Q. B. 173; see title MAGISTRATES, Vol. XIX., p. 653, note (*r*).

(*f*) 29 Car. 2. c. 7; *R. v. Middlesex Justices*, *supra*; followed in *Milch v. Frankau & Co.*, [1909] 2 K. B. 100. As to acts prohibited on Sunday, see p. 443, *ante*.

(*g*) *Morris v. Barrett* (1859), 7 C. B. (N. S.) 139; *Hughes v. Griffiths* (1862), 13 C. B. (N. S.) 324; see p. 452, *post*. In *Mumford v. Hitchcocks* (1863), 14 C. B. (N. S.) 361, it was held that the appearance to a writ was the combined act of the party and the court, and that therefore, if the court were closed on the last day of the limited period, appearance might be entered on the next day. As to the time for entry of appearance to writ of summons, see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 124; as to appearance in special proceedings, see *ibid.*, note (*g*); compare title COUNTY COURTS, Vol. VIII., p. 620.

SECT. 4.

Period within which an Act must be Done.

Corporations and public companies.

Bills of exchange.

Offices of Royal Courts of Justice.

Term of imprisonment.

meeting may take place on the preceding Saturday or the next succeeding Monday (*h*).

In the case of a municipal corporation, however, and other local authorities, it is provided that when any act or proceeding is directed to be done or taken on a certain day and that day happens to be a Sunday, Christmas Day, or Good Friday, or Monday or Tuesday in Easter week, or a day appointed for public fast, humiliation, or thanksgiving, the act or proceeding may be done or taken on the next day, not being one of those days, and provision is also made for cases in which the last day of a limited time allowed happens to be one of the days specified (*i*).

A bill of exchange which falls due on a bank holiday (not a common law holiday) or on a Sunday preceding a bank holiday becomes payable on the next succeeding business day (*j*).

When the time limited for any act which is affected by the offices of the Royal Courts of Justice being closed expires on Sunday or on any other day when the offices are closed, and by reason thereof such act cannot be done on such day, the act must be done on the next day on which the offices are open (*k*), and provision to the same effect is made as regards bankruptcy matters (*l*).

When a term of imprisonment expires on a Sunday, on Christmas Day or Good Friday, the prisoner is to be discharged on the day

(*h*) Sunday Observance Act, 1833 (3 & 4 Will. 4, c. 31), repealed as to boroughs by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). As to boroughs, see the text, *infra*.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 230, incorporated with the Local Government Act, 1888 (51 & 52 Vict. c. 41), by *ibid.*, s. 75; London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 3, 24; see titles LOCAL GOVERNMENT, Vol. XIX., p. 314; METROPOLIS, Vol. XX., p. 433.

(*j*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 14 (1) (b). As to "non-business" days, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 92; and title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 478. The rule was the same at common law: the foundation of the custom on which it rested was that on Sundays men could not be expected to attend to their business (*Wright v. Shawcross* (1819), 2 B. & Ald. 501, n.).

(*k*) R. S. C., Ord. 64, r. 3. The rule does not affect the operation of the Statute of Limitations (*Morris v. Richards* (1881), 45 L. T. 210; *Gelmini v. Moriggia*, [1913] 2 K. B. 549); nor does it apply to acts not affected by the offices being closed (*R. v. Lambert, Ex parte Saffery* (1877), 5 Ch. D. 365, C. A.; *Chambon v. Heighway* (1890), 54 J. P. 520). When the last day for moving for appeal from an order in chambers to a divisional court under R. S. C., Ord. 54, r. 24, is a Sunday, notice of motion should be given for the following day (*Taylor v. Jones* (1875), 34 L. T. 131). Sundays and holidays are not to be reckoned in computing any time less than six days limited for doing any act (R. S. C., Ord. 64, r. 2); see *Re Yeoland Consols, Ltd.* (1888), 58 L. T. 108 (time for filing an affidavit in support of petition to wind up a company). As to the former practice, see *Morris v. Barrett* (1859), 7 C. B. (N. S.) 139; *Mumford v. Hitchcocks* (1863), 14 C. B. (N. S.) 361: stat. (1832) 2 & 3 Will. 4, c. 39, s. 11; as to practice generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 89 *et seq.* A similar provision exists as regards county courts (County Court Rules, 1903, Ord. 54, r. 17); see title COUNTY COURTS, Vol. VIII., p. 620.

(*l*) Bankruptcy Rules, 1886, r. 4; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 141; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 306, 319.

next preceding (*m*). Sundays do not count in calculating the days during which a casual pauper may be detained (*n*).

SECT. 5.—*Computation of Period when Holidays Intervene.*

896. Where a period is fixed within which some act must be done, Sundays and holidays in general count like other days (*o*), and it makes no difference that the last day of the period falls on a Sunday (*p*).

In a charterparty or other contract in which it is stipulated that a thing shall be done in so many days, consecutive days are intended, and holidays or non-working days are not excluded unless there is something in the context to show that working days only were to be included (*q*).

897. In the Parliamentary Elections Act, 1868 (*r*), and the Ballot Act, 1872 (*s*), provision is made to the effect that Sunday, Christmas Day, Good Friday, and any day set apart for public fast or thanksgiving shall be excluded in reckoning any time for the purposes of those Acts (*t*).

The term “daily” as applied to inspection by gas examiners in the Metropolis includes Sundays (*u*).

In assessing compensation under the Workmen’s Compensation Act, 1906 (*v*), due allowance is to be made for holidays embraced within the period on which the assessment is based (*w*).

SECT. 4.
Period
within
which an
Act must
be Done.

Holidays
included.

Elections.

Gas inspector.

Workmen’s
compensa-
tion.

(*m*) Prison Act, 1898 (61 & 62 Vict. c. 41); see title PRISONS, Vol. XXIII., p. 258.

(*n*) Casual Poor Act, 1882 (45 & 46 Vict. c. 36), s. 4; see title POOR LAW, Vol. XXII., p. 568.

(*o*) *Wheeler v. Green* (1839), 7 Dowl. 194; *Re Gilbert, Ex parte Viney* (1877), 4 Ch. D. 794, C. A.; *Pennell v. Uxbridge Churchwardens* (1862), 8 Jur. (N. S.) 99. As to the exceptions to the general rule, see the text, *infra*; as to when the period ends on a Sunday or holiday, see p. 451, *ante*.

(*p*) *Raulins v. West Derby Overseers* (1846), 2 C. B. 72; *Wilkinson v. Britton* (1840), 1 Scott (N. R.), 348; *Morris v. Richards* (1881), 45 L. T. 210 (where a promissory note fell due on a Sunday and it was contended that the Statute of Limitations did not begin to run till the Monday); *Gelmini v. Moriggia*, [1913] 2 K. B. 549; and compare *Niemann v. Moss* (1860), 6 Jur. (N. S.) 775; *Déchène v. Montreal City*, [1894] A. C. 640, P. C.; *Flower v. Bright* (1862), 2 John. & H. 590. As to the last of the days of grace falling on a Sunday, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 477; as to application to justices to state a case, see title MAGISTRATES, Vol. XIX., p. 652, note (*k*).

(*q*) See title SHIPPING AND NAVIGATION, Vol. XXVI., p. 122.

(*r*) 31 & 32 Vict. c. 125.

(*s*) 35 & 36 Vict. c. 33.

(*t*) Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 49 (this provision applies to election petitions and the twenty-one days allowed therefor under *ibid.*, s. 6 (*Pease v. Norwood* (1869), L. R. 4 C. P. 235)); Ballot Act, 1872 (35 & 36 Vict. c. 33), Sched. I., r. 56; see title ELECTIONS, Vol. XII., p. 262.

(*u*) London Gas Act, 1905 (5 Edw. 7, c. clv.). Previously the practice had been to test on week-days only (*London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A.; see title GAS, Vol. XV., pp. 352, note (*u*), 391, note (*k*); compare title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 243.

(*v*) 6 Edw. 7, c. 58.

(*w*) See title MASTER AND SERVANT, Vol. XX., p. 206.

SECT. 6.
Fractions
of Divisions
of Time.

Fractions
disregarded.

SECT. 6.—*Fractions of Divisions of Time.*

898. In computing a period of time, at any rate when counted in years or months, no regard is, as a general rule, paid to fractions of a day, in this sense, that the period is regarded as complete although it is short to the extent of a fraction of a day (*a*). In cases in which the day of the date of an instrument of lease is included in the term it is immaterial that the tenant's enjoyment cannot begin with the beginning of that day (*b*). Similarly, in calculating a person's age the day of his birth counts as a whole day; and he comes of age on the midnight of the day next before the anniversary of his birthday (*c*).

In contracts where payment has to be made at a certain rate *per diem* a part of a day counts as a whole day, unless it appears from the context that the contrary was intended (*d*). Where it is stipulated that money shall be paid at a given hour, the whole period between that hour and the next hour is intended; the hour is considered as the twenty-fourth aliquot part of the day (*e*).

Priorities.

899. When conflicting claims depend on the question which of two events was first in order of time the particular hour when the events occurred may become material. On the same day rival claimants may have been born; on the same day execution may have been issued and the judgment debtor may have died (*f*) or committed an act of bankruptcy (*g*); on the same day two deeds may have been

(*a*) *Lester v. Garland* (1810), 15 Ves. 248, 257; *Pugh v. Leeds (Duke)* (1775), 2 Cowp. 714, *per* Lord MANSFIELD, C.J., at p. 720; cited in *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204, 205.

(*b*) *Clayton's Case* (1585), 5 Co. Rep. 1 a; *R. v. St. Mary, Warwick* (1859), 1 E. & B. 816, where an occupation which began on the 29th September and ceased before midnight on the 30th of the ensuing September was held, for the purpose of a settlement, to be an occupation for a year; as to calculation of days making a quarter of a year, see p. 437, *ante*; and compare titles LANDLORD AND TENANT, Vol. VIII., pp. 446, note (*c*), 456; POWERS, Vol. XXIII., p. 77, note (*s*).

(*c*) *Fitzhugh v. Dennington* (1704), 2 Ld. Raym. 1094, 1095; *Toder v. Sansam* (1775), 1 Bro. Parl. Cas. 468; *Grant v. Grant* (1840), 4 Y. & C. (EX.) 256; *Roe d. Wrangham v. Hersey* (1771), 3 Wils. 274 (will made on 31st January by person who was born on 1st February twenty-one years before, held valid). A gift to a person on attaining his twenty-fifth year means that he is to take the property on his twenty-fourth birthday; see title INFANTS AND CHILDREN, Vol. XVII., p. 44.

(*d*) *Commercial Steamship Co. v. Boulton* (1875), L. R. 10 Q. B. 346; compare *Yeoman v. R.*, [1904] 2 K. B. 429, C. A. (intention of the parties as indicated by the charterparty was that regard should be had to hours); *Cornfoot v. Royal Exchange Assurance Corporation*, [1904] 1 K. B. 40, C. A.; and see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 123; compare titles CONTRACT, Vol. VII., pp. 412 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 152, 153.

(*e*) *Wade's Case* (1601), 5 Co. Rep. 114 a; *Knox v. Simmonds* (1793), 4 Bro. C. C. 433; *Bernard v. Norton* (1864), 10 L. T. 183.

(*f*) *Chick v. Smith* (1840), 8 Dowl. 337; followed in *Wright v. Mills* (1859), 4 H. & N. 488, and *Campbell v. Strangeways* (1877), 3 C. P. D. 105, 106, where *Combe v. Pitt* (1763), 3 Burr. 1423, *per* Lord MANSFIELD, C.J., at p. 1434, was cited; see also *Roe d. Wrangham v. Hersey*, *supra*. As to priority of writs executed, see title EXECUTION, Vol. XIV., p. 26.

(*g*) *Ex parte D'Obree, Ex parte Le Mesurier* (1803), 8 Ves. 81; followed in *Wydown's Case* (1807), 14 Ves. 80, and *Ex parte Dufrene* (1812), 1

SECT. 6.
Fractions
of Divisions
of Time.

registered in the Middlesex Registry (*h*): in all these cases the rights of the parties have to be determined by the ascertainment of the particular moments of the same day at which the several events happened (*i*). The same principle applies where two writs in the same matter are issued against the same defendant on the same day, for the issuing of an original writ is an act of the party and not a judicial act, and therefore the doctrine according to which it is assumed that a judicial act is dated from the earliest moment of the day on which it is done has no application (*k*).

If on one and the same day an award is made and signed and a rule *nisi* obtained calling upon the arbitrator to show cause why a case for the opinion of the court should not be stated, it becomes necessary to discuss the question which of the two events occurred first, for the court has no jurisdiction to grant the rule *nisi* if previously thereto the award has been signed (*l*).

If on the same day a debt becomes payable and the creditor dies, it is presumed that the death took place after the debt should have been paid, so that the Statute of Limitations (*m*) will not run until letters of administration are taken out; but evidence is admissible to prove at what hour the creditor died (*n*).

SECT. 7.—*Special Rules affecting Executive and Judicial Acts.*

900. An exceptional rule prevails in regard to acts done on behalf of the Crown and judicial acts. When the title of the Crown and of a subject accrue on the same day the title of the Crown prevails (*o*). A writ of extent issued in respect of a Crown debt takes precedence of execution issued on the same day at the instance of a subject although the latter is issued at an earlier hour (*p*). Similarly with judicial acts, it is a general, perhaps not a universal, rule that the act is taken to date from the earliest moment of the day

Priority of
Crown.

Ves. & B. 51, 54; *Franklin v. Brownlow* (Lord) (1808), 14 Ves. 550, 554; *Re Newton, Ex parte Bignold* (1836), 3 Mont. & A. 9; *Sadler v. Leigh* (1815), 4 Camp. 195; *Pewtress v. Annan* (1841), 9 Dowl. 828; *Thomas v. Desanges* (1819), 2 B. & Ald. 586; *Godson v. Sanctuary* (1832), 4 B. & Ad. 255; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 23, 24.

(*h*) *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, C. A., per RIGBY, L.J., at p. 273; compare titles MORTGAGE, Vol. XXI., p. 335, note (*a*); SALE OF LAND, Vol. XXV., p. 442.

(*i*) As to the presumption as regards the order of the deaths of persons dying together, see title EVIDENCE, Vol. XIII., p. 503.

(*k*) *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 66, C. A.; *Pugh v. Robinson* (1786), 1 Term Rep. 116; *Warne v. Lawrence* (1886), 54 L. T. 371. As to the presumption applicable to judicial acts, see the text, *infra*.

(*l*) *Tabernacle Permanent Building Society v. Knight*, [1892] A. C. 298; see title ARBITRATION, Vol. I., p. 466.

(*m*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*n*) *Atkinson v. Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377, C. A.; compare titles LIMITATION OF ACTIONS, Vol. XIX., p. 57; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 230, note (*g*).

(*o*) *R. v. Giles* (1820), 8 Price, 293, 334, referring to *R. v. Crump* (1668), cited in *R. v. Cotton* (1751), Park. 112, 126.

(*p*) *Edwards v. R.* (1854), 9 Exch. 628, overruling *Swain v. Morland* (1819), 1 Brod. & Bing. 370; followed in *Wright v. Mills* (1859), 4 H. & N. 488. As to writs of extent, see title CROWN PRACTICE, Vol. X., pp. 14 *et seq.*

SECT. 7.
Special
Rules
affecting
Executive
and Judicial
Acts.

Date of
judgment.
Commence-
ment of
statute.

on which it is done (*g*). The fact, therefore, that at some earlier hour on the same day something has been done or has happened which if it had been done or had happened on the previous day would have nullified the act is immaterial (*r*).

901. A judgment must be dated as of the day on which it was pronounced, but by special leave it may be ante-dated or post-dated (*s*).

902. Any Act of Parliament passed since the 1st January, 1890, and any rule or order made thereunder, is construed as coming into operation immediately on the expiration of the day previous to that on which it is expressed to come into operation (*t*).

SECT. 8.—*Construction of Expressions Limiting Time.*

“Reasonable
time.”

903. Where anything is limited to be done within a “reasonable time” or at a “reasonable hour,” the question what is a reasonable time or reasonable hour must necessarily depend on the circumstances of the particular case, and is, therefore, a question of fact to be determined by a jury (*a*); when the question arises with reference to ascertained or admitted facts it is one of law (*b*).

“Imme-
diately”;
“forthwith.”

904. There appears to be no material difference between the terms “immediately” and “forthwith.” A provision to the effect that a thing must be done “forthwith” or “immediately” means that

(*g*) *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 66, C. A. (where Lord COLERIDGE, C.J., at p. 66, refused to recognise the rule as universal, referring to *Pie v. Coke* (1616), Hob. 128).

(*r*) *Porchester (Lord) v. Petrie* (1783), 3 Doug. (K. B.) 261; *Edwards v. R.* (1854), 9 Exch. 628.

(*s*) R. S. C., Ord. 41, r. 3; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 204, 206, 207. At common law a judgment related back to the first day of the term, and it was said that the priority of one of two judgments signed on the same day could not be averred (*Porchester (Lord) v. Petrie* (1783), 3 Doug. (K. B.) 261; *Pugh v. Robinson* (1786), 1 Term Rep. 116).

(*t*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 36 (2). At common law the rule was that, in the absence of provision to the contrary, every Act was deemed to have been in force from the first day of the session in which it was passed. By the Acts of Parliament (Commencement) Act, 1793 (33 Geo. 3, c. 13), it was enacted that, in the absence of provision to the contrary, every Act should be considered as commencing from the date indorsed on it as the date of its receiving the Royal Assent. It was held with regard to this Act that a statute took effect from the earliest moment of the day on which the Royal Assent was obtained, and that therefore it was immaterial that some fact with reference to which the statute was to be applied had taken place at an hour earlier than that on which the Assent was given (*Tomlinson v. Bullock* (1879), 4 Q. B. D. 230); see also titles PARLIAMENT, Vol. XXI., pp. 616, 722, 776; STATUTES, pp. 155, 156, *ante*.

(*a*) *Burton v. Griffiths* (1843), 11 M. & W. 817 (reasonable time a question of fact); *Pitt v. Shew* (1821), 4 B. & Ald. 208 (reasonable time allowed to landlord to appraise and sell distrained goods). As to what constitutes a reasonable time in reference to particular transactions, see titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 528, 546; CONTRACT, Vol. VII., p. 522; DISTRESS, Vol. XI., p. 183; SALE OF GOODS, Vol. XXV., pp. 179, 280; SALE OF LAND, Vol. XXV., 332, 333; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 275 *et seq.*

(*b*) *Tindal v. Browne* (1786), 1 Term Rep. 167.

it must be done as soon as possible in the circumstances, the nature of the act to be done being taken into account (c).

"Directly" means speedily, or at least "as soon as practicable" (d).

The word "peremptory" is often used in regard to judicial proceedings, as, for instance, a peremptory plea as distinguished from a plea in abatement, a peremptory order, a peremptory mandamus.

SECT. 8.
Construc-
tion of
Expressions
Limiting
Time.

"Directly."

"Peremp-
tory."

(c) *Re Southam, Ex parte Lamb* (1881), 19 Ch. D. 169, 173, C. A., citing *Hyde v. Watts* (1843), 12 M. & W. 254 (where the effecting of an insurance was the act to be done); *Lowe v. Fox* (1885), 15 Q. B. D. 667, C. A.; *Re Darbyshire, Ex parte Hill* (1883), 53 L. J. (CH.) 247; *Ex parte Lyon* (1882), 45 L. T. 768; see also the cases cited in title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 306, note (h); *R. v. Price, Ex parte Heard* (1854), 8 Moo. P. C. C. 203. As to cases where immediate payment of money has been held to mean payment within a reasonable time after demand, see *Toms v. Wilson* (1862), 4 B. & S. 442; *Moore v. Shelley* (1883), 8 App. Cas. 285, P. C.; *Re Burghardt, Ex parte Trevor* (1875), 1 Ch. D. 297; *Brighty v. Norton* (1862), 3 B. & S. 305. In *Pybus v. Mitford* (1673), 2 Lev. 75, 77, it was said that, although the word "immediately" in strictness excludes all mesne time, yet to make good the deeds and intents of parties it should be construed to mean such convenient time as is requisite for doing the thing; see *Burgess v. Boetefeur* (1844), 7 Man. & G. 481, 493. In *R. v. Worcester Justices* (1839), 7 Dowl. 789, a provision to enter recognisances forthwith after notice of appeal was in question; "forthwith" was said to be less strict than "immediately"; see *R. v. Berkshire Justices* (1878), 4 Q. B. D. 469; *R. v. Aston* (1850), 19 L. J. (M. C.) 236; *Ex parte Lowe* (1846), 3 Dow. & L. 737. In *Thompson v. Gibson* (1841), 8 M. & W. 281, and *Grace v. Clinch* (1843), 4 Q. B. 606, the same expression was used; compare *Roberts v. Brett* (1865), 11 H. L. Cas. 337. The certificate for a special jury, required by the Juries Act, 1825 (6 Geo. 4, c. 50), s. 34, to be given immediately after the verdict, must be applied for and given at the time, unless special circumstances prevented the certificate being made or applied for, or unless the judge expressly reserved his decision on the point, in which cases it should be applied for at the first reasonable opportunity (*Barker v. Lewis and Peat*, [1913] 3 K. B. 34, C. A., following *Forsdike v. Stone* (1868), L. R. 3 C. P. 607). In *Costar v. Hetherington* (1859), 1 E. & E. 802, the direction that justices on dismissing a complaint should forthwith give a certificate was held to mean forthwith on demand, and not forthwith on the dismissal. As to cases of contract, see *Doe d. Pittman v. Sutton* (1841), 9 C. & P. 706 (covenant to put premises in repair forthwith); *Simpson v. Henderson* (1829), Mood. & M. 300 (contract to take cargo on board a vessel forthwith); *Roberts v. Brett, supra*; *Staunton v. Wood* (1851), 16 Q. B. 638 (contract for delivery of goods "forthwith" and for payment in fourteen days: held that delivery should be made within fourteen days. "As soon as possible" in a manufacturing contract means within a reasonable time, regard being had to the manufacturer's ability to produce the goods and the orders he already has in hand (*Attwood v. Emery* (1856), 1 C. B. (N. S.) 110); see also title CONTRACT, Vol. VII., p. 412. As to the time for delivery of goods, see title SALE of GOODS, Vol. XXV., pp. 208 *et seq.*; as to the meaning of the word "on" in the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, empowering the court to make an order for permanent maintenance "on" the decree, see *Robertson v. Robertson* (1883), 8 P. D. 94, C. A., *per JESSEL, M.R.*, at p. 96, holding that "on," if not confined to the time of making the decree, must mean shortly after; as to the meaning of "instantly," see *R. v. Brownlow* (1839), 11 Ad. & El. 119, 127, where, however, the decision appears to turn on the facts of the particular case; as to the meaning of "with all possible despatch," see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 92 *et seq.*

(d) *Duncan v. Topham* (1849), 8 C. B. 225. It cannot mean within a reasonable time (*ibid.*); compare title CONTRACT, Vol. VII., p. 412.

SECT. 8.
 Construc-
 tion of
 Expressions
 Limiting
 Time.
 —
 Notice.

A peremptory order is an order whereby a person is required to do something within a fixed time or suffer the consequences (*e*).

905. The requirement that a notice shall be given within so many days of a certain day does not mean that it must be given at least so many days before that day (*f*); nor is a notice required to be given on a certain day invalid because it is given before that day (*g*).

(*e*) *Falck v. Axthelm* (1889), 24 Q. B. D. 174, C. A. (the fact that an order is peremptory does not prevent alteration of it on special circumstances shown); *Beazley v. Bailey* (1846), 16 M. & W. 58.

(*f*) *Elliott v. Popular Playhouses, Ltd.* (1909), *Times*, 1st April (where it was held that a notice required to be given "within seven days prior to" a certain day is not required to be given at least seven days before that day).

(*g*) *Ibid.*

TIME POLICY.

See INSURANCE.

TIPPLING ACT.

See INTOXICATING LIQUORS.

TIPSTAFF.

See CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL.

TITHE AND TITHE RENTCHARGE.

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<i>For Libel</i>	-	-	-	-	<i>See title</i>	LIBEL AND SLANDER.
<i>Malicious Damage</i>	-	-	-	-	"	AGRICULTURE; CRIMINAL LAW AND PROCEDURE; DAMAGES.
<i>Malicious Prosecution</i>	-	-	-	-	"	MALICIOUS PROSECUTION AND PROCEDURE.
<i>Misrepresentation</i>	-	-	-	-	"	MISREPRESENTATION AND FRAUD.
<i>Mistake</i>	-	-	-	-	"	MISTAKE.
<i>Negligence</i>	-	-	-	-	"	NEGLIGENCE.
<i>Nuisance</i>	-	-	-	-	"	NUISANCE.
<i>Passing-off</i>	-	-	-	-	"	TRADE MARKS, TRADE NAMES, AND DESIGNS.
<i>Picketing</i>	-	-	-	-	"	TRADE AND TRADE UNIONS.
<i>Pound Breach</i>	-	-	-	-	"	ANIMALS.
<i>Replevin</i>	-	-	-	-	"	DISTRESS.
<i>Rescue</i>	-	-	-	-	"	DISTRESS.
<i>Restraint of Trade</i>	-	-	-	-	"	CONTRACT; TRADE AND TRADE UNIONS.
<i>Seduction</i>	-	-	-	-	"	MASTER AND SERVANT.
<i>Slander</i>	-	-	-	-	"	LIBEL AND SLANDER.
<i>Slander of Title</i>	-	-	-	-	"	TRADE AND TRADE UNIONS.
<i>Threats</i>	-	-	-	-	"	CRIMINAL LAW AND PROCEDURE; PATENTS AND INVENTIONS; TRADE AND TRADE UNIONS; TRADE MARKS, TRADE NAMES, AND DESIGNS.
<i>Tortious Feoffment</i>	-	-	-	-	"	REAL PROPERTY AND CHATTELS REAL.
<i>Trade Disputes</i>	-	-	-	-	"	TRADE AND TRADE UNIONS.
<i>Trespass</i>	-	-	-	-	"	TRESPASS.
<i>Trover</i>	-	-	-	-	"	TROVER AND DETINUE.
<i>Waste</i>	-	-	-	-	"	EQUITY; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

Part I.—Nature and Classification of Torts.

SECT. 1.—*Nature of Torts.*

SECT. 1. Nature of Torts.

906. Tort is a term which is used to describe a wrong (a) or a breach of duty (b) committed by some person (c) which is legally

(a) A breach of contract is also a legal wrong (*Allen v. Flood*, [1898] A. C. 1, *per Lord Watson*, at p. 96). As to the distinction between actions of tort and actions of contract, see note (d), p. 464, *post*; and p. 466, *post*.

(b) An act of negligence constituting such a breach of duty may consist of misfeasance or nonfeasance (*McClelland v. Manchester Corporation*, [1912] 1 K. B. 118; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149; and see titles CARRIERS, Vol. IV., p. 46; NEGLIGENCE, Vol. XXI., pp. 375 *et seq.*, 421); but mere non-performance of a duty imposed, or omission to exercise a power bestowed, by statute is not such a breach of a duty owed to the individual injured as to give him a cause of action, unless Parliament has used language indicating an intention to impose such a liability (*Pictou Municipality v. Geldert*, [1893] A. C. 524, P. C.; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64; *Maguire v. Liverpool Corporation*, [1905] 1 K. B. 767, C. A.; and see pp. 481, 482, *post*).

(c) "Person" as here used includes every person recognised by the law as capable of owing a duty to some other person and therefore capable of committing a breach of such duty. It includes, therefore, not only single individuals and bodies corporate, but also all persons associated together for any purpose which may involve a duty to other persons. Thus, it may include public bodies and officials, companies, trade unions, and persons acting by means of or on behalf of other persons, provided that they are so associated that the duty owed or the act committed by

Tort, a wrong
or breach of
duty.

SECT. 1.
Nature
of Torts.

Common law
duty of fellow-
citizens one to
the other.

wrongful (*d*) as regards some other person (*e*). An act which constitutes such a breach of duty is called a tortious act (*f*), and the person committing such an act is called a tortfeasor.

The common law recognises that, in addition to the duty of every citizen to obey the law, a duty is owed by every citizen to each one of his fellow-citizens with whom he is brought into relationship (*g*) so to exercise his own rights and perform his own

the one person or set of persons involves the responsibility of the other person or set of persons; see pp. 484 *et seq.*, *post*. The term also includes not only any British subject, but also, when the act is committed in England, or is not justifiable where it is committed, and is actionable in England, every person whatever his nationality (see title CONFLICT OF LAWS, Vol. VI., p. 248; p. 479, *post*), but it does not include a foreign sovereign State (see title CONFLICT OF LAWS, Vol. VI., p. 249). As to the effect of the death of a person who has committed a tortious act, see p. 502, *post*. Husband and wife are one person, and neither can sue the other for a tortious act committed during coverture (see title HUSBAND AND WIFE, Vol. XVI., p. 460), excepting so far as is necessary for protection of the wife's property (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12; *Larner v. Larner*, [1905] 2 K. B. 539).

(*d*) Every act which infringes a public right or private right of some other person affords a cause of action; see title ACTION, Vol. I., pp. 7, 9. Where the basis of such action is in substance the wrong done, the action has been regarded as founded on tort (*ibid.*, pp. 48 *et seq.*). Where the cause of action is based on a duty not embraced by the common law liability arising out of the relationship between the parties the action may be regarded as founded on contract (*ibid.*, p. 50; and see note (*s*), p. 466, note (*a*), p. 472, *post*).

(*e*) *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 613, C. A. Where the person suffering damage is a foreigner the act may be legally wrongful as regards him if it infringes a right allowed to him by the law of the place where it is committed, although no such right would be recognised by the law in England (*Buron v. Denman* (1848), 2 Exch. 167). Where several persons are injured by a tort it is not necessary that all should be joined as plaintiffs; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 100; but where several persons are injured by the same act or series of acts and there is a common question of fact and law, they may be joined as plaintiffs; see titles PLEADING, Vol. XXII., p. 443; PRACTICE AND PROCEDURE, Vol. XXIII., p. 104; TRADE AND TRADE UNIONS, p. 667, *post*. Where the duty owed is a duty to the public, the Attorney-General is a necessary party, except where there is a special interference with a private right of some person or special damage is suffered by some person over and above that suffered by the general public (see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 100, 101; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393). A partnership firm is not a "person" for all purposes, but where the partners suffer joint damage from a tort, they may, subject to exceptions, join in an action; see title PARTNERSHIP, Vol. XXII., p. 38. A corporation may sue for a tort not of a purely personal nature; see titles COMPANIES, Vol. V., p. 311; CORPORATIONS, Vol. VIII., p. 390. A bankrupt can though undischarged recover for a personal wrong (*Re Wilson, Ex parte Vine* (1878)), 8 Ch. D. 364, C. A.; see p. 503, *post*).

(*f*) If special damage is necessary to make up a cause of action, a tort in the eye of the law is not disclosed until special damage is shown (*White v. Mellin*, [1895] A. C. 154, *per* Lord HERSCHELL, L.C., at p. 163). An act committed abroad may be treated as tortious here if it would be actionable if committed in England and is not justifiable by the *lex loci*; see titles CONFLICT OF LAWS, Vol. VI., p. 248; TRESPASS, pp. 864, 872, *post*.

(*g*) Such a duty may be imposed by the common law on every person included in some particular class; thus, there is a duty on a common carrier as such to deliver safely any goods entrusted to him, and a failure to perform such duty is a tort (see title CARRIERS, Vol. IV., p. 8), and a duty

duties that he shall not without legal excuse injure the legal rights of others (*h*), and it gives a right of action (*i*) to every citizen whose legal rights are, without legal excuse (*k*), violated by one with whom he is brought into relationship against that person, whether loss results from such violation or not (*l*).

SECT. 1.
Nature
of Torts.

The relationship out of which the duty arises may result from any or all of the following (*m*):—(1) the application of the law of the State to either or both of the parties (*n*); (2) the surrounding circumstances affecting the parties (*o*); (3) the voluntary acts of either or both of the parties (*p*).

How the duty
may arise.

The voluntary acts resulting in the relationship out of which the duty arises may also result in a contract between the parties to

Contractual
relationship.

on an innkeeper to ensure the safety of the goods of his guests (see title INNS AND INNKEEPERS, Vol. XVII., pp. 314 *et seq.*), subject to certain exceptions (see *ibid.*, p. 315).

(*h*) See pp. 472 *et seq.*, *post*.

(*i*) As to the old forms of action arising out of delicts, see title ACTION, Vol. I., pp. 38 *et seq.*; and as to the abolition of the old forms and the substituted modern form, see *ibid.*, pp. 45 *et seq.*

(*k*) See pp. 492 *et seq.*, *post*.

(*l*) See p. 470, *post*.

(*m*) For examples, see titles AGENCY, Vol. I., pp. 150, 213, 214; ANIMALS, Vol. I., pp. 372 *et seq.*; AUCTION AND AUCTIONEERS, Vol. I., pp. 504, 519, 520; BAILMENT, Vol. I., pp. 553, 560, 564; CARRIERS, Vol. IV., pp. 44 *et seq.*; COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 163 *et seq.*, 182 *et seq.*, 196, 203; DISTRESS, Vol. XI., pp. 195, 197; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 330; ECCLESIASTICAL LAW, Vol. XI., p. 767; EXECUTION, Vol. XIV., pp. 28, 29; FERRIES, Vol. XIV., pp. 559, 561; FISHERIES, Vol. XIV., p. 584; GAME, Vol. XV., pp. 225, 226; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 133; HUSBAND AND WIFE, Vol. XVI., p. 316; INFANTS AND CHILDREN, Vol. XVII., pp. 157, 158; INNS AND INNKEEPERS, Vol. XVII., pp. 314, 322; LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq.*; MASTER AND SERVANT, Vol. XX., pp. 118 *et seq.*, 125 *et seq.*, 128 *et seq.*, 244 *et seq.*, 267 *et seq.*, 276 *et seq.*, 279 *et seq.*; MEDICINE AND PHARMACY, Vol. XX., pp. 330 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 537 *et seq.*, 587 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 360, 426 *et seq.*; *White v. Steadman*, [1913] 3 K. B. 340 (duty of person hiring out animal which he knows or ought to have known to be dangerous is owed to all persons for whose use it is supplied as well as to the hirer); compare *Bates v. Batey & Co., Ltd.*, [1913] 3 K. B. 351; see also titles NUISANCE, Vol. XXI., pp. 507, 528; PATENTS AND INVENTIONS, Vol. XXII., pp. 210 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 167, 175; ROYAL FORCES, Vol. XXV., pp. 91, 92, 102; SEWERS AND DRAINS, Vol. XXV., pp. 732, 741; SHERIFFS AND BAILIFFS, Vol. XXV., p. 812; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 359 *et seq.*; SOLICITORS, Vol. XXVI.; TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 719, 741, 744 *et seq.*, *post*; TRESPASS, pp. 844 *et seq.*, *post*; TROVER AND DETINUE, pp. 888 *et seq.*, *post*; WORK AND LABOUR.

(*n*) See titles LIBEL AND SLANDER, Vol. XVIII., p. 605; MARKETS AND FAIRS, Vol. XX., p. 43; PRIZE LAW AND JURISDICTION, Vol. XXIII., pp. 283, 284; RAILWAYS AND CANALS, Vol. XXIII., pp. 727, 781 *et seq.* As to the duties imposed by statute, see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 565, 582; EXPLOSIVES, Vol. XIV., p. 396; FOOD AND DRUGS, Vol. XV., pp. 1 *et seq.*; GAS, Vol. XV., pp. 332 *et seq.*; NUISANCE, Vol. XXI., pp. 522 *et seq.*; STATUTES, p. 192, *ante*.

(*o*) As to the duties imposed by the common law in particular circumstances, see the titles referred to in notes (*m*), (*n*), *supra*, note (*p*), *infra*.

(*p*) See titles AGENCY, Vol. I., pp. 185, 191, 192; MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 676; MISREPRESENTATION AND FRAUD, Vol. XX., p. 724; SALE OF GOODS, Vol. XXV., p. 273; TRESPASS, pp. 878 *et seq.*, *post*.

SECT. 1.
Nature of
Torts.

perform such duty, and therefore the same act may be both a breach of contract and a tort (q).

SECT. 2.—*Distinction between Actions of Tort and Actions of Contract.*

Action of tort.

907. An action of tort is an action based on facts which constitute a tort, that is, which constitute and are regarded as a breach of duty on the part of the tortfeasor, whether the relationship out of which the duty arises results from a contract or not (r); if, however, the relationship does not give rise to the duty which is broken, but it is necessary to refer to the contract in order to establish such duty, then the action is said to be founded on contract (s).

SECT. 3.—*Distinction between Tort and Crime.*

Tort and
crime.

908. A tort, being a wrong to an individual which gives rise to a cause of action may be distinguished from a crime (t), but the duty which is not fulfilled by a tortfeasor may be a duty imposed for the benefit of the public, and a breach of such duty may be an offence against the public, rendering the person committing it liable to legal punishment, at the same time that it is an offence against an individual giving him a right of civil action, and therefore the same act may be both a crime and a tort (u).

Prosecution
of crime and
private
remedy.

It is the duty of every citizen to endeavour to bring criminals to justice, and no court of justice can properly connive at any failure to perform such duty. Therefore, when a civil action is commenced, the court before which the action is being heard may take judicial notice of the failure, if any, in the performance of such duty, which may be involved in proceeding with such action before the criminal has been punished, and may refuse to allow such action to proceed until criminal proceedings have been taken (a).

SECT. 4.—*Relevancy of Intention of Alleged Tortfeasor.*

SUB-SECT. 1.—*In General.*

How far
intention of
tortfeasor is
relevant.

909. Having regard to the definition of a tort already given (b), the elements in the tortious act or the proceedings arising out of it to which the intention of the alleged tortfeasor may be relevant include (1) the resulting right of action, (2) the proceedings in an action in respect of such right, (3) the alleged tortious act regarded as an exercise of the alleged tortfeasor's own rights or

(q) *Defries v. Milne*, [1913] 1 Ch. 98, C. A.; see title NEGLIGENCE, Vol. XXI., p. 362, note (n).

(r) *Defries v. Milne*, *supra*; see note (a), p. 472, *post*.

(s) See titles ACTION, Vol. I., pp. 48 *et seq.*; CARRIERS, Vol. IV., p. 96. If the claim of the plaintiff is for a breach of some particular stipulation of a contract, as distinguished from a breach of duty arising out of a relationship established by contract, the action is founded on contract.

(t) An act is a crime when it is a breach of duty on the part of the person doing it which is regarded by the law of the State as an offence against the public, and renders the person guilty of it liable to legal punishment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 232. As to the necessity of *mens rea* to constitute a crime, see *ibid.*, pp. 233, 234.

(u) See title TRESPASS, p. 872, *post*.

(a) *Re Shepherd, Ex parte Ball* (1879), 10 Ch. D. 667, 674, C. A.; see title ACTION, Vol. I., pp. 27 *et seq.*; and p. 492, *post*.

(b) See pp. 463, 464, *ante*.

the performance of his own duties, and (4) the legal justification or excuse, if any, available to the alleged tortfeasor.

SUB-SECT. 2.—*Intention as Affecting the Cause of Action.*

910. The fact that an act which causes loss to another was done with a malicious intention (*c*) may form an essential element of the cause of action arising from such act (*d*), which is equivalent (*e*) to saying that where this is the case there is no injury to the legal rights of the person who suffers damage unless such malicious intention exists.

Even where malice does not form an essential element of the cause of action, the intention with which an act is done may be relevant to the question whether a cause of action exists where the intention indicates that an act, which, if accidental, would be too trivial to justify legal proceedings (*f*), is not so because the intention with which it is done gives it a more serious character or gives rise to reasonable fear of such repetition of it as will entitle the person injured to protection from the court (*g*).

(*c*) "Malice" in common acceptation means ill-will against a person, but in a legal sense it is often used to mean some motive other than that which might be inferred from the doing of a similar act in a right way, and in this sense it may be inferred to exist from the doing of a wrongful act intentionally and without just cause or excuse, even though no malice in the common acceptation of the term can be shown to exist (*Bromage v. Prosser* (1825), 4 B. & C. 247; *Abrath v. North Eastern Rail. Co.* (1886), 11 App. Cas. 247); see titles TRADE AND TRADE UNIONS, pp. 650, 674, *post*; TROVER AND DETINUE, p. 892, *post*; TRESPASS, p. 871, *post*; compare title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 746, 747, *post*.

(*d*) Tortious acts of which malice is an essential element are (i.) malicious prosecution, in which case the malice is not to be inferred from the act done, though it is done without just cause or excuse, but a *malus animus* must be established as existing in fact, indicating that the person instituting proceedings, whether criminal or civil, was actuated by spite or ill-will, or by indirect or improper motives (see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 679, 680, 684, 685, 690, 691); (ii.) slander of title, in which case actual malice must be established (see titles LIBEL AND SLANDER, Vol. XVIII., p. 736; TRADE AND TRADE UNIONS, pp. 672, 674, *post*), but may be inferred from the statement and the circumstances in which it was made (see title TRADE AND TRADE UNIONS, p. 674, *post*); (iii.) defamation, in which case legal malice is a necessary element of the cause of action, but may be inferred from the act done, *i.e.*, from the publication of defamatory matter without lawful justification or excuse (*Whitfield v. South Eastern Rail. Co.* (1858), E. B. & E. 115), and the necessity of extrinsically establishing that malice exists in fact only arises when a case showing some legal justification or excuse has to be rebutted (*Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A.; see title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 609, 711 *et seq.*); (iv.) wilful and malicious damage to property (see title TRESPASS, p. 846, *post*; and, as to intent to convert, see also title TROVER AND DETINUE, pp. 892, 895, *post*). As to maintenance where a purpose to stir up strife is essential, see *British Cash and Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.*, [1908] 1 K. B. 1006, C. A.; *Scott v. National Society for the Prevention of Cruelty to Children* (1909), 25 T. L. R. 789; *Holden v. Thompson*, [1907] 2 K. B. 489.

(*e*) This equivalence results from the fact already stated that there is no injury to a legal right without a remedy.

(*f*) See title TRESPASS, p. 859, notes (*v*), (*a*), *post*.

(*g*) See titles INJUNCTION, Vol. XVII., pp. 206, 208, 209, 213, 239; NUISANCE, Vol. XXI., p. 560; TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 773, *post*; TRESPASS, p. 859, *post*; *Wilcox v. Steel*, [1904] 1 Ch. 212, 224, C. A.

SECT. 4.

Relevancy
of Intention
of Alleged
Tortfeasor.

Malice as
an element
of cause of
action.

Aggravation.

SECT. 4.

Relevancy
of Intention
of Alleged
Tortfeasor.

Intention
as bearing on
conduct of
the tortfeasor.

SUB-SECT. 3.—*Intention as Affecting the Action.*

911. Even where malice does not form an essential element in the cause of action and the effect of the intention with which an act was done falls short of altering the legal effects of the act, it may be open to the court to take into its consideration the intention with which an act which is in issue was done, so far as such intention bears on the conduct of the parties (*h*), and affords a ground judicially cognisable for the exercise or refusal to exercise any discretion vested in the court (*i*).

SUB-SECT. 4.—*Intention as affecting Acts Done in the Exercise of Rights or the Performance of Duties.*

Act done in a
particular
capacity.

912. In general there is no effective distinction to be drawn between intention as affecting acts done in the exercise of rights or the performance of duties, and intention as affecting justification or excuse (*j*), since if an act was done in the exercise of the defendant's own rights, and still more if it was done in the performance of his own duties, the fact that it was so done in general either affords a legal justification or excuse, or affords no defence to the action, and the question to be determined is the same, but there are cases in which the alleged tortfeasor is capable of acting in more than one capacity (*k*), and a legal justification or excuse is available to him if he acts in one of those capacities and not if he acts in the other (*l*).

(*h*) As to the effect of fraudulent motives in passing-off cases, see title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 746, 747, *post*. As to the bearing of the question whether the defendant's actions were "conscientious" on the exercise of equitable jurisdiction generally, see title EQUITY, Vol. XIII., pp. 6, 7, 72. The intention of the plaintiff may also be relevant, as, for instance, where the plaintiff, being compelled by a tortious act, has paid money involuntarily (*Kanhaya Lal v. National Bank of India* (1913), 29 T. L. R. 314, P. C.); see also title TRESPASS, p. 854, *post*.

(*i*) See titles INJUNCTION, Vol. XVII., pp. 209, 218 *et seq.*, 234; SPECIFIC PERFORMANCE, p. 46, *ante*; *Behrens v. Richards*, [1905] 2 Ch. 614, 621, 622, where the question whether plaintiff's conduct was capricious was considered, as well as the question whether a trivial act would justify an injunction; *Proctor v. Bayley* (1889), 42 Ch. D. 390, C. A.; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508, 516; *Dixon v. Dixon* (1903), 73 L. J. (CH.) 103; *Brigg v. Thornton*, [1904] 1 Ch. 386, C. A.; *Hunt v. Hunt* (1884), 54 L. J. (CH.) 289; *Thornhill v. Weeks*, [1913] 1 Ch. 438; *Smith v. Streatfeild* (1913), 109 L. T. 173 (intention of tortfeasor may be considered in deciding amount of damages); *Lever Brothers, Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (1912), 106 L. T. 472, C. A. (trap orders accepted by servants contrary to directions of company: injunction not granted). As to whether, and the extent to which the intention of a party to an action may be relevant in deciding for good cause to deprive the successful party of costs, see *Jones v. Curling* (1884), 13 Q. B. D. 262, C. A.; *American Tobacco Co. v. Guest*, [1892] 1 Ch. 630; *Behrens v. Richards*, *supra*; and title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 178, 179. As to the remedy when a person habitually and persistently institutes vexatious legal proceedings, see title ACTION, Vol. I., p. 30; *Re Boaler* (1913), 29 T. L. R. 767.

(*j*) See pp. 469, 470, *post*.

(*k*) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384 (acts done by officials of union: union held not liable); *Oram v. Hutt*, [1913] 1 Ch. 259.

(*l*) For examples of cases where the defendant in a nuisance action was held entitled to do the act complained of in the exercise of his own rights, see *New Imperial and Windsor Hotel Co. v. Johnson*, [1912] 1 I. R. 327; and title NUISANCE, Vol. XXI., p. 563.

In such cases it may be material to prove the intention to act in a particular capacity, and if it is shown that the tortfeasor acted maliciously and not in the exercise of his own rights or the performance of his own duties, the basis of any alleged justification or excuse may cease to be available to him (*m*).

SECT. 4.
Relevancy
of Intention
of Alleged
Tortfeasor.

SUB-SECT. 5.—*Intention as Affecting Justification or Excuse.*

913. Where a person has in the exercise of his own rights or the performance of his own duties committed some act which is alleged to be tortious, and seeks to establish a legal justification or excuse on the ground that the act was done in the exercise of some power or in pursuance of some duty, the intention with which the act was done may be relevant as showing that it was or was not done in the exercise of such power or in pursuance of such duty, as the case may be, and therefore was or was not justified or excused (*n*).

How far
intention
relevant to
justification.

914. A person who owes a duty arising out of his relation to another person to do or not to do a particular act may at the same time owe a duty equally binding on him to himself (*o*) or to such other person (*p*) or to a third person (*a*) or to the State (*b*), which conflicts with that duty, and in a legal sense requires him to do or refrain from doing the same act (*c*).

Conflict of
duties.

In such circumstances the person who owes such conflicting duties does not commit a legal wrong, even though the result of what he does is to cause damage to another person, if he can establish a legal justification or excuse by proving that he honestly did that which he *bonâ fide* and reasonably believed to be his duty (*d*).

Bonâ fide
execution
of duty.

915. Where a person who does an act which adversely affects the rights of another person may be acting in a capacity which involves a duty to do such act, the question of the intention with

Capacity in
which tort-
feasor acts.

(*m*) For examples of cases where persons purporting to act on behalf of trade unions were held not to be so acting, see title TRADE AND TRADE UNIONS, p. 661, *post*; and see *Oram v. Hutt*, [1913] 1 Ch. 259 (slander).

(*n*) *Macintosh v. Dun*, [1908] A. C. 390, 400, P. C.; and see title TRADE AND TRADE UNIONS, pp. 656, 658, *post*.

(*o*) See notes (*c*), (*d*), *infra*; pp. 490, 498, *post*.

(*p*) See pp. 490, 499, *post*.

(*a*) See note (*m*), p. 498, *post*.

(*b*) *Macintosh v. Dun*, *supra*; see pp. 495 *et seq.*, note (*w*), p. 499, *post*.

(*c*) The duty which is based only on moral or religious and not on legally recognised grounds cannot afford a legal justification (*South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, 245; compare *Livingston v. Hawker* (1913), *Times*, 18th October, *per* Lord HALDANE, L.C.), nor can a duty to do a tortious act created towards each other by the persons who do the act afford a justification (*South Wales Miners' Federation v. Glamorgan Coal Co.*, *supra*, *per* Lord MACNAGHTEN, at p. 246). A legal duty to do what is illegal and known to be so is a contradiction in terms (*ibid.*, *per* Lord LINDLEY, at p. 254).

(*d*) *Waller v. Loch* (1881), 7 Q. B. D. 619, 621, C. A.; *Allen v. Flood*, [1898] A. C. 1, *per* HAWKINS, J., at pp. 18, 19 ("If a defendant by way of excuse or justification of a trespass or other wrongful act can satisfy the tribunal that he did such acts in the *bonâ fide* exercise of a legal right or privilege vested in him, no amount of even personal hatred or bad motive co-existing in his mind will render that unlawful which without it is lawful"); compare note (*c*), *supra*; *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, 742, C. A.; *Greenlands, Ltd. v. Wilmshurst* (1913), 29 T. L. R. 685, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 686 ("If you make a communication from a sense of duty it is privileged, if you make it for payment it is not privileged").

SECT. 4.
**Relevancy of
 Intention of
 Alleged
 Tortfeasor.**

Acts done in
 pursuance of
 duty.

When
 intention
 immaterial.

*Damnum
 sine injuriâ.*

*Injuria sine
 damno.*

which he does such act may, even in cases where intention does not form an essential element in the cause of action, be material either as showing that he was or was not acting in that capacity or as showing that the act was or was not done in pursuance of the duty (*e*).

916. Where a conflict of duties exists, and a person who has committed an act which adversely affects the legal rights of another person proves that he in committing such act was acting honestly and *bonâ fide* in pursuance of his duty, he establishes a legal excuse for his act, and no right of action results to the person whose rights have been affected (*f*).

917. Where the intention with which an act is done is not an essential element in the cause of action and no conflict of duties exists, and a person commits an act without legal excuse, which injures the rights of another person, the intention with which he committed such act is immaterial. If the overt act so committed is an injury to the legal right of such other person it gives a right of action, however good the motive and however innocent the intention may be (*g*).

If the overt act so committed is not an injury to any legal right of such other person, it does not give a right of action (*h*), however bad the motive or however guilty the intention (*i*), or however erroneous the view of his legal rights on which he purported to base his act (*k*).

SECT. 5.—*Injury and Damage in Relation to the Wrongful Act.*

918. A tortious act by which one person causes injury to a legal right of some other person gives rise to a cause of action whether loss results from such violation or not (*l*). Such action may take the form of an action for damages, and may succeed without proof of actual damage unless actual damage is of the essence of the action, in which case no injury to a legal right exists unless actual damage is proved (*m*).

(*e*) See the cases cited in note (*d*), p. 469, *ante*; *Quinn v. Leatham*, [1901] A. C. 495, *per* Lord LINDLEY, at p. 537 ("The intention to injure the plaintiff negatives all excuses"):

(*f*) *Macintosh v. Dun*, [1908] A. C. 390; compare *Greenlands, Ltd. v. Wilmshurst* (1913), 29 T. L. R. 685, C. A.; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 613, C. A.

(*g*) *Quinn v. Leatham*, *supra*; see titles CONTRACT, Vol. VII., p. 345; MASTER AND SERVANT, Vol. XX., p. 280; PATENTS AND INVENTIONS, Vol. XXII., p. 211; TRADE AND TRADE UNIONS, p. 651, *post*; and note (*h*), *infra*.

(*h*) An act which does not otherwise amount to a legal injury cannot be actionable because it is done with a bad intent (*Bradford Corporation v. Pickles*, [1895] A. C. 587; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, *supra*, at p. 508; *Kingaby v. Aston Villa Football Club* (1912), *Times*, 28th March).

(*i*) "It is a well established principle in English law that civil obligations are not to be created by or founded upon undisclosed intentions" (*Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240, *per* Lord MACNAGHTEN, at p. 247, citing *Anon.* (1477), Y. B. 17 Edw. 4, 2 pl. 2, "l'entent d'un home ne serr trie, car le Diable n'ad conusance de l'entent de home"): see title TRADE AND TRADE UNIONS, p. 651, *post*.

(*k*) *Trent v. Hunt* (1853), 9 Exch. 14.

(*l*) See titles ACTION, Vol. I., p. 7; DAMAGES, Vol. X., p. 308.

(*m*) See title ACTION, Vol. I., p. 19; and notes (*i*), (*l*), p. 476, *post*.

919. Where a duty to another person is such that any breach of it imports an injury to some legal right of that other person, the injury arises so directly out of the breach that it is not necessary to separately establish a causal connexion between them; but where this is not the case the liability for injury resulting from a tortious act will only ensue if it is established that the act was the effective cause of the injury (*n*).

A tortious act is to be considered to be the effective cause of an injury whenever the injury may fairly and reasonably be considered as arising naturally (*o*), that is, according to the usual course of things, from the tortious act and the circumstances in which it took place (*p*). These circumstances will include all such incidents as

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Damage
in Relation
to the
Wrongful
Act.

Effective
cause.
Circum-
stances con-
stituting an
effective
cause.

(*n*) The existence of such a causal connexion is based on the induction from experience that in the ordinary course of nature every fact capable of being stated as having happened is also capable of being proved to have resulted from antecedently existing facts, if these can be ascertained with sufficient accuracy. The imposition of a liability on a tortfeasor for injuries resulting from a tortious act committed by him is based on the hypothesis that in the ordinary affairs of mankind the above induction is assumed to be sound, and that every person may reasonably be assumed (i.) to expect that where a reasonable inference from past experience has proved that a set of facts answering to a particular description is followed by a consequence capable of being described by reference only to the description of the antecedent facts a similar sequence will result in the future; and (ii.) to contemplate that such additional incidents may occur during and may affect the sequence from an antecedent set of facts to the ultimate consequence as in the ordinary course of nature a reasonable man might expect in similar circumstances (*Sharp v. Powell* (1872), L. R. 7 C. P. 253; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Hadwell v. Righton*, [1907] 2 K. B. 345; *Rickards v. Lothian*, [1913] A. C. 263, 274, P. C.). Accordingly, where a set of facts shows the existence of a duty on the part of A. towards B. to do or not to do a particular act, and a breach of that duty, and an injury to B. ensues, which is capable of being described by reference to the antecedent set of facts combined with such additional incidents as have occurred, and might reasonably be expected to have occurred in similar circumstances, and it is recognised that a reasonable inference from past experience would have led A. to expect that the breach of duty, together with such additional incidents, would be followed by the injury which in fact resulted, A. may reasonably be held responsible for such injury (*Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504, *per* WILLS, J., at p. 512); that is to say, a tortfeasor must be assumed to have contemplated and be liable for all those injuries which result from the tortious act together with such incidents as a reasonable man might in the circumstances have expected to result in the ordinary course of nature (*Fletcher v. Smith* (1877), 2 App. Cas. 781, 787, 788). Where the breach of duty involves an act of volition on the part of the tortfeasor, he is presumed to have contemplated all those facts which a reasonable man would have ascertained before deciding in favour of the act or omission which caused the injury (*Ratcliffe v. Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L. J., at p. 529: "By the very fact that he has committed such a wrong the defendant is prepared for the proof that some general damage may have been done").

(*o*) Where the conscious act of a third person intervenes there may be no liability either because it and not the original act was the real cause of the injury (see title NEGLIGENCE, Vol. XXI., pp. 380 *et seq.*; *Rickards v. Lothian*, *supra*), or because the duty in question did not extend to protection against such a conscious act (*ibid.*, at p. 278).

(*p*) *Hadley v. Barendale* (1854), 9 Exch. 341; see note (*n*), *supra*; titles CARRIERS, Vol. IV., pp. 17, 19; DISTRESS, Vol. XI., p. 206; ESTOPPEL, Vol. XIII., p. 385; EVIDENCE, Vol. XIII., p. 454; LIBEL AND SLANDER, Vol. XVIII., pp. 718 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 378 *et seq.*; SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.

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Act.

may reasonably be supposed to have been in the contemplation of the tortfeasor at the time when the wrongful act was done (*q*). When the injury results in pecuniary damage this proposition may be stated in the form that a tortfeasor is liable for such damages as flow directly and naturally or in the ordinary course of things from the wrongful act (*r*).

SECT. 6.—*Classification of Torts.*

SUB-SECT. 1.—*Modes of Classification.*

Different
modes of
classification.

920. Torts may be classified by reference to any one or more of the essential elements in a tort, namely:—the person wronged; the tortfeasor; the relationship between them; the duty arising out of that relationship (*s*); the injurious act; and the legal remedy. Classification by reference to the last-named element has been rendered obsolete by the Judicature Acts (*a*), and it is for practical purposes found convenient to consider torts under the following heads:—(1) wrongs affecting property; (2) wrongs affecting a person in respect of his property; and (3) wrongs affecting a person in respect of his person or his personal rights.

SUB-SECT. 2.—*Nature of Rights Infringed.*

(i.) *Wrights Primarily Affecting Property.*

Torts *in rem*.

921. The existence of a tort implies the existence of a person injured, and the existence of property implies the existence of a person and of some legal right vested in such person, either of a corporeal or of an incorporeal nature, and where the thing owned is of a corporeal nature implies a relationship between the person and the thing owned (*b*). From each of these implications it follows that it is impossible that a tort should be completely defined by reference to the injury to a thing without reference to the person

(*q*) See title NEGLIGENCE, Vol. XXI., pp. 378 *et seq.*; *London, Tilbury and Southend Railway v. Paterson* (1913), 29 T. L. R. 413, H. L.; *Latham v. Johnson (R.) and Nephew, Ltd.*, [1913] 1 K. B. 398, C. A.

(*r*) *Steamship "Gracie" (Owners) v. Steamship "Argentino" (Owners)*, *The "Argentino"* (1889), 14 App. Cas. 519; see title NEGLIGENCE, Vol. XXI., p. 487; see also *Jones v. Watney, Combe, Reid & Co., Ltd.* (1912), 28 T. L. R. 399 (damages include any augmentation caused by act of plaintiff if done reasonably and carefully); compare *Anglo-Algerian Steamship Co., Ltd. v. Houlder Line, Ltd.*, [1908] 1 K. B. 659, 666; *Price v. Webb*, [1913] 2 K. B. 367 (non-employment consequent on non-return of insurance cards held too remote).

(*s*) As to duties arising out of the ownership or occupation of property, see titles NEGLIGENCE, Vol. XXI., pp. 382 *et seq.*; NUISANCE, Vol. XXI., pp. 525 *et seq.*

(*a*) The forms of statements of claim given in R. S. C., Appendix C, ss. 5, 6, involve no distinction between torts, whether they arise or do not arise out of contract, and it is now settled that, when a plaintiff joins a claim for another remedy with a claim for damages in respect of a tort, the substance of the action is to be regarded in deciding whether it is an action of tort or not (*Keates v. Woodward*, [1902] 1 K. B. 532, C. A. (substantial claim for injunction, ancillary claim for trespass)), whatever the form of the claim may be (*Bryant v. Herbert* (1878), 3 C. P. D. 389, C. A.; *Turner v. Stallibrass*, [1898] 1 Q. B. 56, C. A.; *Sachs v. Henderson*, [1902] 1 K. B. 612, C. A.; *Du Pasquier v. Cadbury, Jones & Co., Ltd.*, [1903] 1 K. B. 104, C. A.; and see title ACTION, Vol. I., pp. 49, 50).

(*b*) *Re Earnshaw-Wall*, [1894] 3 Ch. 156; and see title ECCLESIASTICAL LAW, Vol. XI., p. 713.

owning the thing (*c*), but in some cases the thing injured, such as a ship, is so obviously the subject of ownership by some person who will be damaged by any injury of it that it is possible to regard the person merely in his capacity as owner of the thing, and to define the tort by reference only to the injury to the thing and to the owner considered as owner thereof (*d*). In such cases the tort may be regarded as a wrong primarily affecting the thing owned.

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tion of
Torts.

922. When property, whether of a corporeal (*e*) or an incorporeal nature (*f*), is so injured by a wrongful act as to cause damage to a person in respect of his rights in such property, the wrongful act is a tort, and the person so suffering damage in respect of his rights has a right of action (*g*).

Right of
action.

The rights which such person so has may be created or varied by a contract between him and some other person (*h*), and any wrongful act consisting of an interference by a third person which prevents such other person from fulfilling his contract, and thereby causes damage in respect of the rights so created or varied, will give rise to a right of action (*i*).

Interference
with rights in
property
arising out of
contract.

(ii.) *Wrongs Affecting a Person in Respect of his Property.*

923. Although no injury is caused to the actual thing constituting the subject-matter of property, yet the owner's rights of ownership

Torts against
right of
ownership.

(*c*) *Defries v. Milne*, [1913] 1 Ch. 98, C. A.; *Ryall v. Kidwell & Son*, [1913] 3 K. B. 123; so also, where the actual instrument of a tort is property apart from its owner, the property is not regarded as the delinquent *per se* (*Morgan v. Castlegate Steamship Co., The "Castlegate,"* [1893] A. C. 38, 52; *The Tasmania* (1888), 13 P. D. 110, 116).

(*d*) Thus, the owners of a ship or cargo in a ship may sue as such in respect of any wrong done to them in that capacity; see title ADMIRALTY, Vol. I., p. 81; *The Seacombe, The Devonshire*, [1912] P. 21, 38, C. A.; compare *Ahmedbhoy Habbibhoy v. Bombay Fire and Marine Insurance Co., Ltd.* (1912), L. R. 40 Ind. App. 10 (claim for damage by water to property in possession of insurance company for salvage after fire is not a claim in tort).

(*e*) *Kanhaya Lal v. National Bank of India* (1913), 29 T. L. R. 314, P. C.; see title TRESPASS, pp. 845, 848, 865, 888, *post*.

(*f*) The owner of a *profit à prendre* has rights of a possessory nature, and can bring an action of trespass (see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 340; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.), even though no entry is made on land in his possession (see title GAME, Vol. XV., p. 226); but trespass does not lie for disturbance of a mere incorporeal hereditament unless there is a right to exclusive possession; see title TRESPASS, p. 850, *post*.

(*g*) A patent is a franchise, so that an action for infringement of it cannot be brought in the county court (*E. v. Halifax County Court*, [1891] 2 Q. B. 263, C. A.; see title COUNTY COURTS, Vol. VIII., p. 431), and, although a registered trade mark is not a franchise (*Bow v. Hart*, [1905] 1 K. B. 592, 595, C. A.), the rights in it are analogous to patent rights, and in passing-off cases the court exercises its jurisdiction for the protection of property rather than of personal feelings; see title TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 748, *post*.

(*h*) It was pointed out in *Allen v. Flood*, [1893] A. C. 1, *per* CAVE, J., at p. 34, that a right arising from purchase in the narrower sense is preceded by a right *ex contractu*.

(*i*) To break a contract is an unlawful act (*South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, 253), and anyone who induces and procures another to commit such an unlawful act also acts unlawfully and therefore wrongfully (*ibid.*, at p. 250).

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tion of
Torts.

may be injuriously affected, and a tortious act is committed whenever a person wrongfully does that which injuriously affects the rights which another person has in property, whether the actual thing owned is injuriously affected or not. For instance, a person who maliciously (*k*) makes and publishes a false statement in disparagement of another person's title to property, whether real or personal (*l*), and thereby causes special damage to such other person, commits a tort which is recognised by the name "slander of title" (*m*), and gives a cause of action to such other person (*n*).

(iii.) *Wrongs Affecting a Person in Respect of his Person.*

Corporal
injury.

924. Every person (*o*) is entitled to immunity from all corporal insults and injuries (*p*), such as an assault causing actual injury

(*k*) The malice proved must be actual malice, but such actual malice may be inferred from the circumstances in which the statement is made (*Gerard v. Dickenson* (1590), 4 Co. Rep. 18a (statement made against defendant's own knowledge); *Waterer v. Freeman* (1617), Hob. 205; *Steward v. Young* (1870), L. R. 5 C. P. 122 (mere information not amounting to knowledge of untruth is no evidence of malice); *Dicks v. Brooks* (1880), 15 Ch. D. 22, 40, C. A. (misstatement of fact may be evidence of malice when misstatement of law might not be); *Pitt v. Donovan* (1813), 1 M. & S. 639 (mere irrationality of statement is not sufficient to prove malice); *Smith v. Spooner* (1810), 3 Taunt. 246 (lessor having right to re-enter denying ownership of plaintiff held not malicious); *Watson v. Reynolds* (1826), Mood. & M. 1 (objection to title of property at auction by solicitor without express authority of client)).

(*l*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 533, C. A.; and see title TRADE AND TRADE UNIONS, pp. 671 *et seq.*, *post*.

(*m*) See title TRADE AND TRADE UNIONS, p. 672, *post*. For a definition of "slander of title," see *Hatchard v. Mège* (1887), 18 Q. B. D. 771, 774. The term is not confined to slander of title strictly so called, but is used to describe actions of a similar description which can be brought "against anyone who maliciously decries the plaintiff's goods or some other thing belonging to him and thereby produces special damage to the plaintiff" (*ibid.*, at p. 775; *Ratcliffe v. Evans*, *supra*). As to threats by a patentee, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 227, 228; *Metro-politan Gas Meters, Ltd. v. British, Foreign and Colonial Automatic Light Controlling Co., Ltd.*, [1913] 1 Ch. 150; as to designs, see title TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 744, *post*. As to trade labels, see titles LIBEL AND SLANDER, Vol. XVIII., pp. 627 *et seq.*; TRADE AND TRADE UNIONS, p. 675, *post*. As to slander of goods, see titles LIBEL AND SLANDER, Vol. XVIII., pp. 628, 629; TRADE AND TRADE UNIONS, pp. 671 *et seq.*, *post*. As to the use of trade names and passing-off actions, see title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 744 *et seq.*, *post*.

(*n*) In actions of slander of title it is essential for the plaintiff to allege and to prove that the statement is false (see title LIBEL AND SLANDER, Vol. XVIII., pp. 677, 719, 736); that it is made and published by the defendant and concerning the plaintiff's title in disparagement thereof with actual malice, and that it caused special damage to the plaintiff (*ibid.*, p. 736; *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L.; *Dunlop Pneumatic Tyre Co. v. Maison Talbot* (1904), 20 T. L. R. 579, C. A.; *Barrett v. Associated Newspapers, Ltd.* (1907), 23 T. L. R. 666, C. A.); see title TRADE AND TRADE UNIONS, pp. 671 *et seq.*, *post*.

(*o*) An infant cannot sue for a tort suffered while *en ventre sa mère* (*Walker v. Great Northern Rail. Co. of Ireland* (1891), 28 L. R. Ir. 69).

(*p*) Such corporal insults and injuries include assault, whether there is or is not actual physical contact, and threats not amounting to an assault, provided that they cause damage; see title TRESPASS, p. 873, *post*; and as to the various descriptions of personal assault, see *ibid.*, p. 871; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 606.

to the person or a tortious act resulting in personal injury, not necessarily by direct physical action, but by means connecting the act and the injury so directly that the act is the cause of the injury (*q*).

SECT. 6.
Classifica-
tion of
Torts.

925. Every person is also entitled to protection from wrongful and malicious attacks which injuriously affect his character and reputation, and it is a tort when anyone without justification or excuse falsely and maliciously states and publishes of another that which is untrue and thereby causes him damage (*a*).

Injury to
character
or reputation.

926. Every person is also entitled to personal liberty of action free from any restraint not imposed in the due course of law, and it is a tort for any person to interfere with such liberty of action by imposing on another to his prejudice any restraint otherwise than in the due course of law (*b*). Where such a restraint, whether by force or only by a show of force, prevents a person from freely moving outside limits imposed by the will of another, it amounts to an imprisonment, and if imposed without justification is a false imprisonment and is actionable (*c*). It is a tort for any person, without reasonable and probable cause, maliciously to cause the arrest or imprisonment of another by course of law (*d*).

Personal
freedom.

927. Every person has a right to carry on his pursuits freely, safely, and without undue interference (*e*), and every other person is subject to the correlative duty arising therefrom, and is prohibited from any undue obstruction to the exercise of this right to the fullest extent compatible with the exercise of similar rights by others (*f*).

Freedom of
action.

For the purpose of so carrying on his pursuits, every person has a right to enter into contractual relationship with any other

Freedom of
contract.

(*q*) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C., 11th ed., p. 454; see p. 471, *ante*; and titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 606; TRESPASS, p. 873, note (*r*), *post*.

(*a*) See title LIBEL AND SLANDER, Vol. XVIII., pp. 606 *et seq*.

(*b*) Even where a restraint does not amount to an imprisonment, an action lies if damage arises from it (*Bird v. Jones* (1845), 7 Q. B. 742, *per DENMAN, J.*, at p. 755).

(*c*) *Ibid.*; see title TRESPASS, pp. 878, 885, *post*.

(*d*) See titles MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 689—693; TRESPASS, p. 879, *post*.

(*e*) *Primâ facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade according to his own discretion and choice (*Hilton v. Eekersley* (1856), 6 E. & B. 47, 74, Ex. Ch.; see title TRADE AND TRADE UNIONS, pp. 525, 527, 529, 595, *post*). A person has a right to do as he chooses with his own, whether labour or capital, within the limits set by the law, and this right involves a prohibition against infringement thereof, and such prohibition involves a remedy for the violation thereof (*Erle*, Law relating to Trade Unions (1869), p. 13).

(*f*) *R. v. Adelaide Steamship Co.* (1913), 29 T. L. R. 743, P. C. As to the necessity for any restraint of trade or interference with individual liberty of action being justified by the special circumstances of the case, see *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535; and title TRADE AND TRADE UNIONS, pp. 553 *et seq.*, *post*. Such a restraint must be reasonable in reference to the parties concerned, and reasonable in reference to, and in no way injurious to, the public (*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.*, *supra*; *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L.).

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Torts.

person by means of a contract which is enforceable at law (*g*). Where such a contractual relationship (*h*) exists, any person who wrongfully induces one of the parties to it to break the contract giving rise to the relationship so as to cause damage (*i*) to the other party to the contract commits a tort in respect of which such other party has a right of action (*k*), whether specific damage is proved to have actually accrued or not (*l*). It is a violation of legal right to interfere with contractual relations recognised by law if there is no sufficient justification for the interference (*m*).

Part II.—Liability for Torts.

SECT. 1.—*General Liability of a Person or Body of Persons for his or their Own Torts.*

SUB-SECT. 1.—*Liability of Individual Committing the Act.*

(i.) *In General.*

Actual tort-
feasor
generally
liable.

928. The person who actually commits a tortious act is

(*g*) It is an undue interference with the rights of A. to induce another person, B., with whom he has entered into a contract, to break such contract; see titles CONTRACT, Vol. VII., p. 345; MASTER AND SERVANT, Vol. XX., p. 267; TRADE AND TRADE UNIONS, pp. 649, 650, *post*.

(*h*) It is not every contract to do, or not to do, a particular act which constitutes a contractual relation such as that contemplated; the relation must be such that interference of an active nature with it causes more than nominal damage; see title ACTION, Vol. I., p. 11; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335, C. A. The illustrations given in *ibid.*, *per* JOYCE, J., at p. 350 (namely, contract to marry; contract not to enter into employment in particular trade), even if they are in fact illustrations of what RIGBY, L.J., was referring to when he said "The nature of the contract broken must be considered" (*Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. 147, 157, C. A.), do not indicate any rule of general application for distinguishing contracts which do constitute such a contractual relation from those which do not. The answer to that question cannot depend on the nature of the contract, and must depend on the question whether the contract is such that a breach of it is capable of causing damage to one of the parties to it by prejudicially affecting the legal rights arising out of it, and, in particular, the legal right inherent in a contract (see title CONTRACT, Vol. VII., p. 331) to enforce it at law (*National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*, at p. 361). For cases illustrating contractual relations in respect of which it has been held that an inducement to break the contract was a tort, see titles CONTRACT, Vol. VII., p. 345, note (*v*); TRADE AND TRADE UNIONS, p. 649, notes (*s*), (*a*), *post*.

(*i*) Actual damage is the gist of the action; see title TRADE AND TRADE UNIONS, p. 649, note (*t*), *post*.

(*k*) See *ibid.*, pp. 648 *et seq.*, *post*; and title CONTRACT, Vol. VII., p. 345; compare *Santen v. Busnach* (1913), 29 T. L. R. 214, C. A.

(*l*) *Exchange Telegraph Co. v. Gregory & Co.*, *supra*. Damage in such a case is essential to the cause of action, as it is the only thing which brings the tortfeasor into any relation with the aggrieved party (*ibid.*, *per* RIGBY, L.J., at p. 156); but it is enough to show that the act complained of was done in such a way as to be likely to cause damage, though proof of specific damage is not given (*ibid.*, *per* Lord ESHER, M.R., at p. 153).

(*m*) *Quinn v. Leatham*, [1901] A. C. 495, *per* Lord MACNAGHTEN, at p. 510; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*; *Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, C. A.

SECT. 1.
General
Liability
for Torts.

responsible for it (*n*), notwithstanding that in committing it he was acting as agent for another person (*o*), unless the relation out of which the unaccomplished duty arises is, to the knowledge of the person suffering the wrong, a relation between him and the principal, and the agent is known by such person to be acting on behalf of the principal (*p*), or the act is committed by a servant or agent authorised by and acting for and on behalf of the Crown (*q*), or in some other way the act is such that the authority of the principal deprives it of its tortious character (*a*). There may, however, be defences open to the agent which are not open to the principal (*b*).

(ii.) *In Special Cases.*

(a) *Qualifications of Liability.*

929. In certain descriptions of individual persons the capacity, function or personal qualification of the individual may affect his liability either by affecting the capacity to undertake the duty which is broken or to commit the act which is a breach of it, or by affording a defence to an action for injuries brought in respect of such breach (*c*). Qualifications of liability.

(*n*) *The Mentor* (1799), 1 Ch. Rob. 179, 181. Thus, the liability of the building owner for injuries inflicted in the course of the work will not absolve the contractor (see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 317), unless judgment has been recovered against the building owner (*ibid.*).

(*o*) See titles AGENCY, Vol. I., pp. 224 *et seq.*; COMPANIES, Vol. V., p. 296; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 315; MASTER AND SERVANT, Vol. XX., pp. 276 *et seq.*; TRESPASS, p. 897, *post*. As to the distinction between an action for rescission and an action of deceit for this purpose, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 709, 710, 712.

(*p*) *The Tasmania* (1888), 13 P. D. 110, 114.

(*q*) Since the King can neither do nor authorise a wrong, proceedings for a tort will not lie against the Crown, or any servant of the Crown alleged to be acting by the Crown's authority (see titles AGENCY, Vol. I., p. 213; CROWN PRACTICE, Vol. X., p. 28; MASTER AND SERVANT, Vol. XX., p. 261; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 307), even though he had no authority so to act at the time, if the act is adopted afterwards (*Buron v. Denman* (1848), 2 Exch. 167). It is not enough that the person committing the tortious act is an official duly appointed by and purporting to act on behalf of the Crown, nor even that such person is acting directly under the orders of a higher official; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 316. The court can inquire into the question whether the act is justified by any Act of Parliament or State authority; if it is so justified it is not a tort, and, if it is not so justified, the person actually committing it, or legally responsible for it, remains liable (*Raleigh v. Goschen*, [1898] 1 Ch. 73; *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178, C. A.; see title CONSTITUTIONAL LAW, Vol. VI., pp. 383, 386, 387, 415; see also *Nireaha Tamaki v. Baker*, [1901] A. C. 561, 575, P. C.; and title EXECUTION, Vol. XIV., p. 41). As against a foreigner the order of the Crown may justify a trespass although it would not do so as against a subject; see title TRESPASS, p. 847, *post*.

(*a*) No action can be brought against the agent of a foreign Government for an act done abroad under its authority; see title AGENCY, Vol. I., p. 222, note (*i*).

(*b*) See *ibid.*, pp. 225, 226.

(*c*) See pp. 478 *et seq.*, *post*.

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General
Liability
for Torts.Liability
of infants.(b) *Infants.*

930. An infant above the age of seven years is liable in respect of a tortious act committed by him if such act is not directly founded upon a contract upon which the infant cannot be sued (*d*), but is not liable if such act is directly founded on such a contract. An infant below the age of seven years is not criminally responsible for acts of a criminal nature involving a malicious intention on the ground that there is an irrebuttable presumption that he is incapable of forming such a malicious intention (*e*), and accordingly an infant below that age would presumably not be held liable for a tortious act, such as libel and slander, which involves an inference that a malicious intention existed. The presumption of law that between the ages of seven and fourteen an infant has not sufficient capacity to know that what he did was criminally wrong may be rebutted, and in cases where the malicious intention required to constitute an actionable tort is similar to that required to constitute a crime, such malicious intention may presumably be established from the circumstances attending the act, but need not necessarily be inferred from the mere doing of it (*f*). An infant is not liable for a tort committed by his agent unless committed by his direct command (*g*).

(c) *Married Women.*Liability
of married
women.

931. A married woman is liable to any third person for injuries resulting from any tort committed by her (*h*), but judgment against her will be limited to her separate estate not subject to a restraint on anticipation (*i*).

(d) *Lunatics.*Liability
of lunatics.

932. A lunatic is not necessarily free from liability for a tortious act committed by him (*k*). In cases where malicious intention is essential, but such intention may be inferred from the act done, the inference is not necessarily rebutted by proof that the person doing it was a lunatic (*l*), even though so found by inquisition (*m*). The

(*d*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 74, 75; as to a father's liability for his son's torts, see *ibid.*, p. 116, note (*p*).

(*e*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 239.

(*f*) See *ibid.*

(*g*) See title AGENCY, Vol. I., p. 150.

(*h*) See title HUSBAND AND WIFE, Vol. XVI., pp. 436, 460. As to the liability of the husband, see p. 487, *post*.

(*i*) See title HUSBAND AND WIFE, Vol. XVI., pp. 455, 456.

(*k*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 403.

(*l*) *Emmens v. Pottle* (1885), 16 Q. B. D. 354, 356, C. A.

(*m*) *Hanbury v. Hanbury* (1892), 8 T. L. R. 559, C. A., *per* Lord ESHER, M.R., at p. 560 ("Whenever a person did an act, which act if done by a person with a perfect mind would make him civilly or criminally responsible to the law, if the disease in the mind of the person was not so great as to make him unable to understand the nature and consequence of the act which he was doing, that was an act for which he would be civilly or criminally responsible"); see also *Mordaunt v. Mordaunt* (1872), L. R. 2 P. & D. 109, 382; *Long v. Long and Johnson* (1890), 15 P. D. 218; and title HUSBAND AND WIFE, Vol. XVI., pp. 484, 485.

fact that a person has been so found may, however, have a material bearing on the nature of the duty owed by him from breach of which injury has resulted, and might afford a ground of defence if such duty could only have arisen out of a valid contract which he was not capable of entering into (*n*), and where the tortious act alleged arises out of the ownership of property and the owner has been found to be lunatic or to be incapable of managing his affairs, the duty arising out of such ownership would *primâ facie* rest on his committee or trustee, as the case might be (*o*).

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General
Liability
for Torts.

(e) *Bankrupts.*

933. The liability of a bankrupt for a tort committed by him, being a demand in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust, is not provable (*a*), and is, therefore, not discharged by the bankruptcy (*b*), but a person injured by a tortious act and having an equitable claim, or a claim in contract arising out of it, may waive the tort and prove (*c*), and where damages for a tort have become liquidated by a final judgment, award or compromise, they may be proved in the bankruptcy (*d*). Where the duty broken arises out of the possession or control of property which has vested in the trustee, there may be a liability on the estate and not on the bankrupt, and if the liability is not provable the trustee may by leave of the court be sued as representing the estate (*e*).

Liability of
bankrupts.

(f) *Foreigners and Foreign Ambassadors.*

934. A foreigner is liable for a tort committed within the jurisdiction (*f*), and is liable for a tort committed outside the jurisdiction unless the tortious act is committed in respect of land outside the jurisdiction (*g*), or the law of the place where it was committed expressly permits the tortious act, and thereby takes away its tortious character, or gives exclusive jurisdiction over it to the courts having jurisdiction at the place where it was committed (*h*), or grants a discharge in respect of it (*i*).

Liability of
foreigners.

A foreign ambassador cannot be made liable against his will for a tortious act (*k*).

Ambassadors.

(*n*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 396.

(*o*) See *ibid.*, pp. 433 *et seq.*

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37 (1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 197, 198.

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (2).

(*c*) *Re Edwards, Ex parte Baum* (1874), 9 Ch. App. 673; *Watson v. Holliday* (1882), 20 Ch. D. 780; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 198.

(*d*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 25; *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494, C. A.

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 136; *Watson v. Holliday, supra*.

(*f*) See title CONFLICT OF LAWS, Vol. VI., p. 248.

(*g*) See *ibid.*, pp. 250, 251.

(*h*) See *ibid.*, pp. 248, 249.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 272

(*k*) See title ACTION, Vol. I., pp. 19, 20. As to foreign sovereigns, see *ibid.*; titles CONFLICT OF LAWS, Vol. VI., p. 182; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 310, 311.

SECT. I.

General
Liability
for Torts.Extent of
liability of
corporations.Responsi-
bility of
corporations
for agents.Liability
of public
bodies for
acts of
officers.SUB-SECT. 2.—*Liability of Corporations.*

935. A corporation aggregate (*l*) or sole (*m*) is liable to be sued for a tort in respect of which an action would lie against it if it were an individual, unless the act complained of is one which the corporation could not in any circumstances be authorised by its constitution to commit, and a corporation may be made liable even though malice is an essential element in the cause of action (*n*). Even where the act done is an illegal act the corporation may be responsible for it, provided that it is not to such an extent *ultra vires* that it cannot reasonably be said to be the act of the corporation (*a*).

In general, a tortious act committed by a corporation aggregate is in fact committed by a servant or agent of the corporation (*b*) acting for or on behalf of the corporation, and the act being one which the corporation is itself competent to perform, the corporation is responsible for it (*c*). Where a corporation such as a joint-stock company carries on business, it is also responsible for a tortious act committed by a servant in the course of his employment or by an agent in the course of business done on behalf of the corporation (*d*), even though such act is not one which the corporation is by its constitution competent to perform, provided that it is one which it might possibly be authorised by its constitution to commit (*e*), and it may ratify such a tortious act (*f*).

SUB-SECT. 3.—*Public Bodies and Officers.*

936. A public body, namely, a body endowed with powers to be exercised and duties to be performed for the benefit of the public, is responsible for any tortious act committed in the exercise of such powers or the performance of such duties (*g*) by any servant or agent,

(*l*) See title CORPORATIONS, Vol. VIII., pp. 386 *et seq.*

(*m*) As to acts of a tortious character, such as waste by the occupant of the office in the case of a corporation sole, see title ECCLESIASTICAL LAW, Vol. XI., pp. 767, 768.

(*n*) See titles AGENCY, Vol. I., p. 213; CORPORATIONS, Vol. VIII., pp. 387, 388.

(*a*) *Campbell v. Paddington Corporation*, [1911] 1 K. B. 869.

(*b*) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146, C. A., *per* FLETCHER MOULTON, L. J., at p. 156: "In the case of a corporation, such, for instance, as a limited company, the acts must necessarily be done by agents."

(*c*) See title AGENCY, Vol. I., p. 213.

(*d*) See titles CLUBS, Vol. IV., pp. 425, 426; COMPANIES, Vol. V., p. 309; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; *Radley v. London County Council* (1913), 109 L. T. 162. A liability for such an act may arise by estoppel when there is an apparent authority for the person to act as agent, or an apparent acting within the actual authority of the agent; see title COMPANIES, Vol. V., p. 294.

(*e*) See titles COMPANIES, Vol. V., p. 293; CORPORATIONS, Vol. VIII., pp. 386 *et seq.*

(*f*) See titles COMPANIES, Vol. V., p. 297; CORPORATIONS, Vol. VIII., p. 388.

(*g*) As to restraining such bodies from acts which are not within their powers or duties, see title INJUNCTION, Vol. XVII., pp. 227, 228; as to negligent acts committed in the exercise of such powers, or the performance of such duties, see title NEGLIGENCE, Vol. XXI., pp. 422 *et seq.*; as to nuisances so committed, see title NUISANCE, Vol. XXI., pp. 557, 558.

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for Torts.

including any officer acting on behalf of the authority within the scope of his employment or in performance of duties or exercise of powers delegated to him by the authority, but is not responsible for such an act committed by an officer appointed by the authority merely on the ground that he is so appointed, if the duty which he performs or the power which he exercises in committing the tortious act is bestowed on him for the benefit of the public and not for the benefit or in aid of the authority (*h*).

937. An act committed by a public body in carrying out a duty imposed upon it by Parliament is not tortious, even though it causes damage to an individual, if the act is a necessary result of the performance of the duty or if the doing of the act in the way in which it is done is expressly or impliedly authorised by Parliament (*i*). In such cases the individual injured is without a remedy unless a remedy is provided by the statute (*j*). Powers which when exercised may cause injury must not, however, be exercised arbitrarily, carelessly, or oppressively (*k*), but *bonâ fide* and with judgment and discretion (*l*), and if a public body having power to do a particular act does it negligently (*m*) or otherwise in breach of some legal right (*n*) in such a way as to cause damage to an individual, it is liable, although it was *bonâ fide* acting in the exercise of powers bestowed on it for the benefit of the public (*o*).

Exercise of
statutory
powers.

938. In actions arising out of torts, no sound distinction of general application can be drawn between "nonfeasance" and "misfeasance" (*p*). Where a duty towards the individual injured existed

Nonfeasance
and mis-
feasance.

(*h*) *Tozeland v. West Ham Union*, [1907] 1 K. B. 920, C. A.; see titles AGENCY, Vol. I., p. 213; POOR LAW, Vol. XXII., p. 546; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 322, 323.

(*i*) *London and Brighton Rail. Co. v. Truman* (1885), 11 App. Cas. 45; *East Fremantle Corporation v. Annois*, [1902] A. C. 213, P. C.; and see pp. 495 *et seq.*, *post*.

(*j*) As to compensation where property is injuriously affected by the exercise of compulsory powers, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, pp. 43 *et seq.*, 104 *et seq.*

(*k*) *Boulton v. Crowther* (1824), 2 B. & C. 703.

(*l*) *Galloway v. London Corporation* (1864), 2 De G. J. & Sm. 213, 229, C. A.; see titles RAILWAYS AND CANALS, Vol. XXIII., p. 724; STATUTES, p. 174, *ante*.

(*m*) For cases relating to acts alleged to be negligent, see title NEGLIGENCE, Vol. XXI., pp. 422 *et seq.*; *Shrimpton v. Hertfordshire County Council* (1911), 27 T. L. R. 251, H. L.

(*n*) For cases relating to nuisance, see title NUISANCE, Vol. XXI., pp. 557, 558.

(*o*) A public body doing a legal wrong, without legal justification or excuse, is in exactly the same position as a private person, excepting that, where Parliament has provided a particular remedy, that remedy must be followed (*Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93, 107); thus, it cannot be compelled by a mandatory injunction, or by mandamus, when Parliament has provided another remedy (*Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.); see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 563 *et seq.*; STATUTES, p. 173, *ante*.

(*p*) See titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 316, 317, note (*i*); NEGLIGENCE, Vol. XXI., pp. 375, 376. A distinction has been drawn between nonfeasance of a gratuitous undertaking which does not impose liability and misfeasance which on the contrary does (*Elsee v. Gatward* (1793), 5 Term Rep. 143), and

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to do the act by the omission whereof the injury is caused, the non-feasance of such an act gives rise to a cause of action to the same extent as a misfeasance of some act which there is a duty to perform in a particular manner (*q*). In deciding the preliminary question, however, whether in the particular case or class of case a duty does exist towards the individual, and, if so, what the nature of the duty is, the distinction may be, and frequently is, vital (*r*), more especially when the duty alleged to have been not performed or wrongly performed is one which is imposed on a public authority to be performed gratuitously or at the public expense for the benefit of the public (*s*).

Transferred
public duties.

Where such a duty exists and is clearly defined, the fact that it is transferred to and newly imposed on a new authority will not in itself affect the existence or the nature of the duty, and if the

in certain cases a distinction may exist between the commission of an act by a person which involves an act of conscious volition on his part and, if the act involves danger to others, imposes a duty on him to guard against such danger (as when a person sends an animal not known to be savage on to the highway and it does damage), and some mere omission which does not involve any act of conscious volition, and therefore does not necessarily involve the existence of a state of mind when it is the duty of a person to consider whether care is required or not, such as a mere omission to fence in such an animal, from which if there was no obligation to fence no liability will result; see title NEGLIGENCE, Vol. XXI., pp. 405 *et seq.* Similarly, where a public authority omits to perform some function, and in consequence of such omission damage results to an individual, the mere omission will not give rise to a liability to the individual unless Parliament intended to impose a duty towards him to perform the function omitted (*Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64; see title STATUTES, pp. 175, 176, *ante*); but if the authority elects to do an act which it had a discretion to do or not to do, it comes under such duties as in the case of an individual would result from such an election; see note (*o*), p. 481, *ante*, notes (*g*), (*r*), *infra*, pp. 495, 496, *post*; and title STATUTES, p. 176, *ante*. As to the distinction between omission and commission in relation to waste, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 175.

(*q*) *Kelly v. Metropolitan Rail. Co.*, [1895] 1 Q. B. 944, C. A. "You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was nonfeasance. . . . The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all" (*McClelland v. Manchester Corporation*, [1912] 1 K. B. 118, *per LUSH, J.*, at p. 127); see also *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K. B. 149, C. A., *per KENNEDY, L.J.*, at p. 161; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149; and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 316.

(*r*) Thus, although no distinction between nonfeasance and misfeasance exists in general, a distinction does exist in respect to the question whether an action will lie for that in respect of which an indictment may be preferred (*Sydney Municipal Council v. Bourke*, [1895] A. C. 433, 442, P. C.).

(*s*) *Dawson & Co. v. Bingley Urban Council*, *supra*, *per VAUGHAN WILLIAMS, L.J.*, at p. 154 ("Well-established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injury in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such person is one, yet the public body will be liable if by its acts it alters the normal condition of something which it has a statutory duty to provide or maintain, and in consequence some person

duty of the original authority towards an individual was limited to doing properly that which was done, so that there was no liability unless there was misfeasance, the duty on the substituted authority will be similarly limited (*t*).

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939. If a duty is laid by statute on any person or authority, every member of the public who is concerned in the performance of it has the right to have that duty performed (*u*). Rights of public.

940. If a statute creates a new duty and provides the remedy for a breach of it, that remedy must be adopted (*x*), but if the remedy provided is for the infringement of a right of property, the jurisdiction of the court to protect that right by injunction is not excluded unless the statute expressly so provides (*a*). Statutory remedy.

941. If a statute creates a new duty for the benefit of the public (*b*) and not for the benefit of individuals, and does not provide a remedy, proceedings can only be taken in the name of the Attorney-General, unless the interference with the public right in question involves interference with some private right of the plaintiff, or the plaintiff in respect of his right as a member of the public suffers some special damage peculiar to himself from the interference with the public right (*c*). Where no special remedy provided.

942. Where a statute imposes a duty and a person is injured through a breach of such duty, and it appears to be within the purview of the statute (*d*) that there should be a right of action for the resulting damages against the person on whom the duty is imposed, the person injured may bring such an action (*e*). Right of action.

Where a statute creates a new duty for the benefit of any individual person or class of persons, and neither by providing a particular remedy nor in any other way excludes a right of action, any individual person or member of the class who suffers injury by Individual right.

of a class for whose benefit the statutory duty is imposed is injured"); see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 132 *et seq.*; NEGLIGENCE Vol. XXI., pp. 375 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 318; *Gould v. Birkenhead Corporation* (1909), 74 J. P. 105.

(*t*) *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *Maguire v. Liverpool Corporation*, [1905] 1 K. B. 767, C. A.; *Short v. Hammersmith Corporation* (1910), 104 L. T. 70; see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 133; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 318.

(*u*) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146, 157, C. A.; affirmed, [1910] A. C. 74; *Parkinson v. Garstang Railway*, [1910] 1 K. B. 615; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149; *Watkins v. Naval Colliery Co. (1897), Ltd.*, [1912] A. C. 693; see title STATUTES, p. 192, *ante*.

(*x*) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; *Robinson v. Workington Corporation*, [1897] 1 Q. B. 619, C. A.; see title STATUTES, pp. 169, 189, *ante*.

(*a*) *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894.

(*b*) As to the difference between a public general Act and a private Act, see *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, 448, C. A.

(*c*) *Boyer v. Paddington Borough Council*, [1903] 1 Ch. 109; see title INJUNCTION, Vol. XVII., p. 271.

(*d*) A duty may exist although not imposed by the enacting words; see title STATUTES, p. 171, *ante*.

(*e*) *Couch v. Steel* (1854), 3 E. & B. 402, as modified and explained by *Atkinson v. Newcastle Waterworks Co.*, *supra*; *Smith v. Union Bank of London* (1875), 1 Q. B. D. 31, C. A., *per Lord Cairns, L.C.*, at p. 35;

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Liability
for Torts.

Liability for
misfeasance
only.

reason of a breach of the duty so owed to him may bring an action of tort in respect of it (*f*).

Where a duty is imposed on a public body for the benefit of the public, or even of a particular class of the public, and a remedy is provided for the failure to perform it, the mere non-performance does not, in the absence of special provisions in the statute, give rise to a right of action to the person injured even though he is a member of the particular class (*g*). Such body is, however, liable for misfeasance in the performance of such duty, even though the actual cause of the injury is an omission to do something, as, for example, when the authority having altered the normal condition of something has a duty to maintain it in the altered condition and omits to do so (*h*).

Judicial acts.

943. Persons exercising judicial functions in a court are exempt from all civil liability for anything done or said by them in their judicial capacity (*i*).

SUB-SECT. 4.—*Trade Disputes and Liability of Trade Unions.*

Freedom from
liability.

944. Where a person induces another not to employ or to serve a third person, and accompanies such inducement by violence or threats, he commits a tort which is actionable (*j*), but if it is committed by or on behalf of a trade union, an action against the trade union in respect of it cannot be entertained by any court (*k*).

If without violence or threats a person induces another to break a contract of employment and thereby causes damage to the other party to the contract, he commits a tort which is actionable (*l*); but to this rule there are certain exceptions introduced by statute (*m*).

SECT. 2.—*Liability in Tort for Acts of Others.*

SUB-SECT. 1.—*Master and Servant.*

Liability of
servant.

945. The person who actually commits a tort is liable although in committing it he is acting as servant of another person, and although he has no reason to know or suspect that the act is wrongful, unless the act is incapable of being regarded as a tort in the absence of actual or imputed knowledge (*n*).

R. v. Ingall (1877), 2 Q. B. D. 199, *per* MEILOR, J., at p. 207; *Gibraltar Sanitary Commissioners v. Orfila* (1890), 15 App. Cas. 400, 411, P. C.; *Bentley v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891] 3 Ch. 222; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; see the cases cited in note (*u*), p. 483, *ante*; and title EXPLOSIVES, Vol. XIV., pp. 396, 397.

(*f*) See title CORPORATIONS, Vol. VIII., pp. 389, 390; *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K. B. 149, C. A.

(*g*) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; compare *Hartley v. Rochdale Corporation*, [1908] 2 K. B. 594.

(*h*) *McClelland v. Manchester Corporation*, [1912] 1 K. B. 118; see titles NEGLIGENCE, Vol. XXI., pp. 375 *et seq.*; NUISANCE, Vol. XXI., pp. 518 *et seq.*

(*i*) See titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 323; TRESPASS, p. 882, *post*.

(*j*) *Conway v. Wade*, [1909] A. C. 506, 510; see title TRADE AND TRADE UNIONS, pp. 644—660, *post*.

(*k*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4; see title TRADE AND TRADE UNIONS, pp. 665, 666, *post*.

(*l*) *Conway v. Wade*, *supra*, at p. 511; and see p. 476, *ante*.

(*m*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47); see title TRADE AND TRADE UNIONS, pp. 654, 665 *et seq.*, *post*.

(*n*) See titles MASTER AND SERVANT, Vol. XX., pp. 276, 277; TROVER AND DETINUE, p. 897, *post*; *A.-G. v. De Winton*, [1906] 2 Ch. 106.

The master of a person who commits a tort is liable wherever the person in committing the tort was acting as his servant, that is, where he commits the tort in the course of doing something which he is employed to do (*o*), or where the tort committed is an act done within the apparent scope of the servant's authority and in the course of his employment (*p*).

SECT. 2.
Liability
in Tort
for Acts
of Others.

Liability of
master.

SUB-SECT. 2.—*Principal and Agent.*

946. A person is responsible for a tortious act, although it is not actually committed by him, if it is committed by a person who is, in committing the act, his agent for that purpose, that is, wherever the person is expressly authorised by him to do the particular act or some other act which necessarily results in the tortious act, or where the act is within the scope of the authority of the person committing it measured by reference to his ordinary employment or duties (*q*), or is afterwards ratified (*a*).

Liability of
principal.

SUB-SECT. 3.—*Partners.*

947. All the members of a firm are liable for torts committed by a partner in the ordinary course of business as carried on by the firm (*b*) or with the authority of the partners (*c*).

Liability of
partners.

SUB-SECT. 4.—*Independent Contractor.*

948. Where a tortious act is committed in the performance of some term of a contract, that fact does not of itself render liable the person for whose benefit such performance enures. If the performance of that term is undertaken by an independent contractor (*d*) who acts as such, and not as a servant or agent of the other party to the contract, the liability attaches to such independent contractor, but if such other party retains in his own hands the control over or interferes with such performance he remains responsible (*e*).

Tort
committed
in perform-
ance of
contract.

949. An independent contractor is one who contracts to produce

(*o*) Whether in fact done for the benefit of the master or not (*Irwin v. Waterloo Taxi-Cab Co., Ltd.*, [1912] 3 K. B. 588, C. A.); compare *Hall v. Lees*, [1904] 2 K. B. 602, C. A. (nurse not servant of nursing association); *Evans v. Liverpool Corporation*, [1906] 1 K. B. 160. A statute may render a master liable for an act even though done in violation of express orders; see title STATUTES, p. 179, *ante*.

(*p*) See title MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*; compare *Houghton v. Pilkington*, [1912] 3 K. B. 308; *Radley v. London County Council* (1913), 109 L. T. 162. As to the right of a trustee to be indemnified out of the trust estate where such liability is incurred in the reasonable and proper management of the estate, and as to the right of the person injured to be subrogated to such right, see title MASTER AND SERVANT, Vol. XX., p. 263.

(*q*) See titles AGENCY, Vol. I., pp. 211, 212; CLUBS, Vol. IV., pp. 425, 426; TRESPASS, p. 897, *post*; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; *Samson v. Aitchison*, [1912] A. C. 844, P. C.

(*a*) See title AGENCY, Vol. I., p. 180.

(*b*) See title PARTNERSHIP, Vol. XXII., pp. 13, 30.

(*c*) See *ibid.*, p. 34.

(*d*) *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335, 340, 342, C. A.; *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A.; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392, C. A.; *Hurlstone v. London Electric Rail. Co.* (1913), 29 T. L. R. 514.

(*e*) See title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 316.

SECT. 2.
**Liability
 in Tort
 for Acts
 of Others.**

Independent
 contractor
 distinguished
 from servant
 or agent.

Employer
 not, as a
 rule, liable.

When
 employer
 liable.

a specified result, employing his own means to produce that result, and is in performing his contract entirely independent of any control by or interference from the person with whom he has contracted (*f*). An independent contractor is to be distinguished from a servant by the test whether or not the person with whom he contracts retains the power of directing what work is to be done and of controlling the manner of doing it (*g*), and from an agent by the test that he is not bound to obey instructions other than those which are expressed in or implied by the terms of his contract (*h*).

950. No one can be made liable for an act or breach of duty unless it is traceable to himself (*i*) or some person for whom he is in respect of it responsible (*k*), and where a person employs an independent contractor to do some lawful work which does not, and in the natural course of things will not, involve or result in any duty either towards the community or towards a third party, and a tort is committed in the course of such employment by such independent contractor, the employer is not liable, even though the tort is committed in the doing of work which will ultimately be for his benefit (*a*).

951. Where a person employs another to do work which does, or in the natural course of things will (*b*), involve or result in a duty on the employer either towards the community or towards a third party, the employer cannot escape the responsibility for the performance of that duty by employing someone else to perform it, however competent such person may be, even though such person is an independent contractor and has agreed to assume the whole responsibility (*c*).

(*f*) See title AGENCY, Vol. I., pp. 147, 148.

(*g*) See title MASTER AND SERVANT, Vol. XX., p. 67; *Samson v. Aitchison*, [1912] A. C. 844, P. C. (control of motor car).

(*h*) See title AGENCY, Vol. I., pp. 147, 148.

(*i*) *Pickard v. Smith* (1861), 10 C. B. (N. S.) 470, *per WILLIAMS, J.*, at p. 480 ("Unquestionably no one can be made liable for an act or breach of duty unless it is traceable to himself, or his servant or servants, in the course of his or their employment"); approved in *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93, 114).

(*k*) *Tozeland v. West Ham Union*, [1907] 1 K. B. 920, C. A. (guardians not responsible for act done by person who was appointed by them, but was neither their agent nor servant); *Ching v. Surrey County Council*, [1910] 1 K. B. 736, C. A. (education authority responsible for negligent act of managers of school, although not entirely appointed by them, as being their statutory agents to keep the school efficient).

(*a*) See title MASTER AND SERVANT, Vol. XX., pp. 264 *et seq.*; *Padbury v. Holliday and Greenwood* (1912), 28 T. L. R. 494, C. A. There are two grounds only on which a person who procures the act of another can be made responsible for its consequences:—(i.) if he knowingly and for his own purposes induces that other to commit an actionable wrong; (ii.) if where the act of that other is not in itself wrongful, but has injured a third party, he has procured his object by illegal means directed against that third party (*Allen v. Flood*, [1898] A. C. 1, *per Lord WATSON*, at p. 96; *National Phonograph Co., Ltd. v. Edison-Bell Phonograph Co., Ltd.*, [1908] 1 Ch. 335, 359, C. A.).

(*b*) *Robinson v. Beaconsfield Rural Council*, [1911] 2 Ch. 188, C. A.

(*c*) *Bower v. Peate* (1876), 1 Q. B. D. 321; *Hurlstone v. London Electric Rail. Co.* (1913), 29 T. L. R. 514; *The Snark*, [1900] P. 105, C. A.; and see titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 315, 316; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 136, 137; NEGLIGENCE, Vol. XXI., pp. 473, 474; NUISANCE, Vol. XXI., p. 557; TRESPASS, p. 846, note (*g*), *post*.

SUB-SECT. 5.—*Husband and Wife.*

952. A husband is during coverture liable to be sued jointly with his wife for any tort committed by her during coverture (*d*), excepting where the tort is a fraud connected with a contract of the wife by means of which the wife obtains the contract (*e*).

A husband is also liable in respect of any tort committed before marriage by the wife to the extent of any property which he received from or through her (*f*).

The liability of a husband in respect of his wife's torts is terminated by the death of the wife, or by divorce or judicial separation (*g*).

953. A husband cannot during coverture sue his wife for a tort even in respect of his property. A wife cannot during coverture sue her husband for a tort except for the security and protection of her separate property (*h*).

SUB-SECT. 6.—*Liability under Guarantee or Contract of Indemnity.*

954. Although a tort involves the commission of some act of a wrongful nature, a contract guaranteeing another against, or indemnifying another in respect of, a tort or its consequences is not invalid in this respect (*i*) unless the giving of a guarantee or of an indemnity is contrary to public policy (*j*), or the guarantee is so framed that the commission of an illegal act is or may be presumed to be contemplated by the parties to the contract (*k*).

SECT. 3.—*Liability when Tort Committed by Several Persons.*SUB-SECT. 1.—*Joint Tortfeasors.*

955. Where two or more persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by reason of their common act (*l*). Where several persons so concur in some act or default which is tortious that each of them is responsible for the breach of duty, they are called joint tortfeasors. A person whose legal right is injured by a tort so committed has a right of action against any or all of such joint tortfeasors (*m*), unless

(*d*) See *Seroka v. Kattenburg* (1886), 17 Q. B. D. 177; *Earle v. Kingscote*, [1900] 2 Ch. 585, C. A.; *Beaumont v. Kaye*, [1904] 1 K. B. 292, C. A.; and titles HUSBAND AND WIFE, Vol. XVI., pp. 436 *et seq.*; LIBEL AND SLANDER, Vol. XVIII., pp. 617, 618.

(*e*) See title HUSBAND AND WIFE, Vol. XVI., p. 438.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 13—15.

(*g*) See title HUSBAND AND WIFE, Vol. XVI., p. 437.

(*h*) See *ibid.*, p. 460.

(*i*) See title GUARANTEE, Vol. XV., pp. 439, 444, 446, 447; *Newcombe v. Yewen and Croydon Rural District Council* (1913), 29 T. L. R. 299.

(*j*) See title GUARANTEE, Vol. XV., p. 446.

(*k*) See *ibid.*, pp. 446, 453, note (*h*); *Smith & Son v. Clinton* (1908), 99 L. T. 840; *Kirby v. Chessum* (1913), *Times*, 15th and 18th October.

(*l*) *De Bodreugam v. Le Arcedekin* (1302), Y. B. 30 Edw. 1, fol. 106; *Clark v. Newsam* (1847), 1 Exch. 131; *Smith v. Streatfeild* (1913), 109 L. T. 173; see titles PRACTICE AND PROCEDURE, Vol. XXIII., p. 102; TRESPASS, p. 846, note (*g*), *post*; TROVER AND DETINUE, p. 898, *post*. As to the Admiralty rule, see title SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.

(*m*) *Mills v. Armstrong, The "Bernina"* (1888), 13 App. Cas. 1. For other cases relating to ships held to blame, see title SHIPPING AND

SECT. 2.

Liability
in Tort
for Acts
of Others.

Husband's
liability to
third persons.

Liability to
each other.

Indemnity
against tort.

Position of
joint tort-
feasors.

SECT. 3.
Liability
when Tort
Committed
by Several
Persons.

he stands in such a relation to one of them as to be responsible for his act or default (*n*). Each of such joint tortfeasors may be sued alone and compelled by execution to pay the damages compensating for the whole loss (*o*).

The fact that two or more persons have concurred or assisted in or contributed to an act which has caused damage is not of itself sufficient to make such persons jointly liable, unless by reason of a joint duty being owed to the person who has suffered damage, or on some other ground, relief may be claimed against such persons jointly (*p*).

Successive
torts.

956. The fact that a person has himself committed some tortious act which led up to and resulted in a tortious act committed by some other person renders the former person liable if his act was a part of the true cause of the injury, but not otherwise (*q*). Accordingly where between a tortious act and an injury consequent thereon some other tortious act intervenes, unless the intervention is such that the original act is not the true cause of the injury, both acts contribute to the tort, and the person doing the first act remains liable (*r*).

Judgment
against joint
tortfeasors.

957. Where two or more joint tortfeasors commit a tort there is only one cause of action, and judgment may be recovered against any or all of them for the whole amount of the damages (*s*).

If all are sued and judgment obtained against all, execution may go against one and the whole of the damages may be obtained from him, and in no case can any contribution among such tortfeasors be obtained by action at law (*t*).

If judgment is recovered, whether it be against one or more (*u*),

NAVIGATION, Vol. XXVI., Part XI.; and for cases of joint negligence, see title NEGLIGENCE, Vol. XXI., pp. 382, 433, 434.

(*n*) *Mills v. Armstrong, The "Bernina"* (1888), 13 App. Cas. 1. An ordinary passenger is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence of those in control of the vehicle in which he travels, unless he actually assumes control over their actions and thereby occasions mischief (*ibid.*, at p. 18).

(*o*) *The Seacombe, The Devonshire*, [1912] P. 21, 38, C. A.

(*p*) *Smurthwaite v. Hannay*, [1894] A. C. 494; *Sadler v. Great Western Rail. Co.*, [1896] A. C. 450; *Gower v. Couldridge*, [1898] 1 Q. B. 348, C. A.; *Thompson v. London County Council*, [1899] 1 Q. B. 840, C. A.; *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; *Munday v. South Metropolitan Electric Light Co., Ltd., and New Gutta Percha Co., Ltd.* (1913), 29 T. L. R. 346; see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 103, 104.

(*q*) *Rickards v. Lothian*, [1913] A. C. 263, P. C.; *Ely Brewery Co. v. Pontypridd Urban District Council* (1903), 68 J. P. 3.

(*r*) *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, [1909] A. C. 640, P. C.; see title NEGLIGENCE, Vol. XXI., p. 380.

(*s*) See title LIBEL AND SLANDER, Vol. XVIII., p. 616, note (*a*); *Cocke v. Jennot* (1614), Hob. 66; *Hume v. Oldacre* (1816), 1 Stark. 351; *Eliot v. Allen* (1845), 1 C. B. 18; *Clark v. Newsam* (1847), 1 Exch. 131; *Dawson v. McClelland*, [1899] 2 I. R. 486; *O'Keeffe v. Walsh*, [1903] 2 I. R. 681, C. A.; *Damiens v. Modern Society, Ltd.* (1910), 27 T. L. R. 164; *Beadon v. Capital Syndicate, Ltd.* (1912), 28 T. L. R. 427, C. A. (money paid into court by one defendant in respect of joint tort, as to which see R. S. C., Ord. 22, r. 8A); *Greenlands, Ltd. v. Wilmshurst* (1913), 29 T. L. R. 685, C. A. As to the Admiralty rule, see title SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.

(*t*) *The Seacombe, The Devonshire*, *supra*, at p. 39.

(*u*) *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; and see title LIBEL AND SLANDER, Vol. XVIII., p. 616.

or if a release is given by one or more (*w*), any action arising out of the same tort against any of the tortfeasors is barred (*x*).

SUB-SECT. 2.—*Conspiracy.*

958. Conspiracy consists in two or more persons agreeing together to do something contrary to law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful (*y*). Where two or more persons thus conspire (*a*) to do, and in pursuance thereof do, an act which causes damage to another (*b*), they commit a tort for which they or any one of them can be sued (*c*).

SUB-SECT. 3.—*Contribution between Joint Tortfeasors.*

959. Wrongdoers cannot have redress or contribution against each other in respect of matters arising out of the wrong done (*d*), and accordingly one of several joint tortfeasors cannot recover contribution from another in respect of damages paid to the injured party if he knew, or must be presumed to have known, that in committing the tort he was doing an unlawful act (*e*).

SECT. 3.
Liability
when Tort
Committed
by Several
Persons.

Acts
amounting
to conspiracy.

Rule as to
contribution.

(*w*) *Beardon v. Capital Syndicate, Ltd.* (1912), 28 T. L. R. 427, C. A.; compare *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A. A conclusive election to waive the tort may have the same effect, but a mere acceptance back of part of the proceeds is not necessarily such an election (*Rice v. Reed*, [1900] 1 Q. B. 54, C. A.). A covenant not to sue does not have the same effect (*Duck v. Mayeu*, [1892] 2 Q. B. 511, C. A.).

(*x*) See titles ESTOPPEL, Vol. XIII., pp. 335, 336; TROVER AND DETINUE, p. 915, *post*.

(*y*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 260.

(*a*) In the sense indicated in the text, *supra*, so that either the thing done or the means used is or are unlawful, or the thing done is harmful and wrongful; see title TRADE AND TRADE UNIONS, pp. 640 *et seq.*, 655, *post*.

(*b*) As a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy (*Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* BOWEN, L.J., at p. 616); but the conspiracy may be regarded as a machine set going for wrongdoing (*O'Keefe v. Walsh*, [1903] 2 I. R. 681, 703, C. A.); and see title TRADE AND TRADE UNIONS, p. 656, *post*.

(*c*) As to the limitations imposed on such right of action when it arises in connexion with a trade dispute, see p. 484, *ante*; and title TRADE AND TRADE UNIONS, p. 659, *post*.

(*d*) *Merryweather v. Nixan* (1799), 8 Term Rep. 186; 1 Smith, L. C., 11th ed., p. 398, as explained in *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318, where the difference between the English and the Scotch law is pointed out; *Smith & Son v. Clinton* (1908), 99 L. T. 840; *The Seacombe, The Devonshire*, [1912] P 21, 39, C. A. As to contribution between directors of companies under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84, see title COMPANIES, Vol. V., p. 139; as to the Admiralty rule in collision cases and the provision (in the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 1), as to the apportionment of liability for damage or loss caused by the fault of two or more vessels, see title SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.

(*e*) *Adamson v. Jarvis* (1827), 4 Bing. 66; approved by Lord HERSCHELL, L.C., in *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, *supra*, at p. 324. As to the right to indemnity by a person committing an act not manifestly tortious at the request of another person, see *Sheffield Corporation v. Barclay*, [1905] A. C. 392, 397, 399.

Part III.—Remedies for Tort.

SECT. 1.

Abatement.

Duty to
minimise
damage.

SECT. 1.—*Abatement.*

960. A person injured by a tortious act owes a duty to himself, and to any person liable for the injury, to take any reasonable step available to him for the purpose of minimising the resulting damage, and has a legal justification for any step which he *bonâ fide* and reasonably takes for that purpose (*f*). Where alternative methods exist he is bound to choose that which he reasonably believes to be the least injurious to others, and if by one of such alternative methods a wrong is done to an innocent third party or the public, he is not justified in adopting that method (*g*).

Consequent
injury to
tortfeasor.

961. A person who is or has been engaged in committing a tortious act which is a legal wrong cannot bring an action in respect of any injury sustained by himself which arises to such an extent out of such act that his own tortious act would constitute an essential element in his cause of action (*h*). It follows that any other person can, without rendering himself liable to an action at the suit of the tortfeasor, take such steps as are necessary to limit the damage done by a tortious act, provided that such steps are so closely connected with the tortious act that when all the circumstances are stated the steps taken and the tortious act must be regarded as one transaction (*i*).

SECT. 2.—*Action for Damages or Injunction.*

Injunction
or damages.

962. Wherever a tortious act of a continuing nature which affects property, or which, if it does not affect property, is not merely criminal or illegal (*j*), is being committed or has been committed and a repetition of it is threatened, the court (*k*) has jurisdiction to grant an injunction on the application of any person aggrieved, and either before or after judgment has power to grant an injunction either upon or without terms as may be just (*l*), or may award damages in lieu of an injunction (*m*). Where

(*f*) See title DAMAGES, Vol. X., pp. 311, 312.

(*g*) *Roberts v. Rose* (1865), L. R. 1 Exch. 82, 89, Ex. Ch.; *Kanhaya Lal v. National Bank of India* (1913), 29 T. L. R. 314, P. C. (the tortfeasor himself cannot complain of the choice); and see title NUISANCE, Vol. XXI., pp. 549 *et seq.*

(*h*) *Stacey v. Sherrin* (1913), 29 T. L. R. 555.

(*i*) *Lonsdale (Earl) v. Nelson* (1823), 2 B. & C. 302, *per* BEST, J., at p. 311 ("Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them"). The comments on this judgment in *Lemmon v. Webb*, [1895] A. C. 1, do not detract from this dictum; see also *Roberts v. Rose*, *supra*; title NUISANCE, Vol. XXI., pp. 547 *et seq.*; but, where the nuisance alleged is merely an abridgment of a right and does not amount to exclusion from it, the proper remedy is by action (*Hope v. Osborne*, [1913] 2 Ch. 349, 355), and a forcible abatement is an actionable wrong (*ibid.*, at p. 354).

(*j*) See title INJUNCTION, Vol. XVII., p. 205.

(*k*) Namely, either the High Court, or, in cases within its jurisdiction, the county court (*ibid.*, p. 204).

(*l*) See *ibid.*, p. 203.

(*m*) See *ibid.*, pp. 212, 214.

a tortious act has not been committed, but there is a threat to commit such an act, the court has jurisdiction to grant an injunction (*n*), but cannot award damages in lieu thereof.

963. A bare right of action for damages for tort is not assignable (*o*), but where by virtue of an assignment of any property or rights, with notice thereof, the assignee is brought into such a relation with the party committing an act that the act involves a breach of duty to, and is therefore a tortious act as against, him as such assignee, he may be entitled to an injunction or damages as incident to such property or rights (*p*).

964. Where a tortious act is committed abroad an action can be maintained in the English courts provided that the act complained of is actionable by the law of this country and not justifiable by the law of the country where it is committed (*q*). The jurisdiction of the English courts may, however, be ousted by proving an exclusive jurisdiction over the matter by the courts of the country where the tort was committed, or an act of the legislature of that country, whether retrospective or not, protecting the tortfeasor from proceedings in respect of it (*r*); and the jurisdiction of the English courts is ousted where a question of title to foreign land is involved, and can only be exercised by consent when the tortious act concerns foreign land without directly affecting the title to it (*s*).

SECT. 3.—*Personal Disability for Suing in Tort.*

965. Any person, natural or artificial (*t*), who is injured by a tort may bring an action, subject to the rules of procedure in the court in which the action is brought (*u*), excepting, in certain cases and circumstances, an alien enemy (*a*), a bankrupt (*b*), a convict (*c*), or a person who has habitually and persistently instituted vexatious legal proceedings without reasonable ground and has been restrained from instituting proceedings without leave (*d*).

SECT. 2.
Action for
Damages or
Injunction

Injunction
only.
Rights of
assignee.

Torts
committed
abroad.

Disabilities.

(*n*) See title INJUNCTION, Vol. XVII., p. 213.

(*o*) *Defries v. Milne*, [1913] 1 Ch. 98, 109, C. A. (a right of action for tort never was assignable at law, and it has never been held that it was assignable in equity); see title CHOSSES IN ACTION, Vol. IV., pp. 369, 402. As to when the right of action in respect of a tort passes or does not pass to the trustee in bankruptcy of the person injured, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 137, note (*m*); LIBEL AND SLANDER, Vol. XVIII., pp. 611, 612. An assignment of the damages when recovered may be valid (*Glegg v. Bromley*, [1912] 3 K. B. 474, C. A.).

(*p*) See titles CHOSSES IN ACTION, Vol. IV., pp. 369, notes (*p*), (*q*), 402, note (*x*); TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 756, *post*; TRESPASS, p. 845, *post*. As to subrogation of an underwriter to a remedy of the assured for a tort, see title INSURANCE, Vol. XVII., p. 491.

(*q*) See titles CONFLICT OF LAWS, Vol. VI., p. 248; TRESPASS, pp. 864, 872, *post*. A tort committed on board a ship on the high seas is regarded as having been committed in the country to which the ship belongs; see title CONFLICT OF LAWS, Vol. VI., p. 251.

(*r*) *Ibid.*, p. 249.

(*s*) See titles CONFLICT OF LAWS, Vol. VI., p. 250; EQUITY, Vol. XIII., p. 66.

(*t*) A corporation can sue for any tort, except one of a purely personal nature; see title CORPORATIONS, Vol. VIII., p. 390.

(*u*) See titles ACTION, Vol. I., pp. 7, 17; ALIENS, Vol. I., p. 308.

(*a*) See titles ACTION, Vol. I., pp. 20, 21; ALIENS, Vol. I., pp. 304, 308.

(*b*) See title ACTION; Vol. I., p. 21; and see pp. 502, 503, *post*.

(*c*) See title ACTION, Vol. I., pp. 29, 30.

(*d*) See *ibid.*, p. 30.

SECT. 4.

Felonious
Torts.

Act both
tortious and
felonious.

SECT. 4.—*Felonious Torts.*

966. A tortious act may be felonious either because the commission of it is the commission of a felony or because it is so intimately related to an accompanying felonious act as to be tainted with its felonious character, and the intimacy of this relationship may be affected by the questions whether the tortious act and the felony were committed by the same person and whether they caused injury to the same person (*e*). Where a felony has been committed and a tortious act is so intimately connected with it as to be tainted with a felonious character, a person injured by the tort may be precluded (*f*) from recovering in respect of it until such steps have been taken by him as it is his duty as a citizen to take to bring the felon to justice (*g*). The court will not necessarily refuse on this ground to allow a civil action to proceed where the plaintiff is not the person against whom the felony was committed (*h*), or where the defendant is not the felon (*i*), or where criminal proceedings have without negligence on the part of the plaintiff become impossible (*j*), or where criminal proceedings have already been commenced by another person.

Part IV.—Defences to Actions of Tort.

SECT. 1.—*Justification and Excuse.*SUB-SECT. 1.—*In General.*

Right of
action where
no justifica-
tion or
excuse.

967. The right of action in respect of a tort arises out of the duty of a citizen so to exercise his own rights and perform his own duties that he shall not without legal justification or excuse injure the legal rights of others, and is accordingly given to the person injured in respect of such violation of his rights as is without legal justification or excuse (*k*).

A person may justify or excuse an act or omission which, as being injurious to another, requires justification or excuse by pleading overwhelming necessity or a sufficiently urgent duty to do or to omit the doing of such act, as the case may be (*l*). The duty which is so pleaded may be owed to the State (*m*), or to the person himself,

(*e*) *White v. Spettigue* (1845), 13 M. & W. 603.

(*f*) The claim is not demurrable (*Rooke v. d'Avigdor* (1883), 10 Q. B. D. 412), but may be precluded by the rule already stated, that the court will not connive at a failure to perform the duty of bringing a criminal to justice. No right of action can arise from a felony or misdemeanour committed by the plaintiff himself (*In the Estate of Hall, Hall v. Knight and Baxter* (1913), 29 T. L. R. 769).

(*g*) See title ACTION, Vol. I., pp. 27, *et seq.*; *Midland Insurance Co. v. Smith* (1881), 6 Q. B. D. 561, 568.

(*h*) *Osborn v. Gillett* (1873), L. R. 8 Exch. 88; *Appleby v. Franklin* (1885), 17 Q. B. D. 93.

(*i*) *White v. Spettigue, supra.*

(*j*) *Re Shepherd, Ex parte Ball* (1879), 10 Ch. D. 667, 673, C. A.; *Wells v. Abrahams* (1872), L. R. 7 Q. B. 554, 557.

(*k*) See pp. 464, 465, *ante*.

(*l*) *Ketch Frances (Owners) v. Steamship Highland Loch (Owners)*, [1912] A. C. 312.

(*m*) As to the duty owed by a resident alien, see *De Jaeger v. A.-G. of Natal*, [1907] A. C. 326, P. C.; title ALIENS, Vol. I., p. 306.

or to the person who suffers the injury, or to some third person or persons.

SUB-SECT. 2.—*Act of God.*

968. The laws of a civilised society are based on the supposition that natural phenomena will pursue an ordered course and that the ordinary sequences of cause and effect which may be reasonably expected in such ordered course will result unless some conscious act of a human being intervenes (*n*).

When these ordinary sequences are broken, not by the conscious act of a human being (*o*), but by some event which is out of the ordinary course of nature (*p*), the supposition on which the laws are based may be departed from to such an extent that it will not be just to exact the performance of some duty imposed on or voluntarily undertaken by someone on the understanding that such a breach would not occur. Such a breach of the ordinary course of nature described as the act of God exists where the accident for which it is sought to make a person liable is solely due, not to human intervention, but to natural causes which could not have been foreseen and could not have been avoided by any amount of foresight and care reasonably to be expected from that person (*a*). The ordinary rule of law with regard to such occurrences is expressed in the maxim *actus Dei nemini facit injuriam* (*b*). This

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Ordinary
course of
nature.

Extra-
ordinary
occurrence.

(*n*) *Nichols v. Marsland* (1876), 2 Ex. D. 1, C. A.; *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, C. A.

(*o*) As to the intervention of such a conscious act, see *Rickards v. Lothian*, [1913] A. C. 263, P. C.; and note (*o*), p. 471, *ante*.

(*p*) *Fletcher v. Smith* (1877), 2 App. Cas. 781, 787. Even though it may have occurred on a former occasion (*Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.*, *supra*).

(*a*) The expression *vis major* has a larger signification, and includes the "King's enemies" as well as the act of God; see *Simmons v. Norton* (1831), 7 Bing. 640, *per* TINDAL, C.J., at p. 648. The act of God is distinct from "inevitable accident" (*Trent and Mersey Navigation v. Wood* (1785), 4 Doug. (K. B.) 287, *per* Lord MANSFIELD, C.J., at p. 290), and is "something in opposition to the act of man" (*Forward v. Pittard* (1785), 1 Term Rep. 27, *per* Lord MANSFIELD, C.J., at p. 33). For other examples, see *Thomas v. Birmingham Canal Co.* (1879), 49 L. J. (Q. B.) 851; *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418, 421, 422 (a rainfall must be such as could not reasonably have been anticipated, and not merely an unusual rainfall such as the defendant ought to have been prepared for); *R. v. Essex Sewers Commissioners* (1885), 14 Q. B. D. 561, 581, C. A.; affirmed, *sub nom. Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449; *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781 (extraordinary frost); *Briddon v. Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 51 (snowfall); *Keighley's Case* (1609), 10 Co. Rep. 139 a, 140 a (fire caused by lightning); *R. v. Leicestershire Justices* (1850), 15 Q. B. 88; *Pell v. Linnell* (1868), L. R. 3 C. P. 441, 443; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *Re Bird, Bird v. Cross* (1894), 8 R. 326 (lunacy); *Cuckson v. Stones* (1858), 1 E. & E. 248, 256; *K— v. Raschen* (1878), 38 L. T. 38, *per* CLEASBY, B., at p. 40; compare *Oakley v. Portsmouth and Ryde Steam Packet Co.* (1856), 11 Exch. 618, 623; *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518; *Dale v. Hall* (1750), 1 Wils. 281; *Liver Alkali Co. v. Johnson* (1874), L. R. 9 Exch. 338, Ex. Ch. (fog); *Fenwick v. Schmalz* (1868), L. R. 3 C. P. 313, 316 (ordinary snowfall). As to the law relating to ships and as to the defence of inevitable accident in case of collision at sea, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 108, 644, and, generally, *ibid.*, Part XI.

(*b*) 2 Bl. Com. 122. For early instances of the application of the

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rule applies to duties created by the common law (c), or by a statute which confirms the common law (d), or arising out of implied contracts (e); but it does not apply to duties or obligations created by express contract (f), in respect of which the rule is that a party who undertakes a duty or obligation by express contract is bound to make it good notwithstanding that its performance is rendered impossible by an act of God (g), nor does it apply to an obligation created by a statute which without qualification requires the performance of it (h).

Act of God
gives no right
of action.

969. Accordingly a person who has not come of his own free will or been placed by law under an obligation to insure another against an injury, however caused (i), is not liable in respect of an injury which is caused by an act of nature of so irresistible a character

principle, see 22 Lib. Ass. pl. 41; *Anon.* (1366), Y. B. 40 Edw. 3, 5, 6, pl. 11; *Mouse's Case* (1608), 12 Co. Rep. 63 (where goods were jettisoned by a carrier to save a barge); *Keighley's Case* (1609), 10 Co. Rep. 139 a, 140 a (where damage was caused by sea water); *Bird v. Astcock* (1614), 2 Bulst. 280 (where a carrier was held excused).

(c) *Nichols v. Marsland* (1876), 2 Ex. D. 1, 4, C. A., affirming S. C. (1875), L. R. 10 Exch. 255; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, per Lord CAIRNS, L.C., at p. 750; *Clark v. Glasgow Assurance Co.* (1854), 1 Macq. 668, H. L. It applies to carriers though liable as insurers of goods entrusted to them (see title CARRIERS, Vol. IV., p. 8; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch., per WILLES, J., at p. 121); to bailees (see title BAILMENT, Vol. I., p. 533; *Williams v. Lloyd* (1628), W. Jo. 179, where the borrower of a horse was held not liable for its death without default on his part; 22 Lib. Ass. 41; *Taylor v. Caldwell* (1863), 3 B. & S. 826, per BLACKBURN, J., at pp. 838, 839; compare *Brabant & Co. v. King*, [1895] A. C. 632, P. C.); to prescriptive liabilities such as the liability to repair a sea wall (*Keighley's Case*, *supra*; *R. v. Somerset Sewers Commissioners* (1799), 8 Term Rep. 312; *R. v. Essex Sewers Commissioners* (1823), 1 B. & C. 477; *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449), unless, indeed, it be shown in the particular case that the prescriptive liability extends to injuries done by extraordinary violence of the sea (*R. v. Leigh* (1839), 10 Ad. & El. 398); and to waste (Com. Dig. tit. Pleader (3, O. 7), quoted by TINDAL, C.J., in *Simmonds v. Norton* (1831), 7 Bing. 640, 647; *Walton v. Waterhouse* (1672), 2 Wms. Saund. (1871 ed.), 826; *Griffith's Case* (1664), Moore (K.B.) 69; *Anon.* (1664), Moore (K.B.) 73, pl. 200; Bac. Abr., tit. Waste (E.); Co. Litt. 53 b; *Paradine v. Jane* (1647), Aleyn, 26; see, however, *Davies v. Davies* (1888), 38 Ch. D. 499; and compare *Re Cartwright*, *Avis v. Newman* (1889), 41 Ch. D. 532).

(d) See title STATUTES, p. 194, *ante*.

(e) See *Ford v. Cotesworth* (1870), L. R. 5 Q. B. 544, Ex. Ch., per MARTIN, B., at pp. 547, 548.

(f) *Brecknock and Abergavenny Canal Navigation Co. v. Pritchard* (1796), 6 Term Rep. 750; *River Wear Commissioners v. Adamson*, *supra*, at pp. 750, 761, 770; *Nichols v. Marsland* (1876), 2 Ex. D. 1, 4, C. A.; *Re Arthur, Arthur v. Wynne* (1880), 14 Ch. D. 603; *Taylor v. Caldwell*, *supra*; *Clark v. Glasgow Assurance Co.*, *supra*.

(g) *Paradine v. Jane*, *supra* (where the law is stated to be that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract"); *Nichols v. Marsland*, *supra*; *Atkinson v. Ritchie* (1809), 10 East, 530, per ELLENBOROUGH, C.J., at p. 533; *Lloyd v. Guibert*, *supra*, per WILLES, J., at p. 121.

(h) *River Wear Commissioners v. Adamson*, *supra*, at pp. 750, 763.

(i) *Ibid.*, at p. 750.

that by no reasonable precaution in the circumstances could the injury have been prevented (*k*), and where the injury following on an act which unless excused would be tortious is caused by such an act of nature no liability will result from it. Where, however, the tortious act contributes to bring about the injury, the tortfeasor is liable even though the injury would not have happened but for such an act of nature, and the extraordinary nature of the circumstances in such a case affords no excuse (*l*), except as regards such part of the damage as can be clearly and distinctly attributed to the act of God and not to the tortious act (*m*).

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SUB-SECT. 3.—*Act of State.*

970. An act which is done by the State itself (*n*), or, in other words, which is an act of the sovereign power, gives no right of action (*o*).

Act of
sovereign
power.

SUB-SECT. 4.—*Statutory Authority.*

971. An act which is ordered by the State itself gives no right of action unless the State directs that there shall be such a right (*p*). Accordingly, where Parliament has directed or authorised the doing of a particular thing which, but for such direction or authority, would be tortious, any damage directly resulting from doing it for the purpose indicated and not due to negligence or unreasonable conduct in the doing of it gives no right of action (*q*). In such cases, when the particular act authorised directly causes the injury, Parliament must be taken to have authorised the injury.

Act done
under express
statutory
authority.

972. In addition to the cases where the particular thing which causes injury is directed or authorised, there are numerous and important duties imposed by statute which involve the possibility of committing acts which may or may not result in injury to individuals, and in these cases if injury ensues it is necessary to examine the nature of the duty imposed in order to see whether it justifies or excuses the injury.

Acts done in
pursuance of
statutory
duties.

Such duties may be classified as being or arising out of (1) duties

(*k*) *Nugent v. Smith* (1876), 1 C. P. D. 423, C. A.; *Rickards v. Lothian*, [1913] A. C. 263, 277, P. C.

(*l*) *Burt v. Victoria Graving Dock Co.* (1882), 47 L. T. 378, 381; *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; see title CARRIERS, Vol. III., pp. 8, 9.

(*m*) *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, 527, C. A.

(*n*) As to what is an act of State, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 304.

(*o*) See titles ACTION, Vol. I., pp. 14, 15; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 307 *et seq.*, 316, 317.

(*p*) See titles NEGLIGENCE, Vol. XXI., p. 464; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312, 313. As to statutory damages, see title DAMAGES, Vol. X., pp. 305, 306; as to compensation under the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12), see *ibid.*, pp. 76 *et seq.*

(*q*) See titles ACTION, Vol. I., p. 14; CORPORATIONS, Vol. VIII., pp. 388 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 312; RAILWAYS AND CANALS, Vol. XXIII., pp. 723 *et seq.* For cases where a nuisance was or was sought to be justified on the ground that it arose from an act expressly authorised, see title NUISANCE, Vol. XXI., pp. 516 *et seq.*, 562, 563; for other cases where negligence was alleged in

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expressly imposed; (2) obligations; (3) powers; (4) property; and (5) rights.

A duty or obligation imposed or a power given by statute to do something from which an injury ensues without being expressly authorised may be (1) a duty, obligation, or power to attain an end without defining the means by which that end is to be attained, or (2) a duty, obligation, or power to do a certain act or series of acts which may or may not result in an injury.

Injury
resulting
from
performance
of statutory
duty.

973. Where a duty or obligation is imposed or a power or right is given to do some act which may or may not result in an injury, but does in fact cause the injury, the person committing such act has a legal excuse for the injury done if he proves that he committed it in, or that it necessarily resulted (in circumstances for which he is not responsible) from, the performance of such duty or obligation, or the exercise of such power or right (a).

Where by statute a duty or obligation is imposed to attain an end, or a power or right is given to exercise certain functions and the attainment of the end by the means ordinarily employed to attain that end, or the ordinary and reasonable exercise of the functions, as the case may be, necessarily involves an injury, then, in the absence of special provisions in the statute giving the authority, any injury so involved is covered by the authority given by the statute, and a person suffering such injury has no right of action in respect of it (b).

Liability for
negligence.

In such cases Parliament must be assumed to have anticipated such injury, and the statutory authority affords a legal justification for the doing of the act, but does not cover any injury which results not from the doing of the act but from negligence in the doing of it (c).

Injury not
necessarily
resulting
from perform-
ance of duty.

974. Where by statute a duty or obligation is imposed to attain an end or a power or right is given to exercise certain functions, and the attainment of that end by the means ordinarily employed for that purpose (d), or the ordinary and reasonable exercise of such

the doing of an act expressly authorised, see title NEGLIGENCE, Vol. XXI., pp. 378, 422 *et seq.*

(a) *Hammersmith etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171; *Cracknell v. Thetford Corporation* (1869), L. R. 4 C. P. 629; *East Fremantle Corporation v. Annois*, [1902] A. C. 213, P. C.; *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590, 594; see titles EASEMENTS AND PROFITS A PRENDRE, Vol. XI., p. 283; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312, 313; RAILWAYS AND CANALS, Vol. XXIII.; and compare *Lewis and Solome v. Charing Cross, Euston and Hampstead Railway*, [1906] 1 Ch. 508, 517 (interference with party structure not necessarily following on authorised demolition). As to the plea of compulsory pilotage, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 610, 611.

(b) *Canadian Pacific Railway v. Roy*, [1902] A. C. 220, P. C.; see titles NEGLIGENCE, Vol. XXI., p. 466; NUISANCE, Vol. XXI., pp. 519, 529, 562, 563.

(c) See titles NEGLIGENCE, Vol. XXI., pp. 378, 467; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 313.

(d) *Charing-Cross, West End and City Electric Supply Co. v. London Hydraulic Power Co.* (1913), 29 T. L. R. 649, citing *London Hydraulic Power Co. v. St. James' Electric Light Co.* (1906), *per* FARWELL, J. (water brought under pressure into roadway is within the doctrine of *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330 (see title NEGLIGENCE, Vol. XXI., pp. 401, 466),

functions, as the case may be, may, but does not necessarily, involve an injury to anyone (*e*), there is an obligation on the undertakers to take all reasonable steps to prevent the occurrence of such injury, and if in the course of attaining that end or exercising those functions a needless injury is caused by a tortious act the statutory authority affords no legal justification for it (*f*).

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975. Where the duty which involves the possibility of committing an act which may or may not cause injury arises merely out of the possession of property acquired pursuant to statutory powers, the fact that the property has been so acquired does not of itself afford any justification for the commission of a tortious act (*g*). Such justification, if it exists, must be sought for from some duty, obligation, power, or right (*h*).

Duty arising
from
possession of
property.

976. In addition to the defences arising out of statutory authority and based on legal justification or excuse, there are cases in which a statutory defence is expressly given to the person committing a particular act within the purview of a particular statute (*i*), or to all persons who come within a class which a statute is intended to protect (*k*).

Defences
created by
statute.

even though brought in an ordinary and reasonable manner); compare *Stewart v. Metropolitan Water Board* (1912), *Times*, 28th March.

(*e*) The doctrine of *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330, may apply, for example, to paving by a tramway company (*West v. Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A.), or to a sewer owned by a local authority, where there is a common law duty to see that the sewage does not escape to the injury of others (*Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; compare *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590); see titles NEGLIGENCE, Vol. XXI., p. 467; NUISANCE, Vol. XXI., pp. 519 *et seq.*, 529; SEWERS AND DRAINS, Vol. XXV., p. 741.

(*f*) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256, P. C., as explained in *Sydney Municipal Council v. Bourke*, [1895] A. C. 433, 441, P. C.; *Hawthorn Corporation v. Kannuluik*, [1906] A. C. 105, P. C.; and see titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 313; RAILWAYS AND CANALS, Vol. XXIII., p. 724; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 628, 642, 647, 648.

(*g*) *Stourcliffe Estates Co., Ltd. v. Bournemouth Corporation*, [1910] 2 Ch. 12, C. A.

(*h*) *Embley v. North Eastern Rail. Co.*, [1896] 1 Ch. 418, 429; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437, C. A.

(*i*) The defence of "Not guilty" by statute is preserved by the Judicature Acts (see R. S. C., Ord. 19, r. 12), and, although repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2 (*e*), so far as it was provided for public authorities by public general statutes, it still remains available to private persons (*Lyles v. Southend-on-Sea Corporation*, [1905] 2 K. B. 1, 13, C. A.), or under local and personal Acts, if passed since the 10th August, 1842 (*Boden v. Smith* (1849), 13 Jur. 428), but not if passed before that date (Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), s. 3). Subject to these limitations the defence applies in cases of illegal distress (see title DISTRESS, Vol. XI., p. 205), and to actions for penalties, arrest and imprisonment by persons having authority to arrest or imprison, and for acts done under the Highways, Metropolis Management, County Courts, or Customs and Excise Acts (see title PLEADING, Vol. XXII., pp. 448, 449). As to statutory defences in a county court, see title COUNTY COURTS, Vol. VIII., p. 485.

(*k*) See titles ACTION, Vol. I., pp. 24 *et seq.*; LIMITATION OF ACTIONS, Vol. XIX., pp. 178, 180; PUBLIC AUTHORITIES AND PUBLIC OFFICERS,

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Excuse.When
justifiable.SUB-SECT. 5.—*Protection of Person or Property.*

977. Every person is justified in taking all reasonable and proper steps to defend himself (*l*) and those under his care (*m*), and his or their property (*n*), from injury or imminent risk of injury, whether such injury or risk arises from an attack by or from any other act or omission of another person, or from a natural cause without the intervention of human agency (*o*), and if injury results to another person from the taking of such steps the fact that such injury or risk existed and that such steps were required and were taken for the purpose of obviating it may afford a justification or excuse (*p*).

Self-defence.

Where such injury or risk arises from an attack by or from any other act or omission of the person who is injured which is itself unlawful, all reasonable and proper steps required and taken for the purpose of obviating such injury or risk are justified (*q*), and form a good ground of defence against the person who is causing such

Vol. XXIII., pp. 338 *et seq.*; *Shackleton v. Swift*, [1913] 2 K. B. 304, C. A. (detention of alleged lunatic).

(*l*) The acts must be done "in necessary self-defence" (R. S. C., Appendix D, s. VI.). The defence that they were so done does not cover any excess (*Dean v. Taylor* (1855), 11 Exch. 68; see title TRESPASS, pp. 856, 868, 875, *post*).

(*m*) Thus, an assault may be justified if made by a husband in defence of his wife, a master in defence of his servant, or a parent in defence of his child, or *vice versa* in each case; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 609; INFANTS AND CHILDREN, Vol. XVII., p. 114; TRESPASS, pp. 861, 862, 890, *post*; *Leigh v. Gladstone* (1909), 26 T. L. R. 139. There may also be a duty on a person to take steps where there is danger to the lives of persons who are not under his care (*Handcock v. Baker* (1800), 2 Bos. & P. 260; and see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 95, 561, and Part XI.), but no such duty arises when property only is in danger (*Scaramanga v. Stamp* (1880), 5 C. P. D. 295, C. A.). As to arrest, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296, 307.

(*n*) *Deane v. Clayton* (1817), 7 Taunt. 489, 530; *Maxey Drainage Board v. Great Northern Railway* (1912), 106 L. T. 429; *Greyvensteyn v. Hattingh*, [1911] A. C. 355, P. C.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 609. Including an incorporeal hereditament, such as a right of shooting (*Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, C. A.). The act, to be justified, must be reasonably necessary for the purpose of saving the property from the peril (*Cope v. Sharpe* (No. 2), [1912] 1 K. B. 496, C. A.; see title ANIMALS, Vol. I., pp. 395, 396), which would not be the case if much less injurious means were available for that purpose (*Miles v. Hutchings*, [1903] 2 K. B. 714; and see title GAME, Vol. XV., pp. 227, 228). For defence of property wounding is not justified (2 Co. Inst. 316).

(*o*) Where a person is charged with damage which he could not possibly prevent by the exercise of such ordinary care, caution and skill as may reasonably be required, he is entitled to say that such damage is the result of an inevitable accident (*The Schwan, The Albano*, [1892] P. 419, C. A.), whether such accident takes place at sea or on land (*ibid.*, at p. 434); and if through the happening of events over which he has no control he is put into such a position that, in spite of the exercise of ordinary care, caution and skill, he does damage, he is not responsible for it (*ibid.*; see title SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.).

(*p*) See *Greyvensteyn v. Hattingh*, *supra*; and notes (c), (d), p. 469, *ante*, notes (l), (m), (n), *supra*.

(*q*) *Harrison v. Rutland (Duke)*, *supra*; compare *Hope v. Osborne*, [1913] 2 Ch. 349; and see titles NUISANCE, Vol. XXI., pp. 547 *et seq.*; TRESPASS, pp. 870, 874, *post*.

injury or risk, even though the steps taken would, but for such excuse, have been tortious (*r*).

Where such risk arises from a natural cause without the intervention of human agency (*s*) or from an act or omission of a third party (*t*), or from an act, which is not in the circumstances unlawful, of the party injured, and the risk is still imminent, any act which is *bonâ fide* and reasonably done with the sole intention and in pursuance of the duty of obviating such risk (*u*) may be justified, although otherwise tortious, if that which would give the act its tortious character is a result of the performance of such duty.

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Averting
danger.

SUB-SECT. 6.—*Justification in Particular Classes of Cases.*

978. In particular classes of cases of tort a justification or excuse may be available which arises out of the nature of the act alleged to be tortious (*w*) or out of the relations between the parties concerned (*x*). Special cases.

979. A person may inflict an injury on another in the course of performing some duty owed to the person injured arising out of a personal, contractual, or other relationship between them, and when the act resulting in such injury is done in the performance of such duty and with the *bonâ fide* intention of benefiting the person injured, it is justified, and does not merely by reason of its otherwise tortious character give rise to a right of action (*a*). Relation of parties.

In cases where the person occasioning and the person suffering an injury are fellow servants engaged in a common employment for and under the same master, the master is not, excepting under statute, liable for the consequences of the injury (*b*). Common employment.

(*r*) See titles TRESPASS, p. 862, *post*; TROVER AND DETINUE, p. 908, *post*.

(*s*) *R. v. Pagham Sewers Commissioners* (1828), 8 B. & C. 355; *Nield v. London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4; *Greyvensteyn v. Hattingh*, [1911] A. C. 355, P. C.

(*t*) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C., 11th ed., p. 454, *per* DE GREY, C.J., at p. 461 ("any innocent person removing the danger from himself to another is justifiable"); *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, 141, C. A. ("in *Scott v. Shepherd* the squib was a danger to all and was never in the possession of the person in the coach").

(*u*) See title NEGLIGENCE, Vol. XXI., p. 479. Where the danger is not common to the party committing and the party suffering the injury, the mere fact that what has happened already will, if not remedied, result in danger in the future does not justify an injury to another which results from a voluntary election to get rid of the danger by a step which causes such injury (*Whalley v. Lancashire and Yorkshire Rail. Co.*, *supra*).

(*w*) For examples, see titles TRESPASS, pp. 880 *et seq.*, *post*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 318 *et seq.*; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 550, 555, 556.

(*x*) *Stacey v. Sherrin* (1913), 29 T. L. R. 555 (obstruction of right of way justifying trespass); compare *Hope v. Osborne*, [1913] 2 Ch. 349, 354.

(*a*) As to the parent's duty to educate and right to chastise his child, see titles INFANTS AND CHILDREN, Vol. XVII., pp. 107, 115; TRESPASS, p. 876, *post*; as to the relations of master and scholar, see title EDUCATION, Vol. XII., p. 124; and of master and apprentice, see title MASTER AND SERVANT, Vol. XX., p. 106.

(*b*) See title MASTER AND SERVANT, Vol. XX., p. 132.

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Excuse.

In cases of defamation (*c*) privilege which affords a ground of defence may arise either from the nature of the publication or from the relations between the parties (*d*).

SUB-SECT. 7.—Release.

Privilege.
Effect of
release.

980. If a person of full age and competent understanding who has suffered an injury by reason of a tortious act with full knowledge of all the facts which give him a right of action elects to release such right, such release, even though made without consideration, is binding if made by deed (*e*).

If made for any consideration, however small and however inadequate it may be as compensation for the injury suffered, it gives ground for a plea of accord and satisfaction (*f*), and if made with one of several joint tortfeasors may operate to discharge the right of action as against all (*g*).

SUB-SECT. 8.—Waiver and Consent.

Leave and
licence.

981. Every person of full age and competent understanding being capable of binding himself not to pursue a right of action, even after such right has accrued, is *a fortiori* capable of so doing while such right is in course of accruing. Accordingly, where a tortious act is in course of being committed which may be expected to result in an injury to a person of full age and competent understanding, any words or acts of such person from which if accepted and acted on by a tortfeasor it might be inferred that he had agreed to forego his resulting right of action may afford a legal justification or excuse (*h*). Thus, if such a person to whom a duty is owed either expressly or impliedly authorises a departure from the duty owed to him and injury results to him from an act which is not contrary to law (*i*), but which would but for such authorisation give rise to a cause of action, such authorisation may afford ground for a defence based on leave and licence (*j*).

When a person who suffers injury from an act or default is capable of agreeing and has himself agreed to and invited that very act or default, he has no right of action in respect of it (*k*).

Waiver.

982. Even though the person injured has not expressly invited the very act or default, a defence may exist when waiver is proved. Waiver is the abandonment of a right, and may be express or may be implied from conduct which is inconsistent with the

(*c*) See title LIBEL AND SLANDER, Vol. XVIII., pp. 677 *et seq.*

(*d*) *Ibid.*, pp. 685 *et seq.* Where there is a joint tort, the express malice of one affects all the joint tortfeasors even though otherwise privileged (*Smith v. Streetfeild* (1913), 109 L. T. 173).

(*e*) See titles CONTRACT, Vol. VII., p. 441; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 376; EQUITY, Vol. XIII., pp. 164, 165.

(*f*) See titles CONTRACT, Vol. VII., pp. 442, 443; EQUITY, Vol. XIII., p. 165.

(*g*) See title CONTRACT, Vol. VII., p. 444; and p. 489, *ante*.

(*h*) See titles EQUITY, Vol. XIII., p. 166; STATUTES, p. 196, *ante*.

(*i*) *Edwick v. Hawkes* (1881), 18 Ch. D. 199, 208.

(*j*) See title TRESPASS, pp. 860, 870, *post*.

(*k*) *Smith v. Baker & Sons*, [1891] A. C. 325, *per* Lord HERSCHELL, at p. 360.

continuance of the right (*l*). A mere statement of an intention not to insist on a right does not suffice unless it is so made and acted on as to estop the party making it from relying on the right, that is, unless it operates as a release, and it cannot so operate unless the person making it has full knowledge of the rights which he releases (*m*).

SECT. 1.
Justification
and
Excuse.

983. If the person who suffers from the injury, being of competent age and understanding, has with, full knowledge of the duty owed to him and of the breach of it and the resulting risk, himself voluntarily incurred that risk so that the proximate cause of the injury may reasonably be said to have been his own voluntary act, then, whether the consent estops him from claiming or not, the person who has committed the breach of duty can defend himself on the ground that *volenti non fit injuria* (*n*).

Volenti non fit injuria.

SUB-SECT. 9.—Contributory Negligence.

984. If the person who suffers from the injury has in fact contributed to the injury by a wrongful act or default on his own part, such contributory act or default may afford ground for a defence to an action by him. For example, if notwithstanding a wrongful act by an alleged tortfeasor the person injured might by the exercise of reasonable care have avoided the injury and negligently failed to avoid it, such contributory negligence may afford a ground of defence to an action (*o*). It does afford such a defence whenever it is the folly and recklessness of the plaintiff himself, and not the tortious act of the defendant, which was the real cause of the injury (*p*).

How far a
defence.

SECT. 2.—Statute of Limitations.

985. An action founded on a tort, in whatever court it may be brought (*q*), is within the spirit and meaning of the Statutes of Limitation (*r*). The period of time after which such action will be

Periods
within which
action must
be brought.

(*l*) *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347, C. A.

(*m*) See title EQUITY, Vol. XIII., p. 165; compare *Law v. Law*, [1905] 1 Ch. 140, C. A. As to waiving the tort where there has been a conversion or detention and sale, and suing for money had and received, see *Smith v. Baker* (1873), L. R. 8 C. P. 350; and titles TRESPASS, p. 869, *post*; TROVER AND DETINUE, pp. 908, 912, 915, *post*.

(*n*) *Smith v. Baker & Sons*, [1891] A. C. 325; see title MASTER AND SERVANT, Vol. XX., p. 120; *Giles v. London County Council* (1903), 68 J. P. 10; *Torrance v. Ilford Urban District Council* (1909), 25 T. L. R. 355, C. A.

(*o*) *Grand Trunk Rail. Co. of Canada v. McAlpine* (1913), 29 T. L. R. 679, P. C. (a plaintiff whose negligence contributed to the injury may recover, provided that it can be shown that the defendant could by the exercise of ordinary care and caution have avoided the consequences); see titles NEGLIGENCE, Vol. XXI., pp. 445 *et seq.*; SHIPPING AND NAVIGATION, Vol. XXVI., Part XI.; and compare *London, Tilbury and Southend Railway v. Paterson* (1913), 29 T. L. R. 413, H. L.

(*p*) *Grand Trunk Rail. Co. of Canada v. McAlpine*, *supra*.

(*q*) *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.; *Bull's Coal Mining Co. v. Osborne*, [1899] A. C. 351, P. C.; *Thomson v. Clanmorris* (Lord), [1900] 1 Ch. 718, C. A. (distinction between action for penalty and action of tort).

(*r*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 37, 38. The statute must be pleaded except where special provisions apply (*ibid.*, p. 183).

SECT. 2.
Statute
of Limita-
tions.

barred is not the same for all torts, being two years in an action of slander for the speaking of words which are actionable *per se* (s), four years in an action of trespass to the person (t), and six years in an action of libel or of slander if the words are not actionable *per se* (u).

The date from which time begins to run depends on the nature of the tort, and on the question whether the tort is or is not fraudulently concealed (w).

SECT. 3.—*Death of Either Party.*

Death of
person
injured.

986. The death of a person who has been injuriously affected in his personal capacity by a tortious act puts an end to the cause of action arising therefrom, but where a tortious act has injuriously affected the personal estate of a person who has since died, a right of action survives to his personal representatives in respect of the damage actually caused to such estate (x), and where the death has resulted from a tortious act, an action may be brought for the benefit of the wife, husband, parent, or child of the deceased for the injury resulting to them from such death (a).

Death of
tortfeasor.

987. The death of the person who has committed a tortious act affords a defence to his personal representative against a claim for unliquidated damages arising out of the tort (b); but an action may be brought for any wrong done to another in respect of his property within six months before the death against the personal representatives within six months after they have taken on themselves the administration (c), and the death of a tortfeasor does not afford a defence to a claim for such property as has been added to the estate of the tortfeasor as a result of the tort (d).

SECT. 4.—*Bankruptcy.*

Distinction
between torts
to property
and to person.

988. It is a good defence to an action by a bankrupt that the entire cause of action has passed to the trustee in bankruptcy, and

(s) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 38, 52.

(t) See *ibid.*, pp. 38, 51; and see title TRESPASS, pp. 877, 885, *post*.

(u) See titles LIMITATION OF ACTIONS, Vol. XIX., pp. 38, 52; LIBEL AND SLANDER, Vol. XVIII., p. 723.

(w) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 49 *et seq.* An acknowledgment of liability in respect of a tort will not in general have the effect of extending the time (*ibid.*, p. 60).

(x) *Hatchard v. Mege* (1887), 18 Q. B. D. 771; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 226, 227; LIMITATION OF ACTIONS, Vol. XIX., p. 75.

(a) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93); amended by the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95); and see title NEGLIGENCE, Vol. XXI., pp. 455 *et seq.*

(b) *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387.

(c) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 313, 314; LIMITATION OF ACTIONS, Vol. XIX., p. 75.

(d) See titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 312; EQUITY, Vol. XIII., p. 68. Proceedings to recover the expense caused by extraordinary traffic were held to be in the nature of an action for a personal tort within this rule (*Story v. Sheard*, [1892] 2 Q. B. 515); compare *Chesterfield Rural Council v. Newton*, [1904] 1 K. B. 62, 66, C. A.; and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 177 *et seq.*

all rights of action, whether in contract or in tort, do so pass which relate directly to the bankrupt's property and can be turned into assets (*e*); but where a tort causes bodily or mental suffering or personal inconvenience to the bankrupt, or injury to his person or reputation, the right of action remains with the bankrupt (*f*), and the trustee cannot intercept the proceeds so far as they are required for the maintenance of the bankrupt or his family (*g*). When one tort causes damage both to the property and to the person of the bankrupt and results in distinct causes of action, the bankrupt may sue as well as the trustee (*h*).

SECT. 4.
Bankruptcy.

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137, 138, note (*m*).

(*f*) See *ibid.*, p. 138.

(*g*) See *ibid.*, p. 139.

(*h*) See *ibid.*, p. 138; as to the cases where there is damage to both property and person, but not distinct causes of action, see *ibid.*

TOTAL LOSS.

See INSURANCE; SHIPPING AND NAVIGATION.

TOW.

See SHIPPING AND NAVIGATION.

TOWAGE.

See ADMIRALTY; SHIPPING AND NAVIGATION.

TOWING PATHS.

See FISHERIES; HIGHWAYS, STREETS, AND BRIDGES; WATERS
AND WATERCOURSES.

TOWN CLERK.

See LOCAL GOVERNMENT.

TOWN COUNCIL.

See LOCAL GOVERNMENT.

TOWN PLANNING.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

TOWN POLICE CLAUSES ACT.

See CRIMINAL LAW AND PROCEDURE; POLICE; STREET AND AERIAL
TRAFFIC.

TRACTION ENGINE.

See HIGHWAYS, STREETS, AND BRIDGES; STREET AND AERIAL
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TRADE AND TRADE UNIONS.

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Part I.—Meaning of “Trade” and “Business.”

989. “Trade” in its primary meaning is the exchanging of goods for goods or goods for money ; and in a secondary meaning it is any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture (*a*). The word, however, is one of very

PART I.
Meaning of
“Trade”
and
“Business.”
Trade.

(*a*) The statement in the text summarises the dictionary definitions; but as to the immateriality of “a view to profit” in the legal conception of the term, see note (*n*), p. 511, *post*. See *Bank of India v. Wilson* (1877), 3 Ex. D. 108, *per* POLLOCK, B., at p. 120; *Taxation Commissioners v. Kirk*, [1900] A. C. 588, 592, P. C. (“The word trade no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures”); *Palmer v. Snow*, [1900] 1 Q. B. 725, 727 (trade is buying and selling); *Grainger & Son v. Gough*, [1896] A. C. 325, *per* Lord HERSCHELL, at p. 336 (a wine merchant exercises his trade “by making or buying wine and selling it again with a view to profit”), *per* Lord DAVEY, at p. 345; *Robinson v. Grosccourt* (1695), 5 Mod. Rep. 104, 108 (music and dancing are not trades, but professions; compare *Wannell v. London (City Chamberlain)* (1725), 1 Stra. 675); *Speak v. Powell* (1873), L. R. 9 Exch. 25, 27 (the occupation of a circus proprietor is not a trade; nor is that of an actor or professional gymnast or theatre proprietor); *Harris v. Amery* (1865), L. R. 1 C. P. 148, 154 (banking is not a trade); *Hall v. Franklin* (1838), 3 M. & W. 259 (banking is included in the words “dealing for profit”); compare the distinction between trade and profession in relation to inhabited house duty, as to which see title INHABITED HOUSE DUTY, Vol. XVII., pp. 192, 193. Where statutes enacted that everyone might sell commodities in any city by gross or retail, they were held not to apply to artificers or manufacturers (*City of London’s Case* (1610), 8 Co. Rep. 121 b, 128 a). The making and using of a decoy for ducks was treated as trade (*Keeble v. Hickeringill* (1706), 11 East, 574, n.), but not the mere chance of capturing or enjoyment of the presence of animals *feræ naturæ* which come to a place of their own accord and are not fit for human food, such as rooks (*Hannam v. Mockett* (1824), 2 B. & C. 934; but see *Read v. Edwards* (1864), 17 C. B. (N. S.) 245, 258; *Allen v. Flood*, [1898] A. C. 1, *per* CAVE, J., at p. 36); see title GAME, Vol. XV., p. 252, note (*l*). As to the question where a trade is carried on, see *Grainger & Son v. Gough*, *supra* (a person does not necessarily carry on a trade in a country by exporting to that country or by merely soliciting orders through an agent in that country); *San Paulo (Brazilian) Rail. Co. v. Carter*, [1896] A. C. 31, 38; *Crookston Brothers v. Inland Revenue*, [1911] S. C. 217; and see titles CORPORATIONS, Vol. VIII., p. 395; INCOME TAX, Vol. XVI., pp. 646, 647. For an analysis of different kinds of trade, see the argument of SAWYER, A.-G., in *Sandys v. East India Co.* (1684), Skin. 197, 198. As to the meaning of “trade” and “business” in relation to the Bankruptcy Acts, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173 *et seq.*; in relation to the Companies Acts, see *ibid.*; and title COMPANIES, Vol. V., p. 45; in relation to restrictive covenants in conveyances or leases, see title LANDLORD AND TENANT, Vol. XVIII., p. 516; in relation to the Married Women’s Property Acts, see title HUSBAND AND WIFE, Vol. XVI., pp. 352, 353, 369; in relation to income tax, see title INCOME TAX, Vol. XVI., pp. 643 *et seq.*; in relation to inhabited house duty, see title INHABITED HOUSE DUTY, Vol. XVII., pp. 192, 193; in relation to weights and measures, where the word is defined by statute, see Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 19; and title WEIGHTS AND MEASURES. As to trade customs and usages, see titles CUSTOM AND USAGES, Vol. X., pp. 217 *et seq.*; INSURANCE, Vol. XVII., pp. 337, 342, 344, 346, 458. As to the distinction between retail and wholesale trade in beer, wines, and spirits, see title INTOXICATING LIQUORS,

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general application, and must always be considered with the context with which it is used. Thus, under the Sunday Observance Act, 1677 (*b*), a solicitor (*c*), or a farmer (*d*), or a barber (*e*), or a coach proprietor (*f*), is not a tradesman, but a horse-dealer is (*g*); and as used in various Revenue Acts the word "trade" is not limited to buying and selling (*h*), but may include manufacture (*i*).

Vol. XVIII., pp. 10 *et seq.*; in margarine, see title FOOD AND DRUGS, Vol. XV., pp. 56, 57; in tobacco, see title REVENUE, Vol. XXIV., pp. 678 *et seq.*; in respect of bakehouses, see title FACTORIES AND SHOPS, Vol. XIV., pp. 460, 461; in respect of shops, see Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 19 (1); and title FACTORIES AND SHOPS, Vol. XIV., p. 511. For the distinction between trade purposes and domestic purposes in relation to water supply, see title WATER SUPPLY; and for the distinction between trade and domestic refuse, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 568, 605.

(*b*) 29 Car. 2, c. 7; and see titles CONTRACT, Vol. VII., pp. 402, 403, note (*j*); TIME, p. 443, *ante*.

(*c*) *Peate v. Dicken* (1834), 1 Cr. M. & R. 422 (and even assuming that he is, it is not part of his ordinary calling to make himself personally liable on behalf of a client).

(*d*) *R. v. Cleworth* (1864), 4 B. & S. 927; *sub nom. R. v. Silvester*, 33 L. J. (M. C.) 79. But farming is a business (*Harris v. Amery* (1865), L. R. 1 C. P. 148); see title AGRICULTURE, Vol. I., p. 294.

(*e*) *Palmer v. Snow*, [1900] 1 Q. B. 725, *per* CHANNELL, J., at p. 727: "Tradesman" means to denote a person carrying on a trade—buying or selling." A barber's business is expressly included in the definition of retail trade under the Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 19 (1); see titles FACTORIES AND SHOPS, Vol. XIV., p. 511; CONTRACT, Vol. VII., p. 403.

(*f*) *Sandiman v. Breach* (1827), 7 B. & C. 96 (where, however, the decision turned largely on the fact that in similar statutes carriers, drovers, and wagoners were expressly dealt with); see title CONTRACT, Vol. VII., p. 403.

(*g*) *Fennell v. Ridler* (1826), 5 B. & C. 406. A horse auctioneer selling by private contract is not carrying on his ordinary calling (*Drury v. Defontaine* (1808), 1 Taunt. 131); but see *Smith v. Sparrow* (1827), 4 Bing. 84, 88.

(*h*) *Bank of India v. Wilson* (1877), 3 Ex. D. 108 (occupation for the purposes of a telegraph company is occupation for the purpose of trade only, under the statutes dealing with inhabited house duty (House Tax Act, 1817 (57 Geo. 3, c. 25), s. 1; stat. (1824) 5 Geo. 4, c. 44, s. 4; Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 11); and see *Bank of India v. Wilson*, *supra*, *per* KELLY, C.B., at pp. 113 ("It was not the intention of the legislature to limit the meaning of the word 'trade' to buying and selling; though that is the literal meaning of the word,") and 115 ("We may reasonably say that it ('trade') was intended to embrace a great variety of different operations though all of a commercial character; something therefore like a warehouse, like a shop, like a counting house"); *Edinburgh Life Assurance Co. v. Inland Revenue Solicitor* (1875), 2 R. (Ct. of Sess.) 394; distinguished in *Bank of India v. Wilson*, *supra*, at p. 115 (a life assurance company is not a trader; compare *Citizens Insurance Co. of Canada v. Parsons*, *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96, 111, 112, P. C.); *Ryhope Coal Co. v. Foyer* (1881), 7 Q. B. D. 485 (the business of working a coal mine may be a trade within the Income Tax Acts; but the word "concern" was also used); *Re Incorporated Council of Law Reporting for England and Wales (Duty on Estate)* (1888), 22 Q. B. D. 279 (a limited company publishing and selling law reports, but precluded from paying a dividend, apparently carries on a trade within the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11; but the word "business" was there also used). A circus proprietor is not a trader

(*i*) For note (*i*), see p. 511, *post*.

In connexion with trade unions the word “trade” clearly includes the disposal of his labour by a workman (*k*) and in the expression “restraint of trade” the word is used in its loosest sense to cover every kind of trade, business, profession or occupation (*l*).

990. “Business” is a wider term, not synonymous with “trade,” and means practically anything which is an occupation as distinguished from a pleasure (*m*).

991. Profit or the intent to make profit is not an essential part of the legal definition of a trade or business; nor does payment or profit constitute that a trade or business which would not otherwise be such (*n*).

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for the purpose of carriage licence duty under the Customs and Inland Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 19 (6) (*Speak v. Powell* (1873), L. R. 9 Exch. 25); compare titles INCOME TAX, Vol. XVI., pp. 643, 644; REVENUE, Vol. XXIV., p. 690, note (*h*).

(*i*) *Taxation Commissioners v. Kirk*, [1900] A. C. 588, 592, P. C. As to the meaning of “manufacture,” see title PATENTS AND INVENTIONS, Vol. XXII., p. 134.

(*k*) Compare *Allen v. Flood*, [1898] A. C. 1, *per* CAVE, J., at pp. 35, 36 (though on the point the learned judge was discussing his view was overruled by the House of Lords); and compare *Fazakerley v. Wiltshire* (1721), 1 Stra. 462. But under stat. (1562-3) 5 Eliz. c. 4 (now repealed) a journeyman was held not to be a trader; see p. 512, *post*; and compare *Clark v. Denton* (1830), 1 B. & Ad. 92 (a journeyman does not “use an art”); *R. v. Slaughter* (1700), 2 Salk. 611 (whether a fellmonger who only pulls wool from the skin is a trader is a question for a jury); compare title MASTER AND SERVANT, Vol. XX., pp. 90, 119.

(*l*) For a list of the trades etc. to which the doctrine of restraint of trade has been applied, see p. 583, *post*. As to contracts in restraint of trade generally, see pp. 548 *et seq.*, *post*.

(*m*) *Doe d. Wetherell v. Bird* (1834), 2 Ad. & El. 161 (the use of premises as a private lunatic asylum is not a trade; and compare *ibid.*, *per* Lord DENMAN, C.J., at p. 166 (“Every trade is a business, but every business is not a trade; to answer that description it must be conducted by buying and selling”)); *Harris v. Amery* (1865), L. R. 1 C. P. 148, *per* WILLES, J., at p. 154; *Rolls v. Miller* (1884), 27 Ch. D. 71, C. A. (the carrying on of a charitable home for working girls, boarded without payment, is not a trade, but it is the business of a lodging-house keeper; and compare *ibid.*, *per* LINDLEY, L.J., at p. 88 (“The word (“business”) means almost anything which is an occupation as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business”)); see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 173; LANDLORD AND TENANT, Vol. XVIII., pp. 516, 517; MASTER AND SERVANT, Vol. XX., pp. 155, 156; and compare titles PARTNERSHIP, Vol. XXII., p. 41; PATENTS AND INVENTIONS, Vol. XXII., p. 134.

(*n*) *Rolls v. Miller*, *supra*; *Bramwell v. Lacy* (1879), 10 Ch. D. 691; *Paddington Burial Board v. Inland Revenue Commissioners* (1884), 13 Q. B. D. 9; for the case of a trade, see *Re Incorporated Council of Law Reporting for England and Wales (Duty on Estate)* (1888), 22 Q. B. D. 279, *per* Lord COLERIDGE, C.J., at p. 293 (“the definition of the mere word trade does not necessarily mean something by which a profit is made”); see also title LANDLORD AND TENANT, Vol. XVIII., pp. 516, 517. Sometimes the words “gain” or “profit” are expressly used, as in stat. (1817) 57 Geo. 3, c. 99, s. 3 (now repealed). Under the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (inhabited house duty), occupation for the purposes of a reading-room and library (*London Library v. Carter* (1890), 6 T. L. R. 161), or medical institute (*British Institute of Preventive Medicine v. Styles* (1895), 11

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Exercising
trade or
business.

992. The words "to exercise a trade or business" imply that the trade or business must be habitually or systematically exercised: they do not apply to isolated transactions (o). Nor is it a trading for a person to make articles for his own use or the use of his family or of a family which he serves (p), or to work for his own purposes only (q).

T. L. R. 432), with no payment of dividends, is not an occupation "for the purposes of any trade or business . . . by which the occupier seeks a profit." Under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, farming and grazing was held to be "a business that has for its object the acquisition of gain" (*Harris v. Amery* (1865), L. R. 1 C. P. 148). But under stat. (1562-3) 5 Eliz. c. 4, which forbade any person to set up, occupy, use, or exercise any craft, mystery, or manual occupation in existence at the date of the Act, unless he had served an apprenticeship, the words were held to apply only to a person who got his living thereby (*Shoyle v. Taylor* (1607), Cro. Jac. 178; *City of London's Case* (1610), 8 Co. Rep. 121 b, 128 a). Stat. (1562-3) 5 Eliz. c. 4 was repealed by the Apprentices Act, 1814 (54 Geo. 3, c. 96), ss. 1, 2 (saving the order and custom of the City of London). Being a penal Act and in restraint of trade it was strictly construed, and under it a partner who shared profit and loss, but took no part in the management, was held not to be exercising the trade (*Raynard v. Chase* (1756), 1 Burr. 2); otherwise, where a person directed the trade himself (*Hobbs v. Young* (1691), 2 Salk. 610); see title PARTNERSHIP, Vol. XXII., pp. 4, 5. But exercising a trade by servants or apprentices was within the Act (*Hobbs v. Young*, *supra*), and, apparently, it is doubtful whether even under the Act *Raynard v. Chase*, *supra*, was good law. Only a master, and not a journeyman, was liable to penalties under the Act, for a journeyman was held not to exercise the trade (*Hobbs v. Young* (1691), as reported in 1 Show. 266, *per* HOLT, C.J., at p. 268; *Beach v. Turner* (1769), 4 Burr. 2449; and see note (g), p. 525, *post*); compare title INCOME TAX, Vol. XVI., pp. 643, 644.

(o) Compare *Grainger & Son v. Gough*, [1896] A. C. 325, *per* Lord MORRIS, at p. 343 (dissenting on the main question in the case from the majority of the court); *Spiers and Pond, Ltd. v. Green*, [1912] 3 K. B. 576; *Newman v. Oughton*, [1911] 1 K. B. 792; see titles FOOD AND DRUGS, Vol. XV., p. 64, note (g); MONEY AND MONEY-LENDING, Vol. XXI., p. 44; But if a person carrying on a particular business does a single isolated preliminary first act in that business, he is carrying it on; see *A.-G. v. Plymouth Corporation* (1909), 100 L. T. 742, C. A., *per* BUCKLEY, L.J., at p. 744. As to the case of a "sleeping partner," see note (n), p. 511, *ante*; as to how far a sleeping partner is bound, see title PARTNERSHIP, Vol. XXII., pp. 24, 25.

(p) *Shoyle v. Taylor*, *supra*; *City of London's Case*, *supra*, at pp. 128 a, 129 a ("It is not properly said that one uses a manual occupation when he makes no more than for himself, as he who brews or bakes for his own use"); *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a, 54 a (a domestic servant making garments for his master is not exercising a trade within stat. (1562-3) 5 Eliz. c. 4, or the bye-law of a corporation of tailors); *Norris v. Staps* (1616), Hob. 210, 211 (it is not exercising a trade to do it privately, as a tailor in a house, or the like); *Hobbs v. Young*, *supra*.

(q) *Fazakerley v. Wiltshire* (1721), 1 Stra. 462 (a bye-law regulating porters did not apply to a person carrying his own goods); *A.-G. v. Plymouth Corporation*, *supra* (it is not "carrying on the business of a wharfinger" to use one's own wharf for loading and unloading materials for one's own works; nor is it "permitting" such a business to be carried on to lease neighbouring land with leave to the lessee to use the wharf for loading or unloading materials for his own works).

Part II.—General Control and Supervision of Trade.

SECT. 1.—*The Board of Trade.*

993. The Board of Trade is the general supervising authority over the trade, industry, and navigation of the British Empire (*a*).

The Board is by statute the supervising and regulating authority, with executive and administrative powers and powers of inquiry and investigation, in the following matters, in addition to the matters more fully dealt with in this title (*b*):—railways and canals (*c*); tramways (*d*); the supply of gas (*e*), water (*f*) and electric light (*g*); companies generally (*h*); patents, designs, and trade marks (*i*); merchandise marks (*j*); merchant shipping (*k*); registration of births and deaths at sea (*l*); boiler explosions (*m*); harbours (*n*); foreshores (*o*); telegraphs (*p*); lighthouses (*q*); coinage (*r*); explosives (*s*); weights and measures (*t*); rifle ranges adjoining the sea or tidal waters (*u*); assurance companies (*v*); bankruptcy (*w*); labour exchanges (*x*); unemployment insurance (*y*), and sea fisheries (*z*).

SECT. 1.

The Board of Trade.

Functions of Board of Trade.

(*a*) As to the constitution and functions of the Board of Trade generally, see title CONSTITUTIONAL LAW, Vol. VII., pp. 102, 103.

(*b*) See pp. 514 *et seq.*, *post*.

(*c*) See title RAILWAYS AND CANALS, Vol. XXIII., pp. 619 *et seq.*; as to electric traction, see *ibid.*, pp. 697, 698.

(*d*) See title TRAMWAYS AND LIGHT RAILWAYS, pp. 779 *et seq.*, *post*.

(*e*) See title GAS, Vol. XV., pp. 305 *et seq.*

(*f*) See title WATER SUPPLY.

(*g*) See title ELECTRIC LIGHTING, Vol. XII., pp. 541 *et seq.*

(*h*) See title COMPANIES, Vol. V., pp. 1 *et seq.*

(*i*) See titles PATENTS AND INVENTIONS, Vol. XXII., pp. 125 *et seq.*, 197, 198; TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 685, 687, 694, 695, 704, 741, *post*.

(*j*) See title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 722 *et seq.*, *post*.

(*k*) See title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 649 *et seq.* As to chain cables and anchors, see pp. 544 *et seq.*, *post*.

(*l*) See title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS, Vol. XXIV., pp. 457 *et seq.*

(*m*) See title FACTORIES AND SHOPS, Vol. XIV., pp. 474, 475.

(*n*) See titles SHIPPING AND NAVIGATION, Vol. XXVI., p. 645; WATERS AND WATERCOURSES.

(*o*) See title WATERS AND WATERCOURSES.

(*p*) See title TELEGRAPHS AND TELEPHONES, pp. 347 *et seq.*, *ante*.

(*q*) See title SHIPPING AND NAVIGATION, Vol. XXVI., p. 649.

(*r*) See title CONSTITUTIONAL LAW, Vol. VI., p. 461.

(*s*) See title EXPLOSIVES, Vol. XIV., pp. 384 *et seq.*

(*t*) See title WEIGHTS AND MEASURES.

(*u*) See title WATERS AND WATERCOURSES.

(*v*) See title COMPANIES, Vol. V., pp. 620 *et seq.*

(*w*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 1 *et seq.*

(*x*) See title WORK AND LABOUR.

(*y*) See National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 84 *et seq.*; title WORK AND LABOUR.

(*z*) See title FISHERIES, Vol. XIV., p. 621. By the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), part of the powers and duties of the Board of Trade as to fisheries generally was transferred to the Board of Agriculture and Fisheries; see title FISHERIES, Vol. XIV., pp. 595, 621.

SECT. 2.

Census of
Production.Date of
census.SECT. 2.—*Census of Production.*

994. A census of production was taken in 1908, and is to be taken after that date at intervals prescribed by an order of the Board of Trade (a). The taking of the census is superintended by the Board, which issues the necessary forms and instructions (b), and as soon as possible after its completion a report and summary of the statistics compiled are presented to Parliament (c).

Advisory
committee.

995. For the purposes of the census the Board of Trade appoints a committee or committees, including persons conversant with the conditions of and engaged in various trades and industries, to advise the Board in the preparation of forms and instructions (d). The members of the committee receive such travelling and other allowances as the Board may fix (e). No member of a committee is permitted as such to see any individual return, or to be made acquainted with any information contained in any answer to any question put for the purposes of the census (f).

Forms.

996. The Board of Trade prepares forms to be filled up by occupiers of factories and workshops (g); by the owner, agent, or manager of any mine or quarry; by every builder; by every person who by way of trade or business (h) executes works of construction, alteration or repair of railroads, tramroads, and the like; by every person who by way of trade or business (h) gives out work to be done off his premises; and by every person carrying on any other trade or business (h) which may be prescribed (i). The forms require such particulars, for the calendar year preceding the date of the census, or any part of such year, as may be necessary for ascertaining the quantity and value of production (k).

(a) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 1. By an Order of the Board of Trade dated the 28th October, 1911, the census is to be taken in 1913, and thereafter in every fifth year. As to the census of population, see title CONSTITUTIONAL LAW, Vol. VI., pp. 343 *et seq.*

(b) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 2.

(c) *Ibid.*, s. 4.

(d) *Ibid.*, s. 9 (1), (3).

(e) *Ibid.*, s. 9 (2).

(f) *Ibid.*, s. 9 (4).

(g) That is (*ibid.*, Schedule (A)), within the meaning of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149; see title FACTORIES AND SHOPS, Vol. XIV., pp. 436 *et seq.*

(h) For the meaning of these words, see pp. 509 *et seq.*, *ante*. In the expression "trade or business" is included the exercise and performance, by a local or other public authority, of its powers and duties (Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 7). Where a trade or business is carried on by a company by means of a subsidiary company or companies, any two or more returns are to be treated as one (*ibid.*, s. 6 (4)). A company is "subsidiary" if not less than three-fourths of its ordinary share capital is held by the other company (*ibid.*). As to subsidiary companies generally, see title COMPANIES, Vol. V., p. 640.

(i) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 3 (1), Schedule; see the Rules of the 4th January, 1913, 20th January, 1913, and 14th February, 1913, thereunder (Stat. R. & O., 1913, Nos. 34, 194, 195).

(k) The required particulars may include the nature of the trade, the output, number of working days, number of persons employed, power used or generated and the like; but not the amount of wages (*ibid.*,

Every form must be filled up, signed, and delivered by the date prescribed by notice in writing by the Board (*l*). Rules are made for the carrying out of the census by the Board in consultation with the Home Secretary (*m*); and in the case of factories, workshops, mines or quarries the Home Secretary has power, by arrangement with the Board, to issue and collect the necessary forms and to cause any statistical returns which he is authorised under any enactment to obtain to be collected at the same time and, if convenient, upon the same forms (*n*).

SECT. 2.
Census of
Production.

997. Either the Board of Trade or the Home Secretary may obtain, either by the insertion of additional particulars or by the circulation of additional forms, any further statistical or other information which any person may be willing to supply (*o*). By the rules provision may be made for the exemption, either wholly or in part and conditionally or unconditionally, of any prescribed person or class of persons from the obligation to make returns (*p*).

Additional
information.

998. Provision is made for ensuring the secrecy of individual returns, and the avoidance of the disclosure of trade secrets and trading profits, the penalty for disclosure or wrongful use of information being imprisonment for not exceeding two years, with or without hard labour, or a fine of unspecified amount, or both imprisonment and fine (*a*).

Secrecy.

The penalty for wilful refusal or neglect to fill up, sign, or deliver a form, or for wilfully making a false return or for refusing to answer or wilfully giving a false answer to any necessary question, is a fine not exceeding £10, and in the case of a continuing offence a further fine not exceeding £5 for each day during which the offence continues. In the case of a false return or answer the offence continues till a true return or answer is made (*b*).

Penalties.

s. 3 (1). Where it is inconvenient to take the calendar year prescribed, some other period may be substituted (Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 3 (1) (*a*)); particulars as to output may include particulars of the aggregate estimated value of the materials used, and the total amount paid to contractors for work given out to them (*ibid.*, s. 3 (1) (*b*)); and particulars as to quantity of output are only required in the case of articles which are required by the official import and export list to be entered on importation into, or exportation from, the United Kingdom (*ibid.*, s. 3 (1) (*c*)). As to the provisions relating to the report of goods on importation, see title REVENUE, Vol. XXIV., pp. 587, 588.

(*b*) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 3 (2). The date must be not less than three months after the issue of the form (*ibid.*).

(*m*) *Ibid.*, s. 8.

(*n*) *Ibid.*, s. 5 (1), (2). As to returns which the Home Secretary is authorised by other Acts to direct, see, for instance, Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 130; Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 18, 22; and titles FACTORIES AND SHOPS, Vol. XIV., p. 526; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 606, 607. The Home Secretary may direct that the intervals at which returns are to be made under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 130, are to be the same as the intervals at which a census is directed (Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 10).

(*o*) *Ibid.*, s. 11.

(*p*) *Ibid.*, s. 8 (*b*).

(*a*) *Ibid.*, s. 6 (1), (2), (3), (5).

(*b*) *Ibid.*, s. 12.

SECT. 3.
Inquiries
and
Arbitrations
by the
Board of
Trade.
—
Provisions as
to inquiries.

SECT. 3.—*Inquiries and Arbitrations by the Board of Trade.*

999. Under many of the general Acts already referred to (*c*), the Board of Trade is directed or authorised to hold inquiries, and when required or authorised by any special Act (*d*) to sanction, approve, confirm or determine any appointment, matter or thing, or to make any order or do any other matter or thing for the purposes of a special Act, the Board is empowered to make such inquiry as may be necessary (*e*); such inquiry may be held by any person or persons duly authorised by the Board (*f*). When application is made to the Board in pursuance of a special Act to be arbitrator, or to appoint an arbitrator, or to hold an inquiry, or to give its sanction, approval, confirmation or determination, or to make an order, all expenses of the Board are to be defrayed by the parties to the application, or such of them, subject to any provision in the special Act, as the Board may direct; or they may, by order of the Board, be paid as the costs of the arbitration (*g*).

SECT. 4.—*Conciliation Boards.*

SUB-SECT. 1.—*Definition.*

Settlement of
disputes.

1000. A conciliation board is any board constituted for the purpose of settling disputes between employers and workmen by conciliation or arbitration, or any association or body authorised by an agreement in writing made between employers and workmen to deal with such disputes (*h*).

SUB-SECT. 2.—*Registration.*

Application.

1001. A conciliation board may apply to the Board of Trade for registration, sending with its application copies of its constitution, bye-laws and regulations, with such other information as the Board of Trade may reasonably require (*i*).

The Board of Trade keeps a register of conciliation boards, with

(*c*) See p. 513, *ante*.

(*d*) Namely, a local or local and personal Act, or an Act of a local or personal nature, including a provisional order of the Board confirmed by Act of Parliament, and a certificate granted by the Board under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121) (Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 4); see title RAILWAYS AND CANALS, Vol. XXIII., pp. 739, 740.

(*e*) Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 2.

(*f*) *Ibid.*, s. 2.

(*g*) *Ibid.*, s. 3. The Board may require payment on account or security; its certificate is conclusive as to amount, and the amount may be recovered as a debt, and, if payable to the Board, as a debt due to the Crown (*ibid.*, s. 3); as to recovery of debts due to the Crown, see title CROWN PRACTICE, Vol. X., pp. 7 *et seq.* As to the reference to the Railway Commissioners of cases to which a railway or canal company is a party, see Board of Trade Arbitrations, etc. Act, 1874 (37 & 38 Vict. c. 70), s. 6; and title RAILWAYS AND CANALS, Vol. XXIII., pp. 740, 746, 754, 791.

(*h*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 1 (1); see title MASTER AND SERVANT, Vol. XX., pp. 210, 211.

(*i*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 1 (1), (2).

the name and principal office of each and such other particulars as it thinks expedient (*j*). The name of any board may be removed from the register either on a written application by the board (*k*), or if the Board of Trade is satisfied that it has ceased to exist or to act (*l*).

SECT. 4.
Conciliation
Boards.
Register.

Every registered conciliation board must furnish such returns, reports of its proceedings, and other documents as the Board of Trade may reasonably require (*m*).

Returns.

SUB-SECT. 3.—*Procedure.*

1002. Proceedings for conciliation before a registered conciliation board must, subject to any agreement to the contrary, be conducted in accordance with the regulations of the board (*n*). The Arbitration Act, 1889 (*o*), does not apply to the settlement by arbitration of any difference or dispute to which the Conciliation Act, 1896 (*p*), applies; but any such arbitration proceedings must be conducted in accordance with such of the provisions of the Arbitration Act, 1889 (*o*), or such of the regulations of the conciliation board, or under such other rules or regulations as may be agreed upon by the parties (*q*).

Conduct of
proceedings.

SUB-SECT. 4.—*Local Inquiries, Conciliation, and Arbitration.*

1003. The Board of Trade has power, if it appears to the Board that in any district or trade adequate means do not exist for having disputes submitted to a conciliation board, to appoint any person or persons to inquire into the conditions of the district or trade and to confer with the employers and employed, and, if the Board thinks fit, with any local authority or body, as to the expediency of establishing a conciliation board for the district or trade (*r*).

Establish-
ment of
conciliation
board.

1004. The Board of Trade has power, where a difference exists or is apprehended between an employer, or any class of employers, and workmen, or between different classes of workmen, to do any or all of the following things:—To inquire into the causes and circumstances of the difference (*s*); to take steps for the purpose of enabling the parties to the difference to meet together, by themselves or their representatives, under the presidency of a chairman mutually agreed upon or nominated by the Board or by some other person or body, with a view to the amicable settlement of the difference (*t*); to appoint a person or persons to act as a conciliator or board of conciliation, on the application of employers

Powers as to
conciliation.

(*j*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 1 (3).

(*k*) *Ibid.*, s. 1 (3).

(*l*) *Ibid.*, s. 1 (5).

(*m*) *Ibid.*, s. 1 (4).

(*n*) *Ibid.*, s. 1 (6).

(*o*) 52 & 53 Vict. c. 49; see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*p*) 59 & 60 Vict. c. 30.

(*q*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 3.

(*r*) *Ibid.*, s. 4. For forms of rules of a conciliation and arbitration board, see Encyclopædia of Forms and Precedents, Vol. XIV., p. 535.

(*s*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 2 (1) (a).

(*t*) *Ibid.*, s. 2 (1) (b).

SECT. 4.
Conciliation
Boards.

or workmen interested, and after taking into consideration the existence and adequacy of means available for conciliation in the district or trade and the circumstances of the case (*u*); and to appoint an arbitrator on the application of both parties (*a*).

Duties of
conciliator.

1005. A conciliator so appointed is to inquire into the causes and circumstances of the difference by communication with the parties and otherwise to endeavour to bring about a settlement. He reports to the Board of Trade; and if a settlement is effected, either by conciliation or arbitration, a memorandum of the terms is to be drawn up and signed by the parties or their representatives, and a copy of such memorandum is to be delivered to and kept by the Board (*b*).

SUB-SECT. 5.—*Reports.*

Report to
Parliament.

1006. The Board of Trade must from time to time present to Parliament a report of its proceedings under the Conciliation Act (*c*).

SECT. 5.—*Trade Boards.*

SUB-SECT. 1.—*Nature and Object.*

Regulation of
wages.

1007. In the case of four specified trades (*d*) and any other trades specified in a provisional order made by the Board of Trade and confirmed by Parliament (*e*), provision is made by statute for the regulation of the rates of wages through the medium of trade boards, which are to be established, if practicable, by the Board of

(*u*) Conciliation Act, 1896 (59 & 60 Vict. c. 30), s. 2 (1) (*c*).

(*a*) *Ibid.*, s. 2 (1) (*d*).

(*b*) *Ibid.*, s. 2 (2), (3).

(*c*) 59 & 60 Vict. c. 30, s. 5. Expenses incurred by the Board of Trade are defrayed out of moneys provided by Parliament (*ibid.*, s. 6). The following Acts are repealed:—the Masters and Workmen Arbitration Act, 1824 (5 Geo. 4, c. 96); the Councils of Conciliation Act, 1867 (30 & 31 Vict. c. 105); and the Arbitration (Masters and Workmen) Act, 1872 (35 & 36 Vict. c. 46).

(*d*) Namely, (1) ready-made and wholesale bespoke tailoring and any other branch of tailoring in which the Board of Trade considers that the system of manufacture is generally similar to that prevailing in the wholesale trade; (2) the making of boxes or parts thereof made wholly or partially of paper, cardboard, chip, or similar material; (3) machine-made lace and net finishing and mending or darning operations of lace curtain finishing; (4) hammered and dollied or tommied chain-making (Trade Boards Act, 1909 (9 Edw. 7, c. 22), Sched.).

(*e*) Any other trade may be included if the Board of Trade is satisfied that the rate of wages prevailing in any branch of the trade is exceptionally low and that the other circumstances of the trade are such as to render the application of the Act expedient (*ibid.*, s. 1 (1), (2)); and, on the other hand, a trade may be removed from the operation of the Act if the Board of Trade considers that the conditions of the trade have so altered as to render the application of the Act unnecessary (*ibid.*, s. 1 (3)). As to provisional orders and petitions against them, see *ibid.*, s. 1 (3), (5), (6)); as to confirmation of provisional orders, see title PARLIAMENT, Vol. XXI., pp. 703, 740 *et seq.* Provisional orders have been made applying the Act to the following trades:—sugar, confectionery and food preserving, shirt-making, hollow ware making, linen and cotton embroidery, and calendering and machine ironing in steam laundries, but these have not yet been confirmed.

Trade for any trade, or any branch of work in any trade, to which the Act applies (*f*).

SECT. 5.
Trade
Boards.

SUB-SECT. 2.—*Constitution and Procedure.*

1008. A trade board consists of representative and appointed members, chosen in accordance with regulations of the Board of Trade (*g*). Representative members are members representing employers and members representing workers in equal proportions (*h*). They are elected or nominated, or partly elected and partly nominated, as may be provided by the regulations; and in trades where a considerable proportion of home workers are engaged the regulations must provide for the representation of home workers (*i*).

Representa-
tive members.

Appointed members may be appointed by the Board of Trade in such numbers as the Board thinks fit (*k*), and such of them act on each trade board or district trade committee as the Board of Trade may direct (*l*). The number of appointed members acting on the same trade board or district committee at the same time must, however, be less than half the total number of representative members (*m*).

Appointed
members.

Women are eligible as members (*n*); in the case of a board for a trade in which women are largely employed, at least one of the appointed members acting must be a woman (*o*).

Women.

(*f*). Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 2. The boards are established in accordance with regulations made under the Act. Regulations have been made as follows:—for the chain-making trade, 29th November, 1909 (Stat. R. & O., 1909, p. 765); for the box-making trade, 27th April, 1910 (Stat. R. & O. 1910, p. 827); for the lace etc. trade, 4th May, 1910 (Stat. R. & O., 1910, p. 825); for the tailoring trade, 25th July, 1910 (Stat. R. & O., 1910, p. 831); as to constitution of district trade committees, 22nd July, 1910 (Stat. R. & O., 1910, p. 835); as to mode of giving notice under the Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 18 (see note (*k*), p. 521, *post*), 27th April, 1910 (Stat. R. & O., 1910, p. 837). Where a board is established for a branch of work, any reference to the trade for which a board is established is a reference to that branch (Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 2 (2)). As to a trade or branch of work carried on in Ireland, see *ibid.*, s. 2 (1); as to the laying of regulations before Parliament and the amendment thereof, see *ibid.*, s. 19; as to the exercise of statutory powers by a Secretary of State, see *ibid.*, s. 20 (1), (2); as to the payment of expenses and remuneration, see *ibid.*, s. 21.

(*g*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), ss. 11, 13. The regulations may apply generally to the constitution of all trade boards or specially to the constitution of any particular board or class of boards (*ibid.*, s. 11 (1)). For the dates of the regulations, see note (*f*), *supra*.

(*h*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 11 (1). An employer, for the purposes of the Act, includes any shopkeeper, dealer, or trader, who, by way of trade, makes any arrangement, express or implied, with any worker in pursuance of which the worker performs any work for which a minimum rate of wages has been fixed; and in such case the wages are the net remuneration obtainable by the worker in respect of the work after allowing for his necessary expenditure in connexion therewith (*ibid.*, s. 9).

(*i*) *Ibid.*, s. 11 (3).

(*k*) *Ibid.*, s. 13 (1).

(*l*) *Ibid.*, s. 13 (2). As to district trade committees, see p. 520, *post*.

(*m*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 13 (2).

(*n*) *Ibid.*, ss. 11 (2), 13 (1).

(*o*) *Ibid.*, s. 13 (2).

SECT. 5.
Trade
Boards.

Chairman.
Quorum.

The Board of Trade appoints the chairman, who must be a member, and the secretary (*p*).

1009. In order to constitute a meeting of a trade board, at least one-third of the representative members and at least one appointed member must be present (*q*).

The proceedings of a trade board are not invalidated by any vacancy in its number or by any defect in the appointment, election, or nomination of any member (*r*).

A trade board may regulate its own proceedings as it thinks fit, subject to the provisions of the Trade Board Act, 1909 (*s*), and the regulations, if any, made by the Board of Trade (*t*).

SUB-SECT. 3.—*District Trade Committees.*

Constitution.

1010. A trade board may establish district trade committees, consisting partly of members of the board and partly of persons who are not members but represent employers or workers engaged in the trade. Such committees must be constituted in accordance with regulations made by the Board of Trade and act for such area as the Board of Trade may determine (*u*).

At least one appointed member must act as a member of each district committee; local employers and workers must be equally represented thereon; home workers must be represented in the case of any trade in which a considerable proportion of home workers are engaged in the district; and there must be a standing sub-committee to consider applications for special minimum piece-rates and complaints made to the trade board, to which sub-committee all applications and complaints must be referred (*v*).

Delegation of
powers.

1011. A trade board may refer all matters which it thinks expedient to a district committee for its report and recommendations; and may also delegate to such committee any of the powers and duties of the board, except the power and duty to fix a minimum time-rate or general minimum piece-rate (*a*).

Recommendation of
minimum
rate.

1012. Where a district committee is established for any area, it is the duty of the committee to recommend to the trade board minimum time rates and, so far as it thinks fit, general minimum piece-rates applicable to the trade in that area. No such minimum rate fixed under the Act, and no variation or cancellation thereof, takes effect within the area unless recommended by the committee, or unless an opportunity has been given to the committee to report thereon to the board and the board has considered the report, if the committee has made one (*b*).

(*p*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 11 (4).

(*q*) *Ibid.*, s. 11 (6).

(*r*) *Ibid.*, s. 11 (5).

(*s*) 9 Edw. 7, c. 22.

(*t*) *Ibid.*, s. 11 (7). The Board of Trade has power to make such regulations as to proceedings and meetings, including the method of voting. For the dates of the regulations made, see note (*f*), p. 519, *ante*.

(*u*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 12 (1). The regulations made are dated 22nd July, 1910 (Stat. R. & O., 1910, p. 835).

(*v*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 12 (2). The Board of Trade regulations must provide for the above requirements (*ibid.*).

(*a*) *Ibid.*, s. 12 (3). As to the rates, see p. 521, *post*.

(*b*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 12 (4).

SUB-SECT. 4.—*Duties of Trade Boards.*

SECT. 5.

Trade
Boards.(i.) *In General.*

1013. It is the general duty of a trade board to consider as occasion requires any matter referred to it by a Secretary of State, the Board of Trade, or any other Government department, with reference to the industrial conditions of the trade, and to report thereon (c). Industrial conditions.

(ii.) *Fixing of Rates of Wages.*

1014. Trade boards must, unless relieved from this duty by the Board of Trade (d), fix minimum rates of wages for time work (referred to as “minimum time-rates”), and may fix general minimum rates of wages for piece work (referred to as “general minimum piece-rates”) for their trades (e). Such rates may be fixed so as to apply universally to the trade, or so as to apply to any special process in the work, or any special class of workers, or any special area (f); they may be cancelled or varied by the board at discretion, and must, if the Board of Trade so direct, be reconsidered, whether an application is made for the purpose or not (g). Minimum rate.

If however, a board reports that the fixing of a minimum time-rate is impracticable in any case, the Board of Trade may relieve it of its duty so far as respects that case (h).

1015. On the application of any employer a trade board must fix a special minimum piece-rate to apply as respects the persons employed by him in cases to which a minimum time-rate, but no general minimum piece-rate, is applicable; and the board may, as it thinks fit, cancel or vary any such rate either on the application of, or after one month’s notice to, the employer (i). Special minimum piece-rate.

1016. Provision is made as to notice and the considering of objections (k). Notices.

(c) Trade Boards Act, 1909 (9 Edw. 7, c. 22) s. 3.

(d) See the text, *infra*.

(e) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 4 (1). “Trade” includes a branch of work in a trade where the board is established for a branch of work; see *ibid.*, s. 2 (2); and note (f), p. 519, *ante*.

(f) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 4 (1).

(g) *Ibid.*, s. 4 (4).

(h) *Ibid.*, s. 4 (1).

(i) *Ibid.*, s. 4 (5). As to the meaning of “employer,” see *ibid.*, s. 9; and note (h), p. 519, *ante*; see also title MASTER AND SERVANT, Vol. XX., pp. 149, 190.

(k) Before fixing a minimum rate, the trade board must give notice of the rate proposed and consider any objections lodged within three months (Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 4 (2)); it must give notice of any rate fixed (*ibid.*, s. 4 (3)); and where it is proposed to cancel or vary a rate the provisions as to notice apply in the same manner as they apply where it is proposed to fix a rate (*ibid.*, s. 4 (4)). The Board of Trade must make regulations as to the notice to be given of any matter under the Act, with a view to bringing the matter, so far as practicable, to the knowledge of persons affected (*ibid.*, s. 18 (1)); such regulations, dated the 27th April, 1910 (Stat. R. & O., 1910, p. 837), have been made. Every occupier of a factory or workshop, or of any place used for giving out work to outworkers, must, in manner directed by the regulations, fix any notices in his factory, workshop, or place which he may by the regulations be required to fix, and must give notice in any other manner, if required by

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Trade
Boards.

Duty of the
Board of
Trade.

SUB-SECT. 5.—*Orders by the Board of Trade.*

1017. When a trade board has given notice of the fixing of a minimum time-rate or general minimum piece-rate it then becomes the duty of the Board of Trade, upon the expiration of six months from the date of the notice, to make an order, referred to as "an obligatory order," making that minimum rate obligatory, in cases in which it is applicable, on all employers and persons employed, unless the Board of Trade is of opinion that the circumstances are such that it is premature or otherwise undesirable to make such order, in which case the Board of Trade must make an order, referred to as an "order of suspension," suspending the obligatory operation of the rate (*l*).

Proceedings
upon order of
suspension.

1018. When an order of suspension has been made, then at any time after the expiration of six months from its date the trade board may apply to the Board of Trade for an obligatory order, and the Board of Trade must make an obligatory order unless it is of opinion that a further order of suspension is desirable, in which case it must make such further order. To this further order the provisions applicable to the first order also apply; and any order of suspension remains in effect till an obligatory order is made (*m*).

General
order.

1019. The Board of Trade may, however, if it thinks fit, make an order to apply generally as respects any rates which may be fixed by any trade board constituted, or about to be constituted, for any trade within the Act. Such order is revocable at any time after three months' notice to the trade board, but while it is in force any minimum time-rate or general minimum piece-rate becomes obligatory after the lapse of six months from the date on which notice of its fixing has been given by the board, in the same manner as if the Board of Trade had made an obligatory order, unless in any particular case the Board of Trade, on the application of any person interested, directs to the contrary (*n*).

SUB-SECT. 6.—*Effect of Rate before it is made Obligatory by Order.*

When
minimum rate
operative.

1020. A minimum rate of wages fixed by a trade board, until it has been made obligatory under an order of the Board of Trade, has the following limited operation, unless the Board of Trade directs to the contrary in a case in which it has directed the trade board to reconsider the rate (*o*):—(1) In all cases to which the minimum rate is applicable the employer must, in the absence of a written agreement to the contrary, pay to the person employed wages at not less than the minimum rate, and the person employed may, in the absence of such agreement, recover wages at such

the regulations, to the persons employed by him of any matter of which he is required to give notice, under a penalty recoverable summarily of not more than 40s. in respect of each offence (Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 18 (2)). As to the exhibition of notices in factories and shops, see title FACTORIES AND SHOPS, Vol. XIV., pp. 448, 495, 510.

(*l*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 5 (2). As to the meaning of "employer," see note (*h*), p. 519, *ante*.

(*m*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 5 (3).

(*n*) *Ibid.*, s. 5 (4).

(*o*) *Ibid.*, ss. 5 (1), 7 (1).

rate (*p*); (2) any employer may give written notice to the trade board which fixed the rate that he is willing that that rate shall be obligatory on him, in which case he is under the same obligation to pay wages at not less than the minimum rate, and liable to the same fine for not doing so as he would be if the rate were obligatory under an order of the Board of Trade (*q*). Unless an employer has given such notice he cannot obtain any contract involving employment to which the minimum rate is applicable from any Government department or local authority, except in cases of public emergency, in which cases the Board of Trade may by order suspend the operation of this provision as respects contracts for any such work being done or to be done on behalf of the Crown (*r*).

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SUB-SECT. 7.—*Effect of Rate when made Obligatory by Order.*

1021. When any minimum rate has been made obligatory by order of the Board of Trade, then in cases to which the minimum rate is applicable an employer must pay wages to the person employed at not less than the said rate clear of all deductions (*s*). Duty to pay minimum rate.

Any agreement for the payment of wages at less than the minimum rate clear of all deductions is void (*t*).

1022. Where persons are employed on piece work, and a minimum time-rate, but no general minimum piece-rate, has been fixed, an employer is deemed to pay wages at less than the minimum Piece work.

(*p*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 7 (1) (a). As to the meaning of "employer," see note (*h*), p. 519, *ante*.

(*q*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 7 (1) (b).

(*r*) *Ibid.*, s. 7 (1) (c). The order must state the extent and period of the suspension and the work in question. The trade board keeps a register of all notices given under this provision, which is open to public inspection without payment of any fee, and is evidence of the matters stated therein; a copy purporting to be certified by the secretary of the board, or any officer of the board authorised for the purpose, to be a true copy of any entry is admissible in evidence without further proof (*ibid.*, s. 7 (2)). As to the rights of the Crown generally, see title CONSTITUTIONAL LAW, Vol. VI., pp. 309 *et seq.*, Vol. VII., pp. 1 *et seq.*

(*s*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 6 (1). Failure to comply is punishable, on summary conviction, by a fine not exceeding £20 for each offence, and not exceeding £5 for each day on which the offence is continued after conviction (*ibid.*); and the court may by the conviction order the payment, in addition to the fine, of such sum as appears to be due to the person employed on account of wages calculated at the minimum rate; but this power to order the payment of wages is not in derogation of any right of the person employed to recover wages by any other proceedings (*ibid.*, s. 6 (2)). On such a prosecution the burden is on the employer to prove by wages sheets or other records, or otherwise, that he has not paid or agreed to pay wages at less than the minimum rate (*ibid.*, s. 6 (4)). As to the meaning of "employer," see note (*h*), p. 519, *ante*.

(*t*) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 6 (5). A trade board has, however, a discretion, if satisfied that a worker employed, or desiring to be employed, on time work is affected by any infirmity or physical injury which renders him incapable of earning the minimum time-rate, and if it is of opinion that the case cannot suitably be met by employing the worker on piece work, to grant to the worker, subject to such conditions, if any, as the board may prescribe, a permit exempting the employment of such worker from the provisions which render the minimum time-rate obligatory (*ibid.*, s. 6 (3)). The employer is thereby relieved from liability to a penalty for paying wages at less than the minimum rate so long as the conditions prescribed are complied with (*ibid.*).

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rate (1) in cases where a special minimum piece-rate has been fixed, if the rate paid is less than that special minimum piece-rate, and (2) in cases where a special minimum piece-rate has not been fixed, unless he shows that the piece-rate paid would yield, in the circumstances of the case, to an ordinary worker at least the same amount of money as the minimum time-rate (a).

SUB-SECT. 8.—*Complaints by Workers.*

Complaints.

1023. Any worker, or any person authorised by a worker, may complain to the trade board that the wages paid to him are below the minimum rate, and the board must consider the matter and may take any proceedings under the Act on behalf of the worker (b).

SUB-SECT. 9.—*Appointment and Powers of Officers.*

Duties of
officers.

1024. Officers are appointed by the Board of Trade for investigating complaints under and securing the observance of the Act, and such officers act under the direction of the Board of Trade, or, if the Board of Trade so determines, under the direction of any trade board (c).

Any such officer (d) has power, in pursuance of any special or general directions of the Board of Trade, to take proceedings under

(a) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 8.

(b) *Ibid.*, s. 10 (1). Before taking such proceedings the board may, and on the first occasion on which proceedings are contemplated by the board against an employer must, take reasonable steps to bring the case to the notice of the employer, with a view to the settlement of the case (*ibid.*, s. 10 (2)). The obligatory provision clearly applies on each occasion when a particular employer is to be proceeded against for the first time.

(c) *Ibid.*, s. 14 (1). The Board of Trade, in lieu of or in addition to appointing officers, may arrange for the co-operation, generally or in special cases, of any other Government department by officers of that department whose duties bring them into relation with a trade to which the Act applies (*ibid.*, s. 14 (2)). Each officer of the Board of Trade or of such other department is furnished with a certificate of his appointment, which he must produce, if required, to any person affected (*ibid.*, s. 16). Such officers have power to require the production of wages sheets or other records of wages by an employer, and records of payments to outworkers, and to inspect, examine, and copy the same (*ibid.*, s. 15 (1) (a)); to require persons giving out work and outworkers to give information which it is in their power to give as to the names and addresses of persons to whom work is given out or from whom it is received, and as to the payments made for the work (*ibid.*, s. 15 (1) (b)); to enter at all reasonable times any factory or workshop or place used for giving out work (*ibid.*, s. 15 (1) (c)); and to inspect and copy any material part of any list of outworkers (*ibid.*, s. 15 (1) (d)). Failure to furnish the means required by an officer for any entry or inspection or the exercise of his powers, or the hindering or molesting an officer in the exercise of his powers, or the refusal to produce any document or to give any information required, is punishable, on summary conviction, by a fine not exceeding £5; and the production of any wages sheet or record of wages or payments, or any list of outworkers, knowing the same to be false, or the furnishing of any information knowing the same to be false, is punishable, on summary conviction, by a fine not exceeding £20 or imprisonment for a term not exceeding three months, with or without hard labour (*ibid.*, s. 15 (2)). As to factories and workshops generally, see title FACTORIES AND SHOPS, Vol. XIV., pp. 433 *et seq.*

(d) Including officers of other departments than the Board of Trade; see note (c), *supra*.

the Act; and a trade board may also take any such proceedings either in the name of any officer of the Board of Trade for the time being acting under its directions (e), or in the name of its secretary or any of its authorised officers (f).

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Boards.

Part III.—Freedom of Trade and Monopoly.

SECT. 1.—General Principle of Freedom of Trade.

1025. It is the general principle of the common law that a man is entitled to exercise any lawful trade as and where he wills; and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract (g), as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State (h).

Freedom
of trade.

(e) See note (c), p. 524, *ante*.

(f) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 17 (1). An officer appointed by the Board of Trade, or an officer of any other department assisting the Board of Trade, or the secretary or other officer of a trade board, may, although not a counsel or solicitor, conduct proceedings under the Act before a court of summary jurisdiction (*ibid.*, s. 17 (2)).

(g) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord WATSON, at p. 552; *Trego v. Hunt*, [1896] A. C. 7, *per* Lord MACNAGHTEN, at p. 24; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per* RIGBY, L.J., at p. 308; *R. v. Adelaide Steamship Co.* (1913), 29 T. L. R. 743, P. C.; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 187; 1 Smith, L. C., 11th ed., p. 406, at p. 410; *Homer v. Ashford* (1825), 3 Bing. 322, *per* BEST, C.J., at p. 326; *Hilton v. Eckersley* (1855), 6 E. & B. 47; (1856), 6 E. & B. 66, 74, 75, Ex. Ch.; approved in *Quinn v. Leatham*, [1901] A. C. 495, *per* Lord BRAMPTON, at p. 525; *R. v. Druitt* (1867), 10 Cox, C. C. 592, 600; *R. v. Batt* (1834), 6 C. & P. 329; *Quinn v. Leatham*, *supra*, *per* Lord LINDLEY, at p. 534; compare *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, *per* Lord HALSBURY, L.C., at p. 36; and see, generally, the cases on restraint of trade, at pp. 648 *et seq.*, *post*. The early cases on customs and bye-laws repeatedly state the general principle; see *Davenant v. Hurd* (1599), Moore (K. B.), 576; referred to in *Darcy v. Allein* (1602), 11 Co. Rep. 84 b, 86 a; *Darcy v. Allein*, *supra*; *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a; *Norris v. Staps* (1616), Hob. 210, 211; *Hesketh v. Braddock* (1766), 3 Burr. 1847; *R. v. Coopers' Co., Newcastle* (1798), 7 Term Rep. 543; *R. v. Tappenden* (1802), 3 East, 186; *Clark v. Le Cren* (1829), 9 B. & C. 52, *per* BAYLEY, J., at p. 58. On the same principle the stat. (1562-3) 5 Eliz. c. 4 (see p. 512, *ante*) was construed strictly (*R. v. Turnith* (1679), 1 Mod. Rep. 26; *Raynard v. Chase* (1756), 1 Burr. 2, 6). In *R. v. Maddox* (1706), 2 Salk. 613, the Act was described as "a hard law."

(h) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, at p. 552; *Horner v. Graves* (1831), 7 Bing. 735, 743; *Wallis v. Day* (1837), 2 M. & W. 273; *Whittaker v. Howe* (1841), 3 Beav. 383; questioned, but not on this point, in *Tallis v. Tallis* (1853), 1 E. & B. 391; *Leather Cloth Co. v. Lonsont* (1869), L. R. 9 Eq. 345; *Tivoli, Manchester, Ltd. v. Colley* (1904), 20 T. L. R. 437; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 516, C. A.; affirmed, [1912] A. C. 421, 430; and see *Spalding (A. G.) & Brothers v. Gamage (A. W.), Ltd. and Benetfink & Co., Ltd.* (1913), 29 T. L. R. 541. As to public policy generally, see *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1; *Richardson v. Mellish* (1824), 2 Bing. 229, *per* BURROUGH, J., at p. 252 ("Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you").

SECT. 1.
General
Principle
of Freedom
of Trade.

There is at common law no limit to the number of trades which a man may carry on (i).

Sole exercise
of a trade.

SECT. 2.—*Monopoly.*

1026. It is a monopoly, and against the policy of the law, for any person or group of persons to secure the sole exercise of any known trade throughout the country (k); and the Crown cannot grant such a monopoly without statutory authority (l), except in certain cases

It is not against public policy as in restraint of trade for a petitioner for divorce, with a view to protecting the honour of the respondent, to bind a co-respondent by agreement not to come for a period of years within a certain area (*Upton v. Henderson* (1912), 106 L. T. 839), though it is conceivable that in some cases a covenant having apparently no reference to trade may be a colourable device in restraint of trade (*ibid.*). As to agreements contrary to public policy generally, see title CONTRACT, Vol. VII., pp. 394 *et seq.*

(i) *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a. By stat. (1363) 37 Edw. 3, c. 6, the carrying on of more trades than one was prohibited, but this was repealed at the next Parliament by stat. (1365) 38 Edw. 3, c. 2 (*Norris v. Staps* (1616), Hob. 210, 211; *Hobbs v. Young* (1691), Carth. 162, 163). As to restrictions upon the professions and trades which may be carried on by a barrister, see title BARRISTERS, Vol. II., p. 363; as to fellows and members of the Royal College of Physicians, see title MEDICINE AND PHARMACY, Vol. XX., pp. 310, 311; as to solicitors, see title SOLICITORS, Vol. XXVI.

(k) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 187; 1 Smith, L. C., 11th ed., p. 406, at p. 410; *Ipswich Tailors' Case*, *supra*; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A.; compare *East India Co. v. Sandys* (1684), Skin. 132, 165, 197, 223, 226: "A monopoly is an immoral act, but only against the politic part of our law; which if it happens to be of advantage to the public as this trade is, then it ceases also to be against the politic part of our law and so not within the law of monopolies"); and see title PATENTS AND INVENTIONS, Vol. XXII., p. 128. The old offences of badgering, forestalling, regrating and engrossing were abolished by stat. (1844) 7 & 8 Vict. c. 24, s. 1; see *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* FRY, L.J., at p. 629; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*, *per* FARWELL, L.J., at p. 444; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, 263, P. C. (a case decided on an Australian statute for the "Repression of Destructive Monopolies," but containing a number of *dicta* of general application; see note (t), p. 528, *post*); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 562; and compare title MARKETS AND FAIRS, Vol. XX., pp. 44 *et seq.*

(l) The earliest authority for this proposition may be derived from Magna Charta (1215), c. 18, "Nullus liber homo disseisetur de libero tenemento vel libertatibus vel liberis consuetudinibus suis," which was interpreted by Coke (2 Inst. 47) as covering property in goods as well as other franchises and liberties; compare the argument in *Nightingale v. Bridges* (1691), 1 Show. 135, 139; 5 Bac. Abr., tit. Monopoly (A); 3 Co. Inst. 182, 183; Com. Dig., tit. Trade (D. 4); *Darcy v. Allein* (*The Case of Monopolies*) (1602), 11 Co. Rep. 84 b (a grant by letters patent of the sole right of making playing cards held void as a monopoly against common law); *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*, *per* FARWELL L.J., at p. 445; *A.-G. of Australia v. Adelaide Steamship Co.*, *supra*. In *East India Co. v. Sandys* (1684), Skin. 132, 165, 197, 223, it was held that a grant to a company of the sole right of trading to the East Indies was good; but in *Nightingale v. Bridges* (1691), 1 Show. 135, it was held, though there was no considered judgment, that, though the Crown may give to a corporation exclusive right to trade and hold territories within prescribed limits, yet a clause prohibiting others to trade within those limits under pain of imprisonment and forfeiture, and authorising the search and seizure of ships and goods, is void. The right of the Crown to create such companies and to give

where the Crown has a prerogative of granting an exclusive right to print (*m*).

SECT. 2.
Monopoly.

1027. By the Statute of Monopolies (*n*) all monopolies, licences, and letters patent for the sole buying, selling, making, working, and using of anything within the realm (*o*) were declared void, with the exception of letters patent thereafter to be granted for fourteen years or under, in the case of new manufactures, to the first and true inventors (*p*).

Statute of
Monopolies.

A monopoly of trade must, however, be distinguished from the exclusive licence which a landowner may grant to exercise rights over his land (*q*).

Exclusive
licence over
land.

1028. Where an agreement, taken together with all its surrounding circumstances, including agreements made between the parties to it and third persons (*r*), discloses an attempt on a very large scale

Attempts
to control
markets.

them exclusive right to trade was not disputed, but only the forfeiture clause. In 1694 (Journals of the House of Commons, Vol. II., p. 64, 19th January, 1693-4) it was resolved "that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament"; compare *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406. In *East India Co. v. Sandys* (1684), Skin. 132, 165, 197, 223, the validity of the grant was based on the prerogative of the Crown to control trade with foreigners and to create companies; compare *Michelborne v. Michelborne* (1610), 2 Brownl. 296; and see titles CONSTITUTIONAL LAW, Vol. VI., p. 488; CORPORATIONS, Vol. VIII., p. 316. As to licences to alien enemies to trade, see title ALIENS, Vol. I., p. 311.

(*m*) As to the prerogative of the Crown to grant exclusive right to print the authorised version of the Bible, the Book of Common Prayer, charts and ordnance maps, see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 173; as to the prerogative of the Crown in respect of printing and publishing generally, see title CONSTITUTIONAL LAW, Vol. VI., pp. 496 *et seq.*; as to the prerogative of the Crown generally, see *ibid.*, pp. 371, 372, and compare *Mounson v. Lyster* (1631), W. Jo. 231; *Yarmouth (Earl) v. Darrel* (1686), 3 Mod. Rep. 75; *Stationers' Co. v. Parker* (1685), Skin. 233.

(*n*) Stat. (1623) 21 Jac. 1, c. 3, s. 1; see *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C.; titles CONSTITUTIONAL LAW, Vol. VI., p. 488; PATENTS AND INVENTIONS, Vol. XXII., p. 128.

(*o*) The statute therefore does not extend to foreign trade (*East India Co. v. Sandys*, *supra*, at pp. 165, 197, 223).

(*p*) Stat. (1623) 21 Jac. 1, c. 3, s. 6; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 128 *et seq.* The statute did not affect any grants, charters or letters patent, or any customs of any city, borough, or town corporate, or any corporation, company, or fellowship of any art, trade, or occupation (stat. (1623) 21 Jac. I, c. 3, s. 9); see also title CONSTITUTIONAL LAW, Vol. VI., pp. 496 *et seq.*

(*q*) *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502, C. A., *per FARWELL, L.J.*, at p. 518; reversed without affecting this point, [1912] A. C. 52; and see titles FERRIES, Vol. XIV., pp. 555 *et seq.*; MARKETS AND FAIRS, Vol. XX., pp. 44, 45.

(*r*) Such other agreements are relevant for the purpose of ascertaining the object of the restrictions imposed in the agreement under consideration and whether such restrictions are reasonably necessary for the protection of the covenantee's interest (*North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A., *per VAUGHAN WILLIAMS, L.J.*, at p. 440). The dictum that "No evidence is given in these public policy cases" (*Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, *per Lord BRAMWELL*, at p. 45) does not mean that such evidence is not to be admitted (*North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*, at p. 440). See also *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per LINDLEY, M.R.*, at p. 306 ("The contract must be construed

SECT. 2.
Monopoly.

to obtain the control of a market, and particularly of a market in one of the necessities of life (s), and to keep up prices at an artificial figure, by means of restrictions which are more stringent than is reasonably necessary for the protection of a particular or local trade, to the obvious detriment of the public, such an agreement will not be enforced (t). *A fortiori* is this the case when there is anything in the methods adopted which tends to mislead the public (a).

Such a contract is merely unenforceable: it is not unlawful in any criminal sense, nor does it give any cause of action to a third person injured by its operations (b). The court takes cognisance of its illegality though it is not pleaded (c).

with reference to the business of the plaintiff which it was the object of the parties to protect").

(s) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, *per* FARWELL, L.J., at p. 445.

(t) *Ibid.* (the plaintiffs by the agreement secured practically the defendants' whole output of salt for four years, bound the defendants during that period not to make any other salt or to sell any salt other than a limited quantity bought back at the plaintiffs' prices from the plaintiffs, imposed restrictions as to price, class of buyers, charges and the like, and prohibited the defendants from selling or leasing any land for the purpose of the manufacture of salt. Further, the plaintiffs had an agreement securing the whole output of a number of other manufacturers for a period of five years, and thus had almost the entire control of the market). VAUGHAN WILLIAMS, L.J., *ibid.*, at pp. 441, 444, drew a distinction between the case of a number of persons who as partners or members of a company agree together for the purpose of keeping up prices in a particular locality and the case where such partnership or company enter into an agreement with a third party, and confined his judgment to the latter case only, accepting the proposition that the agreement in the former case is free from the taint of illegality; FARWELL, L.J., on the contrary, *ibid.*, at p. 444, apparently treated the two cases as indistinguishable ("Since the penalties against engrossing, forestalling and regrating have been abolished there is nothing to prevent an individual salt manufacturer from restricting his output, withholding his products for any time he likes and raising his prices as he pleases. . . . But it is quite a different matter when a number of traders, and still more when all the traders in a large part of England combine together; if the effect of this agreement is to injure the public, then no court will give any assistance to enforce or remedy a breach thereof"). Compare *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C., which, though decided upon the words of an Australian statute, contains *dicta* apparently relevant to the decision in *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*. Where a restraint is reasonable as between the parties, the burden of showing that it creates a pernicious monopoly is upon the person alleging it (*A.-G. of Australia v. Adelaide Steamship Co.*, *supra*, at p. 263). It does not necessarily follow that, because a contract is unenforceable as being an unreasonable restraint of trade, the parties must be taken to have intended a detriment to the public (*ibid.*, at p. 265). By the public is not meant merely the consuming public (*ibid.*). A mere intention to raise prices is not in itself proof of an intention to injure the public: there must be an intention to raise them to an excessive or unreasonable extent (*ibid.*, at p. 268). For other cases in which contracts have been held illegal or of doubtful legality, see note (e), p. 529, *post*. As to restraint of trade generally, see pp. 548 *et seq.*, *post*.

(a) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra* (by the method adopted the public might order the goods of one manufacturer and receive those of another).

(b) *Ibid.*, *per* FARWELL, L.J., at p. 444; *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; *A.-G. of Australia v. Adelaide Steamship Co.*, *supra*, at p. 265; see p. 601, *post*.

(c) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*,

It is, however, no monopoly if the control, being lawfully and fairly obtained, is limited to particular persons or places (*d*); and an agreement among traders to prevent competition among themselves and even to keep up prices is not necessarily invalid, if it is carried out by provisions reasonably necessary for the purpose and not detrimental to the public (*e*).

SECT. 2.
Monopoly.

Agreement
to prevent
competition.

1029. Even though the object or effect may be to secure a monopoly, a trader selling goods (other than articles protected by a

Restrictions
as to user.

per VAUGHAN WILLIAMS, L.J., at p. 441, and *per* FARWELL, L.J., at p. 446, discussing the effect of R. S. C., Ord. XIX., rr. 4, 15, and disapproving *Clarke v. Callow* (1877), 46 L. J. (Q. B.) 53, C. A., *per* BRETT, J.A., at p. 54; see also *Société des Hôtels Réunis v. Hawker* (1913), 29 T. L. R. 578; and title PLEADING, Vol. XXII., p. 448.

(*d*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 187; 1 Smith, L. C., 11th ed., p. 406, at p. 410; *Freemantle v. Silkthrowsters' Co.* (1678), 1 Lev. 229 (a bye-law of a company binding members not to have over a certain number of spindles per week held not a monopoly, but a restraint of a monopoly and therefore good). An agreement by one trader to take a particular class of goods exclusively from another is not in restraint of trade (*Servais Bouchard v. Prince's Hall Restaurant, Ltd.* (1904), 20 T. L. R. 574, C. A.).

(*e*) *Collins v. Locke* (1879), 4 App. Cas. 674, 685, P. C. (where a number of stevedores parcelled out the shipping of a port among themselves by allotting to each the ships consigned to certain named traders, it was held a reasonable provision that if any of such traders refused to allow the work to be done by the party to whom it was allotted the party securing the work should make good the loss to the party losing it; but a provision which in effect provided that if a ship was loaded by a person other than the consignee and such person did not choose the stevedore entitled under the agreement, no other party to the agreement should do the work, was held to be unreasonable); *Kirkman v. Shawcross* (1794), 6 Term Rep. 14 (agreement by a number of dyers not to receive goods to be dyed except on the terms that they should have a general lien held legal and to have created a legal agreement between a party and a person sending goods with knowledge of it); *Hearn v. Griffin* (1815), 2 Chit. 407 (agreement between postmasters not to compete held legal); *Wickens v. Evans* (1829), 3 Y. & J. 318 (agreement between traders to parcel out England, not to compete or assist rival traders, and not to purchase certain goods in a certain place at prices higher than certain agreed prices, held legal); *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1851), 17 Q. B. 652 (agreement excluding competition held legal); *Jones v. North* (1875), L. R. 19 Eq. 426 (agreement between traders to sell goods at a certain price, and that some of them should not tender for a contract at a lower price than one or more of the others, held legal); *Cade v. Daly*, [1910] 1 I. R. 306 (agreement not to sell below certain prices enforceable if reasonably limited), distinguishing *Urmston v. Whitelegg Brothers* (1890), 63 L. T. 455 (agreement not to sell at less than a specified price for ten years, under a penalty, held unenforceable), and *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25. See also *Keppell v. Bailey* (1834), 2 My. & K. 517 (*quære* whether an agreement by lessees of ironworks with a railway company to procure all their limestone from a certain quarry and convey all of it along the railway at an agreed charge was an unreasonable restraint, the case being decided on a different point); *Toby and Offer v. Major* (1899), 107 L. T. Jo. 489, *per* DARLING, J. (*quære* whether an agreement between German bakers to remove the competition of an English baker by buying him out and restraining him from trading within three miles is against public policy); *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K. B. 422, C. A.; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C.; see note (*t*), p. 528, *ante*. As to pooling agreements between railway companies, see title RAILWAYS AND CANALS, Vol. XXIII., pp. 712, 713.

SECT. 2.
Monopoly.

patent (*f*) or letting them for hire may by the contract of sale or lease prohibit the use therewith of goods supplied by rival traders (*g*) and attach other conditions calculated to protect himself from such rivals (*h*), or to keep up the price of his goods (*i*).

Part IV.—Restraint of Trade by Custom and Statute.

SECT. 1.—*Restraint by Custom.*

Custom.

1030. Restraints upon the general freedom to trade may be roughly divided into restraints imposed upon a person by custom or statute and restraints imposed by virtue of his own agreement (*k*).

By custom (*l*) there existed in certain cities, towns and boroughs

(*f*) As to this exception and its limitations, see title PATENTS AND INVENTIONS, Vol. XXII., p. 193.

(*g*) *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C.; *Mallan v. May* (1843), 11 M. & W. 653, 668; *Leather Cloth Co. v. Lonsont* (1869), L. R. 9 Eq. 345; and see title CONTRACT, Vol. VII., pp. 408, 439.

(*h*) *Jones v. Lees* (1856), 1 H. & N. 189 (covenant by licensee of patented improvements for a term not to make or vend the machine without the improvement during the term); *British United Shoe Machinery Co. v. Somervell Brothers* (1906), 95 L. T. 711 (lease of machines with a condition that they should be used to their full capacity during the term, so far as the number of goods made in the factory would permit); *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335, C. A. (sale of phonographs to wholesale dealers on terms that they should not sell to dealers who had not signed a retailer's agreement, or to dealers placed on a "suspended list," both classes of dealers being bound not to sell at less than current list prices; see *ibid.*, per Lord ALVERSTONE, C.J., at p. 356 ("I cannot see any objection to a trader in such a trade saying that he will not, if he can help it, allow his machines to be at the disposal of his trade rivals")). But if a person has agreed not to sell to a person on a "suspended list" he does not commit a breach of that agreement if he sells to such a person in ignorance induced by fraud (*ibid.*, per KENNEDY, L.J., at p. 368); see also *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (1913), 29 T. L. R. 270.

(*i*) *Elliman, Sons & Co. v. Carrington & Son, Ltd.*, [1901] 2 Ch. 275, distinguishing *Hilton v. Eckersley* (1855), 6 E. & B. 47, *Urmston v. Whitelegg Brothers* (1890), 63 L. T. 455, C. A., and *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; followed in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, *supra*.

(*k*) Compare the classification in *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406, which is, to some extent, now obsolete, though the broad distinction there drawn between involuntary and voluntary restraints remains. The law of involuntary restraint by Crown grants is now governed by statute (see title PATENTS AND INVENTIONS, Vol. XXII., pp. 125 *et seq.*), as is in practically all cases the law of restraint by custom and bye-law (see p. 531, *post*), and the distinction between general and particular voluntary restraints has disappeared; see p. 550, *post*.

(*l*) As to the meaning of custom and the differences between custom and usage, see title CUSTOM AND USAGES, Vol. X., pp. 218 *et seq.*; as to usages applicable to particular trades, businesses, and professions, see *ibid.*, pp. 274 *et seq.* As to the power of corporations to make bye-laws, and as to bye-laws generally, see title CORPORATIONS, Vol. VIII., pp. 334 *et seq.*; as to particular classes of bye-laws, see titles COMPANIES, Vol. V., p. 717 (statutory companies generally); RAILWAYS AND CANALS, Vol. XXIII.,

power in the corporation or in companies or guilds of traders (*m*) to restrict trade within certain areas, or by certain persons, and bye-laws framed in accordance with such customs were held to be valid (*n*).

In 1835 all such customs and bye-laws were abolished except in the city of London, and any person may now keep any shop and follow any trade or handicraft in any borough (*o*).

SECT. 1.
Restraint
by Custom.

City of
London.

pp. 728 *et seq.*, 787, 788 (railway and canal companies); MARKETS AND FAIRS, Vol. XX., pp. 23 *et seq.* (markets and fairs); METROPOLIS, Vol. XX., pp. 460 *et seq.* (London); LOCAL GOVERNMENT, Vol. XIX., p. 328 (borough councils); PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.* (public health). As to evidence of bye-laws, see title EVIDENCE, Vol. XIII., p. 526; as to the definition of bye-law, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 388.

(*m*) As to these companies in the City of London, see title COMPANIES, Vol. V., p. 746.

(*n*) See note (*o*), *infra*.

(*o*) Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 14, repealed and re-enacted by Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 247. The City of London was not a borough within either of these Acts; and nothing in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), alters the effect of any local Act (*ibid.*, s. 251); see titles CORPORATIONS, Vol. VIII., p. 339; LOCAL GOVERNMENT, Vol. XIX., p. 293. Such customs and bye-laws, though not abolished in London, appear to have become obsolete there. A few of the many cases on the subject may be referred to. In London and other large cities and towns it was the object to keep out "foreigners," that is, persons not free of the city (as to the ways of acquiring "freedom," see *City of London's Case* (1610), 8 Co. Rep. 121 b, 126 b; and title COMPANIES, Vol. V., p. 748), or of one of its guilds. A custom, therefore, that no foreigner should keep any shop or exercise any trade within the city, and a bye-law founded thereon, were held good (*City of London's Case*, *supra*; compare *London Corporation v. Bernardiston* (1661), 1 Lev. 14; *Robinson v. Grosccourt* (1695), 5 Mod. Rep. 104; *Fazakerley v. Wiltshire* (1721), 1 Stra. 462; *Clark v. Denton* (1830), 1 B. & Ad. 92). Similar bye-laws were upheld in many other places. In *Robinson v. Grosccourt*, *supra*, it was laid down that though the custom of the City of London was that whoever is free of the City must be free of some company, yet it did not oblige a man to be free of any particular company; but the case was decided on the ground that music and dancing were not a "trade," and in other cases the principle was accepted that a man should be free of the company appropriate to his trade; see *Wannel v. London (City Chamberlain)* (1725), 1 Stra. 675; *R. v. Harrison* (1762), 3 Burr. 1322. It was recognised as a reasonable custom that no freeman should be permitted to employ any person not a freeman or an apprentice to a freeman; and it was no objection that the prohibition was not confined to cases in which a qualified person was available (*Shaw v. Poynter* (1834), 2 Ad. & El. 312). Based on the same principle was the custom of "foreign bought and foreign sold," namely, that no non-freeman might sell or buy goods for or from another non-freeman in a city or borough; and this also could be enforced by bye-law (*City of London's Case*, *supra*; compare Com. Dig., tit. Trade (D. 2); *Anon.* (1568), Dyer, 279 b). Similar customs were recognised applying to particular trades and giving to particular companies the right to make bye-laws for their enforcement (*Weavers' in London Co. v. Brown* (1601), Cro. Eliz. 803; but compare *Davenant v. Hurdis* (1599), cited in *Darcy v. Allein* (1602), 11 Co. Rep. 84 b, 86 a). An action on the case lay on the custom without any bye-law (*Weavers' in London Co. v. Brown*, *supra*; *Bodwic v. Fennel* (1748), 1 Wils. 233, 237); but it was essential that such a bye-law should be supported by a custom (*Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406; *City of London's Case*, *supra*; *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a; *Norris v. Staps* (1616), Hob. 210; *Parry v. Berry* (1717), 1 Com. 269; *Harrison v. Godman* (1756), 1 Burr. 12; *R. v. Harrison* (1762), 3 Burr. 1322; *Hesketh v. Brad-dock* (1766), 3 Burr. 1847; *Adley v. Whitstable Co.* (1810), 17 Ves. 315, per Lord ELDON, L.C., at p. 322; *Clark v. Le Cren* (1829), 9 B. & C. 52), and such a bye-law was not good by grant or charter (*City of London's*

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by Statute.

Classification
of statutory
restraint.

SECT. 2.—*Restraint by Statute.*SUB-SECT. 1.—*In General.*

1031. Under the head of restraint of trade by statute (*p*) come all those cases in which certain trades have been absolutely forbidden by Parliament (*g*), or in which restrictions have been imposed by Parliament on the carrying on of particular trades and professions with a view to the maintenance of a proper standard of competence in, and a proper control over, those engaged in them (*r*), or with a view to the protection of employees and the public (*s*) or public

Case (1610), 8 Co. Rep. 121 b, 126 b; *Adley v. Whitstable Co.* (1810), 17 Ves. 315). *A fortiori* a bye-law in restraint of trade which was contrary to custom was void (*R. v. Tappenden* (1802), 3 East, 186; compare *R. v. Coopers' Co., Newcastle* (1798), 7 Term Rep. 543). A bye-law was good if warranted by the principle of the custom (*Clark v. Denton* (1830), 1 B. & Ad. 92); but it was necessary that it should be within the terms of the custom (*R. v. Tappenden, supra*; *Wood v. Searl* (1618), J. Bridg. 139). A custom, without statutory authority, could not support a bye-law imposing imprisonment (*Clark's Case* (1596), 5 Co. Rep. 64 a; *Wood v. Searl, supra*; *Langham's Case* (1642), March, 179, 186; Com. Dig., tit. By-law (E. 1); Vin. Abr., tit. By-laws (A 2), pl. 1); and cases which suggest the contrary, such as *Wood v. London Corporation* (1701), 1 Salk. 697; *R. v. Clerk* (1697), 1 Salk. 349, refer, apparently, to customs confirmed by statute (*R. v. Merchant Taylors of London* (1677), 2 Lev. 200). Judicial notice would not be taken of a custom not pleaded (*Harrison v. Godman* (1756), 1 Burr. 12; *R. v. Harrison* (1762), 3 Burr. 1322; *Clark v. Le Cren* (1829), 9 B. & C. 52). Where, however, a bye-law was not in restraint but a mere regulation of trade, it was good if reasonable and for the benefit of the place and made in prevention of inconvenience or nuisance (*Harrison v. Godman, supra*; *London Chamberlain's Case* (1590), 5 Co. Rep. 62 b; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L.C., 11th ed., p. 406; *Shaw v. Pope* (1831), 2 B. & Ad. 465; see title CORPORATIONS, Vol. VIII., p. 337). For cases as to penalties, see *Player v. Vere* (1679), T. Raym. 288, 324; *Bodwic v. Fennel* (1748), 1 Wils. 233; *Totterdell v. Glazby* (1765), 2 Wils. 266; *Adley v. Reeves* (1813), 2 M. & S. 53; and title CORPORATIONS, Vol. VIII., pp. 339, 340. What might be bad as a bye-law might be good as an agreement between the parties (*Adley v. Whitstable Co., supra*, at p. 322; *R. v. Faversham Free Fishermen* (1799), 8 Term Rep. 352; *London Tobacco Pipe Makers' Co. v. Woodroffe* (1828), 7 B. & C. 838; and see *Freemantle v. Silkthrowsters' Co.* (1668), 1 Lev. 229; and title CORPORATIONS, Vol. VIII., pp. 334, 338. A bye-law in restraint of trade might be good in part and bad in part, but only when the two parts are entire and distinct (*Fazakerley v. Wiltshire* (1721), 1 Stra. 462, 469; *R. v. Faversham Free Fishermen, supra*; *Clark v. Denton, supra*, at pp. 95, 100). As to severing in the case of covenants in restraint of trade, see pp. 572, 573, *post*. As to restraint by custom generally, see, further, *Mitchel v. Reynolds, supra*; *Grant on Corporations* (1856), pp. 28, 29, 78, 82, 83, 85, 322. As to particular restraints which were held good by custom, see *Geffery at Hay v. William at Ford* (1334), Y. B. 8 Edw. 3, f. 37 a, b; *Fermor v. Brooke* (1590), Cro. Eliz. 203; *Dunstable (Prior) v. B.* (1433), Y. B. 11 Hen. 6, f. 19 a, b, all cited in *City of London's Case* (1610), 8 Co. Rep. 121 b, 125 a, 125 b, 127 a.

(*p*) See title CONTRACT, Vol. VII., pp. 405, 406. In this title such cases only are dealt with as are not conveniently grouped under other headings, and for particular cases reference should be made to the appropriate titles.

(*g*) As, for instance, the slave trade; see pp. 533, 534, *post*.

(*r*) As in the case of doctors, dentists, apothecaries, chemists and midwives (see title MEDICINE AND PHARMACY, Vol. XX., pp. 305 *et seq.*); solicitors (see title SOLICITORS, Vol. XXVI., pp. 705 *et seq.*); auctioneers (see title AUCTION AND AUCTIONEERS, Vol. I., pp. 499 *et seq.*).

(*s*) As, for instance, the Factory Acts (see title FACTORIES AND SHOPS, Vol. XIV., pp. 433 *et seq.*; as to phosphorus matches, see *ibid.*, p. 479,

order (*t*), or the public health and safety (*u*), or for purposes of revenue (*a*).

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by Statute.

SUB-SECT. 2.—*The Slave Trade.*

(i.) *Nature of Slavery.*

1032. There is no precise legal definition of slavery, but it may be described as a service for life for bare necessities, with power in the master over the person and property of the slave, a right to all the acquirements of his labour and a right of alienation, and the like power and right over the slave's descendants (*b*). A man is not a slave if he is taken as a "free labourer" under local immigration laws, even though he has been kidnapped for the purpose (*c*).

Definition
of slavery.

1033. At common law a contract for the sale of a slave was good and could be enforced (*d*), but the status of slavery has only a local existence, founded on the particular law of the locality, and does not accompany a man when he leaves the territory where that law prevails (*e*).

Status of
slavery.

1034. Slavery is not recognised by English law as existing in the United Kingdom, and a slave while in the United Kingdom or its territorial waters or on a British man-of-war is a free man (*f*), and

Not recog-
nised in
England.

notes (*a*)—(*c*); money-lenders (see title MONEY AND MONEY-LENDING, Vol. XXI., p. 44); pawnbrokers (see title PAWNS AND PLEDGES, Vol. XXII., pp. 233 *et seq.*); millers (see title WEIGHTS AND MEASURES); rag flock (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 564, 565).

(*t*) As in the case of intoxicating liquors (see title INTOXICATING LIQUORS, Vol. XVIII., pp. 1 *et seq.*); hawkers and pedlars (see title MARKETS AND FAIRS, Vol. XX., pp. 55 *et seq.*).

(*u*) As in the case of the sale of food and drugs generally (see title FOOD AND DRUGS, Vol. XV., pp. 1 *et seq.*); of explosives (see title EXPLOSIVES, Vol. XIV., pp. 355 *et seq.*); of guns (see title GAME, Vol. XV., p. 254); of poisons (see title MEDICINE AND PHARMACY, Vol. XX., pp. 381 *et seq.*); of fabrics described as non-inflammable (Fabrics (Misdescription) Act, 1913 (3 & 4 Geo. 5, c. 17); see title TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 726, note (*n*), *post*); of coal (see title WEIGHTS AND MEASURES).

(*a*) See titles INTOXICATING LIQUORS, Vol. XVIII., pp. 1 *et seq.*; REVENUE, Vol. XXIV., pp. 531 *et seq.*

(*b*) *Somerset v. Stewart* (1772), Lofft, 1, HARGRAVE's argument, at p. 2; *Forbes v. Cochrane* (1824), 2 B. & C. 448, *per* BEST, J., at p. 472; *Chamberline v. Harvey* (1696), 5 Mod. Rep. 182, 187 *et seq.* A slave was real property in the colonies and passed under a devise of such (*Stewart v. Garnett* (1830), 3 Sim. 398 (a Jamaican estate)), but the compensation money granted on the abolition of slavery in the British dominions was held to be personal estate (*Richards v. A.-G. for Jamaica* (1848), 6 Moo. P. C. C. 381). For other cases as to compensation money, see *Farquharson v. Balfour* (1836), 8 Sim. 210; *Shaw v. Simpson* (1842), 1 Y. & C. Ch. Cas. 732; *Gordon v. Bruce* (1838), 2 Moo. P. C. C. 261.

(*c*) *R. v. Casaca* (1880), 5 App. Cas. 548, 556, P. C.

(*d*) *Somerset v. Stewart*, *supra*, *per* Lord MANSFIELD, C.J. at p. 17; but see *Forbes v. Cochrane*, *supra*, *per* BEST, J., at p. 469.

(*e*) *Forbes v. Cochrane*, *supra*, *per* HOLROYD, J., at pp. 461, 462, and *per* BEST, J., at p. 466; *Somerset v. Stewart*, *supra*, at p. 19; and compare *Chamberline v. Harvey*, *supra*.

(*f*) *Somerset v. Stewart*, *supra*, *per* Lord MANSFIELD, C.J., at p. 19. This case put an end to a system of traffic in slaves in London; see *The Slave Grace* (1827), 2 Hag. Adm. 94, *per* Lord STOWELL, at p. 104; see also *Smith v. Brown* (1706), 2 Salk. 666, *per* HOLT, C.J.; *Shanley v. Harvey* (1762), 2 Eden, 126; *Knight v. Wedderburn* (1778), cited in *Somerset's Case* (1772), 20 State Tr. 1; *Williams v. Brown* (1802), 3 Bos. & P. 69;

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may assert his freedom by a writ of *habeas corpus* (*g*), may retain money given to him (*h*), and may maintain an action for ill-usage or detention (*i*); and to kill him is murder (*k*). Mere residence in England without manumission (*l*) does not create permanent freedom, and the status of slavery revives if the slave returns to the place of original servitude (*m*).

Slavery was abolished in the British dominions by statute as from the 1st August, 1834, the owners having the right to the services of their slaves as apprentices for a limited time and £20,000,000 being granted by way of compensation (*n*).

(ii.) *The Trade in Slaves.*

Slaves of
foreign
owners.

1035. The trade in slaves is not by international law piracy or a crime, except by treaty; and a British statute cannot of itself affect rights or interests of foreigners outside British jurisdiction (*o*). Consequently there is no right to seize a foreign ship merely because there are slaves on board, and a prize court will not condemn slaves to whom the claimants are entitled by the law of their own country (*p*).

Slave trade
within
Admiralty
jurisdiction.

1036. The trade in slaves within the Admiralty jurisdiction is by statute piracy and felony punishable with penal servitude for life or for not less than three years, or imprisonment with or without hard labour for not more than two years (*q*), and all the operations of the trade are illegal (*r*).

Forbes v. Cochrane (1824), 2 B. & C. 448, *per* HOLROYD, J., at pp. 461, 463, and *per* BEST, J., at p. 466; and compare 1 Bl. Com. 424. As to actions for harbouring a servant, see title MASTER AND SERVANT, Vol. XX., pp. 269, 270.

(*g*) *Somerset v. Stewart* (1772), Lofft, 1; *The Slave Grace* (1827), 2 Hag. Adm. 94, 116.

(*h*) *Shanley v. Harvey* (1762), 2 Eden, 126; *The Slave Grace*, *supra*, at p. 116.

(*i*) *The Slave Grace*, *supra*, at p. 116; *Forbes v. Cochrane*, *supra*, *per* BEST, J., at p. 472. But a slave brought to England and continuing in service there was held not entitled to recover wages on a *quantum meruit* in the absence of contract (*Alfred v. FitzJames* (Marquis) (1799), 3 Esp. 3); but in that case there was apparently evidence of a subsequent promise to pay wages, as to which no decision is reported.

(*k*) *Forbes v. Cochrane*, *supra*, *per* BEST, J., at p. 467.

(*l*) Procuring a slave to enter into a contract to serve as a servant for a term of years is equivalent to manumission (*Keane v. Boycott* (1795), 2 Hy. Bl. 511). For a discussion of "manumission," see *Chamberline v. Harvey* (1696), 5 Mod. Rep. 182, 187, 188, 190.

(*m*) *The Slave Grace*, *supra*.

(*n*) Slavery Abolition Act, 1833 (3 & 4 Will. 4, c. 73). For the cases as to this compensation money, see note (*b*), p. 533, *ante*. As to the assignment of the services of slaves who have become apprentices, see *Mittelholzer v. Fullarton* (1842), 6 Q. B. 989.

(*o*) *The Le Louis* (1817), 2 Dods. 210, *per* Lord STOWELL, at pp. 246, 248; *Madrazo v. Willes* (1820), 3 B. & Ald. 353; *Buron v. Denman* (1848), 2 Exch. 167; and see titles CONSTITUTIONAL LAW, Vol. VII., p. 66; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 306, 307, 309.

(*p*) *Forbes v. Cochrane*, *supra*, *per* BAYLEY, J., at p. 457, and compare *ibid.*, *per* HOLROYD, J., at p. 461; *The Fortuna* (1811), 1 Dods. 81; *The Donna Marianna* (1812), 1 Dods. 91; *The Diana* (1813), 1 Dods. 95.

(*q*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 9; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 523, 526. For offences in relation to

(*r*) For note (*r*) see p. 535, *post*.

1037. Offences against the Slave Trade Acts (*s*), in addition to being punishable as felony or misdemeanour (*t*), are punishable with penalties and forfeitures (*u*).

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The Acts being penal, proof of their infringement lies on the captor; but such proof may rest on circumstantial evidence (*a*).^o

Penalties.

The penalties and forfeitures are as follows:—

(1) For breach of the provisions as to dealing in, carrying, importing, and shipping slaves a fine of £100 per slave for each offence upon the offenders and their procurers, counsellors, aiders and abettors (*b*); forfeiture of all property or pretended property in the slaves or persons intended to be dealt with as slaves, and seizure of such slaves or persons (*c*);

(2) For breach of the provisions against fitting out, manning,

the slave trade by Indian subjects, see the Slave Trade Act, 1876 (39 & 40 Vict. c. 46). As to the jurisdiction of the Admiralty Division of the High Court in regard to the condemnation of vessels etc. seized under the Slave Trade Acts, see pp. 538, 539, *post*; and title ADMIRALTY, Vol. I., p. 78. As to the decoying of Pacific Islanders, see Pacific Islanders Protection Acts, 1872 (35 & 36 Vict. c. 19), and 1875 (38 & 39 Vict. c. 51); *Burns v. Nowell* (1880), 5 Q. B. D. 444, C. A.; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 527.

(*r*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 2; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 526. The offence of shipping goods employed or to be employed in accomplishing any of the prohibited operations is committed even though the vessel carrying out the goods is not intended to bring back slaves in return; it is enough to show that there was a slave adventure in which the vessel was concerned (*R. v. Zulueta* (1843) 1 Car. & Kir. 215). As to the liability of British subjects, see Slave Trade Act, 1843 (6 & 7 Vict. c. 98), s. 1; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 526, 527. A foreigner committing an offence against the Slave Trade Acts within British jurisdiction is liable to penalties and his vessel may be seized (*Del Campo and Martinez v. R.* (1837), 2 Moo. P. C. C. 15, 17, 18), and a foreigner who has obtained a British register for his vessel is estopped from asserting that the register is a nullity (*Dionissis v. R., The Laura* (1865), 3 Moo. P. C. C. (N. S.) 181). *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861, Ex. Ch., must be read in relation to the Slave Trade Act, 1843 (6 & 7 Vict. c. 98), s. 5, which was repealed as to all British dominions by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67).

(*s*) Slave Trade Acts, 1824 (5 Geo. 4, c. 113), 1833 (3 & 4 Will. 4, c. 73), 1843 (6 & 7 Vict. c. 98), 1873 (36 & 37 Vict. c. 88), and 1876 (39 & 40 Vict. c. 46).

(*t*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 526. The provisions of the Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 10, as to the forgery of certificates etc. required by the Slave Trade Acts, are repealed by the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 30, and replaced by *ibid.*, s. 2 (2) (*j*), which comes into operation on the 1st January, 1914.

(*u*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 527. A person convicted of felony under the Slave Trade Act, 1824 (5 Geo. 4, c. 113), is not thereby debarred from prosecuting an appeal against a subsequent civil sentence for penalties, though apparently the conviction may be a bar to an action for repayment of the penalties if the appeal is successful (*Sherwill v. R.* (1836), 2 Moo. P. C. C. 1, 7). Offences under the Slave Trade Acts are extradition offences (Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 27); see title EXTRADITION AND FUGITIVE OFFENDERS, Vol. XIV., pp. 403 *et seq.*

(*a*) *Sherwill v. R.*, *supra*, at p. 12; *Barton v. R.* (1840), 2 Moo. P. C. C. 19; *Hocquard v. R., The Newport* (1857), 11 Moo. P. C. C. 155, 164; *Dionissis v. R., The Laura*, *supra*, at pp. 186, 187.

(*b*) One half of the fine goes to any person who informs, sues, and prosecutes for the same (Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 2).

(*c*) *Ibid.*, s. 3.

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navigating, using, letting or hiring slave ships, forfeiture and seizure of the ship with all property of her owners or part owners found on board (*d*);

(3) For knowingly and wilfully lending or guaranteeing money, goods or effects for the purposes of the slave trade, a fine of double the value of the money, goods and effects so lent or guaranteed on each offender and his procurers, counsellors, aiders and abettors (*e*);

(4) For knowingly and wilfully guaranteeing agents, or contracting to engage in the trade as partner, agent, or otherwise, a fine of double the value of all the money, goods and effects secured or contracted to be secured (*f*);

(5) For knowingly and wilfully shipping or receiving on board any money, goods or effects for the purposes of the trade, a fine of double the value of such money, goods and effects (*g*);

(6) For knowingly and wilfully insuring, or contracting to insure, any slaves or property engaged in the trade, a fine of £100 for each such insurance or contract and treble the amount of the premium, each such insurance or contract being null and void (*h*).

(iii.) *Seizure of Vessels Engaged in the Trade.*

Right of
seizure.

1038. Any vessel suspected on reasonable grounds (*i*) of being

(*d*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 4. In spite of the absence of the words "knowingly and wilfully" in this provision, guilty knowledge of the person charged must be proved either directly or by inference from circumstances (*Barton v. R.* (1840), 2 Moo. P. C. C. 19; *Hocquard v. R.*, *The Newport* (1857), 11 Moo. P. C. C. 155, 164, 165; *R. v. Casaca* (1880), 5 App. Cas. 548, 554, P. C.). But no damages can be awarded against the seizer if there was probable cause for the seizure, that is, if, from all the surrounding circumstances, there was to a reasonable mind a fair and reasonable suspicion that the vessel was engaged in or fitted out for the slave trade, and the fact that passengers have been kidnapped for the purpose of carrying them as "free labourers" to a place where slavery does not exist does not raise a reasonable suspicion that they are consigned to slavery (*R. v. Casaca*, *supra*). For a statement of what are reasonable grounds of suspicion, see *Burns v. Nowell* (1880), 5 Q. B. D. 444, C. A. (Pacific Islanders Protection Acts, 1872 (35 & 36 Vict. c. 19), and 1875 (38 & 39 Vict. c. 51)); compare *Edward v. Trevellick* (1854), 4 E. & B. 59 (to justify desertion from a ship a threat to sell the deserter as a slave is not a reasonable cause, unless the place where such sale is threatened is one in which such sale would be lawful).

(*e*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 5.

(*f*) *Ibid.*, s. 6.

(*g*) *Ibid.*, s. 7; *Sherwill v. R.* (1836), 2 Moo. P. C. C. 1, 7 (knowledge may be inferred from circumstances). The goods are only forfeited when they belong to the owner of the vessel (*Del Campo and Martinez v. R.* (1837), 2 Moo. P. C. C. 15, 17; *Hocquard v. R.*, *The Newport*, *supra*). The offence of receiving goods on board committed by, for instance, the owner and the master, is a joint offence, and one penalty only must be imposed upon them jointly (*Del Campo and Martinez v. R.*, *supra*, at p. 18).

(*h*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 8. One half of the penalty goes to any person who informs, sues, and prosecutes for the same (*ibid.*).

(*i*) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 3. As to what are "reasonable grounds," see note (*d*), *supra*. Certain equipments are specified in the Slave Trade Act, 1873 (36 & 37 Vict. c. 88), Sched. I., as *prima facie* evidence of the vessel being engaged in the trade; and, even though a vessel so equipped establishes her innocence, no damages may be awarded against the seizer (*ibid.*, s. 4). This last provision does not extend to a foreign vessel except by treaty, and where a treaty embodied in a British Act (stat. (1843) 6 & 7 Vict. c. 53) prescribed similar articles as

engaged in or fitted out for the slave trade may be visited, seized, and detained, if British, or engaged in the slave trade within British jurisdiction (*k*), or not a vessel of a foreign state (*l*), by any British naval or military officer, or customs officer in the United Kingdom, or British colonial governor or any person authorised by a colonial governor, or any officer of any foreign cruiser authorised in pursuance of any treaty; and if a vessel of a foreign state, by any British naval officer duly authorised in pursuance of any treaty and by any officer of any cruiser of that state. The vessel, with any slaves on board, and the master and all persons and goods on board, may be brought in for adjudication (*m*).

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1039. Any vessel seized and condemned may, subject to the treaty rights of foreign states, be taken into the service of the Crown at such price as the Admiralty deems proper (called "the appraised value"), and if not so taken must be broken up and sold in separate parts (*n*). Any slaves on board are forfeited to the Crown for the purpose of divesting all other right and interest in them; they are not to be treated as slaves, but must be provided for and disposed of as the court may direct, subject to Treasury regulations if any (*o*).

Effect of
condemna-
tion.

1040. Provision is made for the payment to seizers of bounties, which vary according as the seizer is or is not a naval officer (*p*).

Bounties.

evidence of guilt constituting a bar to compensation, it was held that such treaty related only to foreign vessels captured on the high seas (*R. v. Casaca* (1880), 5 App. Cas. 548, 556, 562, P. C.; compare *Casanova v. R.*, *The "Ricardo Schmidt"* (1866), L. R. 1 P. C. 268); see, further, titles ADMIRALTY, Vol. I., p. 78; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 526, 527.

(*k*) The Slave Trade Act, 1824 (5 Geo. 4, c. 113), authorised the seizure of a foreign ship in British waters (*Del Campo and Martinez v. R.* (1837), 2 Moo. P. C. C. 15, 17; *Casanova v. R.*, *The "Ricardo Schmidt," supra*).

(*l*) The cases of vessels of foreign states and of the officers of foreign cruisers are all subject to any existing slave trade treaty regulations (Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 3). "Existing slave trade treaty" means a treaty in force at the passing of the Act (*ibid.*, s. 2). *Ibid.*, Sched. II. (now repealed), contained a list of the treaties carried into effect by statute; and by *ibid.*, s. 29, any subsequent treaty might by Order in Council be directed to be deemed an "existing slave trade treaty." For the list of such treaties signed since the Act, see title COURTS, Vol. IX., p. 106, 107; and see Index to the Statutory Rules and Orders, in force on the 31st December, 1912, *sub voce* "Slave Trade" (2).

(*m*) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 3; see titles ADMIRALTY, Vol. I., p. 78; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 526, 527.

(*n*) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 9. As to the disposition of the money realised, see *ibid.*, ss. 11—13. By the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 2 (2), which comes into operation on the 1st January, 1914, it is a felony to forge any certificate, certificate of valuation, sentence or decree of condemnation or restitution, or any copy of such sentence or decree, or any receipt required by the Slave Trade Acts.

(*o*) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 10.

(*p*) *Ibid.*, ss. 11, 12. As to the case of seizure by a foreign naval officer, see *ibid.*, s. 13. As to the evidence necessary in order to secure payment of bounty, see *ibid.*, ss. 14, 16. By *ibid.*, s. 16, the provisions of the Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), apply to all money payable to naval officers under this Act; and see titles PRIZE LAW AND JURISDICTION, Vol. XXIII., pp. 293, 294; ROYAL FORCES, Vol. XXV., p. 35, note (*i*). All questions as to bounties and joint capture or seizure are within the jurisdiction of the Admiralty Division of the High Court (Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 19). A governor of a colony is entitled to his bounty even though absent, and

SECT. 2.
Restraint
by Statute.

The costs, compensation, or damages incurred or awarded in the case of any visitation, seizure, detention, or prosecution must, if required by treaty, and in other cases may, be paid by the Treasury; but the seizer may be required by the Treasury to make good any sum so paid (q).

Protection
of seizers.

1041. Persons authorised to make seizures have the benefit of the protection granted to persons authorised to make seizures under any Act relating to customs (r).

(iv.) *Jurisdiction.*

Admiralty
jurisdiction.

1042. The courts having jurisdiction in the case of any vessel, slave, or goods seized are the Admiralty Division of the High Court, the colonial courts of admiralty, and the vice-admiralty courts; and in certain cases, under treaties, mixed courts (s). Such courts are not thereby given any jurisdiction inconsistent with any existing slave trade treaty (t) over the vessel of any foreign state which has not been engaged within British jurisdiction in the slave trade; but where a vessel of a foreign state is liable to be condemned by a British slave court, such court has the same jurisdiction as if the vessel were British (a). Each of such courts has the same jurisdiction in regard to any person seized, at sea or on land, on the

represented by an acting-governor at the time of the seizure (*Re Bounties for Seizure of Slaves* (1863), 9 Jur. (N. S.) 1254). In cases of joint capture the same principles apply as in the case of a prize of war (*The Sociedade Feliz* (1842), 1 Wm. Rob. 303), and a ship authorised to capture slave ships, being in sight during the chase and capture of a slaver by another ship, is a joint captor entitled to a share of bounties unless the *animus capiendi* is clearly rebutted (*Brig, Name Unknown* (1864), Brown & Lush. 370); see title PRIZE LAW AND JURISDICTION, Vol. XXIII., pp. 292, 293.

(q) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 15. As to taxation of costs, see *ibid.*, s. 20; Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), Sched. II. As to the Treasury's right of appeal, see Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 21; and title ADMIRALTY, Vol. I., pp. 79, 124, 125.

(r) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 17; see title REVENUE, Vol. XXIV., p. 546.

(s) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), ss. 2, 5—8; Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 2; see titles ADMIRALTY, Vol. I., p. 140; COURTS, Vol. IX., pp. 106, 107. Where a person is charged with an offence against the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27) (which Act comes into operation on the 1st January, 1914), or with an offence indictable at common law, or under any Act for the time being in force, consisting in the forging or altering of any matter whatsoever, or in offering, uttering, disposing of or putting off any matter whatsoever, knowing the same to be forged or altered, and such offence relates to documents made for the purpose of any Act relating to the suppression of the slave trade, it is to be treated for the purposes of jurisdiction and trial as an offence against the Slave Trade Act, 1873 (36 & 37 Vict. c. 88) (Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 14 (1)). The institution and pendency of any proceeding in a slave court, or final judgment therein, are complete bars to every legal proceeding for the recovery of the vessel in question or damages in relation to the visitation or seizure (Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 18). As to regulations governing procedure of mixed courts, see *ibid.*, s. 8; and, as to regulations generally, see *Hocquard v. R.*, *The Newport* (1857), 11 Moo. P. C. C. 155. The courts may award damages if a vessel is restored (Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 5).

(t) See note (l), p. 537, *ante*.

(a) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 5.

ground that he has been, or is suspected to have been, detained as a slave for the purpose of the slave trade, as if that person had been so detained on a vessel seized and brought in for adjudication (b).

SECT. 2.
Restraint
by Statute.

1043. In the case of offences committed against the Slave Trade Acts (c) out of the United Kingdom, but within British territory, the King's Bench Division of the High Court, on indictment or information laid, may by writ of mandamus require the chief judicial officer of the place to hold a court for the examination of witnesses and receiving other proofs, and the depositions taken may be used at the trial in England (d).

Offences out
of United
Kingdom.

1044. The Admiralty Division has jurisdiction to review and enforce the order of any British slave court (e).

Review.

SUB-SECT. 3.—*Chicory Dryers and Roasters.*

1045. Every dryer and roaster of and dealer in chicory is under a statutory obligation to make entry, in accordance with the excise laws (f), of his name and place of abode, and of every building, kiln or utensil which he intends to use, and no person other than a dryer, roaster, or dealer who has so made entry may have in his possession any dried chicory (g). A proper warehouse must be provided, to be approved by the Commissioners of Inland Revenue and locked by an excise officer (h); and provision is made for notice before beginning to dry (i), and of intention to remove from the kiln (k), for supervision of the weighing and removal from the kiln (k), as to storage in and removal from the warehouse (l), as to returns by the excise officer, and the payment of duty on deficiency of the amount in the warehouse (m), and as to the keeping of weights (n). No dryer may have any dried chicory in his possession other than that dried on his own kiln or lawfully received into his warehouse (o).

Protection
of revenue.

1046. The businesses of a dryer and a roaster may not be carried on upon the same premises or on premises communicating with one another, under a penalty of £100, unless by special licence in the cases of combined businesses existing before 1860 (p).

Combination
of businesses.

(b) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 5.

(c) See note (s), p. 535, *ante*.

(d) Slave Trade Act, 1843 (6 & 7 Vict. c. 98), s. 4.

(e) Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 19. As to Admiralty appeals generally, see title ADMIRALTY, Vol. I., p. 141. The provisions as to appeal in the Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 29 (now repealed), were held to be imperative, and the court could not extend the time (*Muter v. Chipchase* (1836), 1 Moo. P. C. C. 1; *Logan v. Burslem, The Guiana* (1842), 4 Moo. P. C. C. 284); they applied to foreigners (*Lopez v. Burslem, The Guiana* (1843), 4 Moo. P. C. C. 300).

(f) See, generally, title REVENUE, Vol. XXIV., pp. 595, 596, 616; and, as to imitations of coffee or chicory, see title FOOD AND DRUGS, Vol. XV., p. 63.

(g) Excise Act, 1860 (23 & 24 Vict. c. 113), s. 8. The penalty is £100 and forfeiture of the article (*ibid.*).

(h) *Ibid.*, s. 9.

(i) *Ibid.*, s. 10.

(k) *Ibid.*, s. 11.

(l) *Ibid.*, ss. 12, 13.

(m) *Ibid.*, ss. 14, 15. The penalty for a deficiency (after allowing for a 2 per cent. margin) is £200 in addition to the duty (*ibid.*, s. 14).

(n) *Ibid.*, s. 16.

(o) *Ibid.*, s. 17. The penalty is £100 and forfeiture of the article (*ibid.*).

(p) *Ibid.*, s. 18.

SECT. 2.
 Restraint
 by Statute.

A dryer may, however, send dried chicory to the warehouse of another dryer without charge, the latter becoming answerable for the duty (*q*): a dryer or roaster may receive foreign dried chicory on which import duty has been paid (*r*), and a dryer may remove into an approved warehouse chicory partly dried and to be returned to the kiln for complete drying (*s*).

Penalties.

1047. For all acts, neglects, or omissions for which no penalty is specially provided the penalty is £100 (*t*).

SUB-SECT. 4.—*Hosiery Manufacturers.*

Tickets and
 duplicates.

1048. When a manufacturer of hosiery (*a*) or his agent gives out to a workman the materials to be wrought he must at the same time deliver to him a ticket signed by the manufacturer and containing particulars of the agreement between them, and must make and keep a duplicate of such ticket till the work is completed or paid for (*b*). The ticket and its duplicate must be produced in any dispute, and they are evidence of their contents (*c*). If the dispute relates to the improper or imperfect execution of any work, the piece of work must be produced, and if not produced it is deemed to have been sufficiently and properly executed (*d*). The penalty for non-compliance is a fine not exceeding £5 on summary conviction (*e*).

SUB-SECT. 5.—*Silk Weavers.*

Tickets and
 duplicates.

1049. As in the case of hosiery manufacturers (*f*), a manufacturer of silk goods must give a ticket when he gives out work to a weaver, but the parties may agree in writing to dispense therewith (*g*). There

(*q*) Excise Act, 1860 (23 & 24 Vict. c. 113), s. 19 (1).

(*r*) *Ibid.*, s. 19 (2).

(*s*) *Ibid.*, s. 19 (3).

(*t*) *Ibid.*, s. 33. As to the recovery of penalties, see Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 21, 22; and title REVENUE, Vol. XXIV., pp. 737 *et seq.*

(*a*) As to the special provisions relating to payment of wages in this trade, see title FACTORIES AND SHOPS, Vol. XIV., p. 524.

(*b*) Hosiery Act, 1845 (8 & 9 Vict. c. 77), s. 1. For the definitions of "manufacturer," "agent" and "workman," see *ibid.*, s. 9. For the particulars required on the ticket, see *ibid.*, Schedule.

(*c*) *Ibid.*, s. 2.

(*d*) *Ibid.*, s. 3.

(*e*) *Ibid.*, s. 4. No order or conviction may be quashed for want of form, or be removed by *certiorari* or otherwise into any superior court of record (*ibid.*, s. 8). As to the repeals of the provisions of the Act relating to summary procedure, see Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4, Schedule; Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); and see, generally, title MAGISTRATES, Vol. XIX., pp. 531 *et seq.*, 556. As to the furnishing of particulars of work and wages under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116, see title FACTORIES AND SHOPS, Vol. XIV., pp. 512 *et seq.* As to offences by workmen in the hosiery trade, see the Hosiery Act, 1843 (6 & 7 Vict. c. 40); and in the felt-making and hat-making trades, see the Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), as amended by the Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), and the Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 1; and see, further, titles COURTS, Vol. IX., p. 79; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, 310, 311; MAGISTRATES, Vol. XIX., p. 556; MASTER AND SERVANT, Vol. XX., pp. 127, 128.

(*f*) See the text, *supra*.

(*g*) Silk Weavers Act, 1845 (8 & 9 Vict. c. 128), s. 1. As to the repeal of the provisions of the Act relating to summary procedure, see

are similar provisions as to the production of the ticket and of work alleged to have been improperly done (*h*).

There is no provision as to any penalty for failure to deliver such ticket (*i*).

SECT. 2.
Restraint
by Statute.

SUB-SECT. 6.—*The Growing of Tobacco.*

1050. The planting and growing, making and curing, of tobacco (*k*) in the United Kingdom was formerly restrained and prohibited by statute (*l*), but the prohibition was removed as to Ireland in 1907 (*m*), as to Scotland in 1908 (*n*), and as to England in 1910 (*o*). Every person growing, cultivating, or curing tobacco must take out a licence annually, on which there is charged an excise duty of 5s. (*p*), and excise duties are charged on the tobacco grown (*q*).

Licence
required.

SUB-SECT. 7.—*Old Metal Dealers.*

1051. The trade of a dealer in old metals (*r*) is regulated with a view to the diminishing of facilities for the disposal of stolen goods (*s*). A dealer in old metals means any person dealing in buying and selling old metal, scrap metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, whether such person deals in such articles only or together with second-hand goods or marine stores (*t*).

Definition.

1052. Every old metal dealer must register his name and place of abode, and every place of business, warehouse, store, and place of deposit occupied or used by him for the purpose of his business, in

Registration
required.

Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); and note (*e*), p. 540, *ante*.

(*h*) Silk Weavers Act, 1845 (8 & 9 Vict. c. 128), ss. 2, 3; see p. 540, *ante*.
(*i*) A provision (Silk Weavers Act, 1845 (8 & 9 Vict. c. 128), s. 7) providing a summary remedy for the recovery of wages was repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17. As to offences by workmen in the silk trade, see Hosiery Act, 1843 (6 & 7 Vict. c. 40); and note (*e*), p. 540, *ante*.

(*k*) As to the duties and drawbacks on tobacco and the manufacturers' and vendors' licences, and the regulations in relation thereto, see title REVENUE, Vol. XXIV., pp. 607, 608, 626, 637, 644 *et seq.*, 663, 678 *et seq.*, 697. As to the sale of tobacco to children, see title INFANTS AND CHILDREN, Vol. XVII., p. 175.

(*l*) Stat. (1660) 12 Car. 2, c. 34; stat. (1663) 15 Car. 2, c. 7; Tobacco Act, 1782 (22 Geo. 3, c. 73); Tobacco Cultivation Act, 1831 (1 & 2 Will. 4, c. 13) (all now repealed); see note (*o*), *infra*.

(*m*) Irish Tobacco Act, 1907 (7 Edw. 7, c. 3), repealed and re-enacted by the Finance Act, 1908 (8 Edw. 7, c. 16), s. 3 (4).

(*n*) Tobacco Growing (Scotland) Act, 1908 (8 Edw. 7, c. 10), repealed and re-enacted in 1910; see note (*o*), *infra*.

(*o*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 83 (5), Sched. VI., repealing the statutes mentioned in notes (*l*), (*n*), *supra*, and so much of any Act as prohibits or restrains the growth, making, or curing of tobacco in England or Scotland.

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 83 (2) (England and Scotland); Finance Act, 1908 (8 Edw. 7, c. 16), s. 83 (1) (Ireland); see title REVENUE, Vol. XXIV., p. 644.

(*q*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 83 (2); see title REVENUE, Vol. XXIV., p. 626.

(*r*) As to the purchase of old metal from children, see p. 543, *post*.

(*s*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110). As to the law relating to receivers of stolen goods, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 676 *et seq.*

(*t*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 3; compare

SECT. 2.
Restraint
by Statute.

Search
warrant.

Effect of
conviction.

Police
regulations.

a book to be kept by the local authority of the district (*a*), and must correctly enter in a book kept by himself for the purpose the description and price of all articles purchased or otherwise acquired by him, and the name, address, and occupation of the person from whom the same were purchased or otherwise acquired (*b*).

1053. A justice of the peace, on complaint made before him that the complainant has reason to believe, and does believe, that any old metal stolen or unlawfully obtained is kept in any old metal dealer's house, shop, room, or place, may grant a search warrant, and the articles may be seized; and if on summons before two justices the dealer fails to prove to the satisfaction of the court how he came by the articles, or if a dealer is found in possession of any old metal which has been stolen or unlawfully obtained and it is proved, on summons before two justices, that he had reasonable cause to believe that it was stolen or unlawfully obtained, the dealer is liable to a penalty not exceeding £5, and for any subsequent offence to a penalty not exceeding £20, or imprisonment with hard labour for not exceeding three months (*c*).

1054. If a dealer is convicted he may be ordered to be registered in a police register, and thereupon becomes subject, for a period not exceeding three years, which may be extended on subsequent convictions, to certain regulations (*d*), and must give notice to the police of any removal of his business (*e*), and is liable, on an order of two justices, to police visit and inspection at any time (*f*).

The regulations to which a dealer becomes subject on such order are the following, namely:—(1) He must keep books showing particulars

the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 13, where the definition is the same. As to the jurisdiction to try metal dealers, see title COURTS, Vol. IX., p. 79. As to marine store dealers, see pp. 543, 544, *post*.

(*a*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 86 (1). This provision only applies in districts to which it has been extended by an order of the Home Secretary; see *ibid.*, ss. 2 (2), 3 (4); and title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364. Marine store dealers are also subject to the provisions of this Act; see p. 543, *post*; as to the penalties, see note (*b*), *infra*.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 86 (2). The penalty for carrying on the business without registration, or without keeping a book and making correct entries, is not exceeding £5 and, if a continuing offence, not exceeding 40s. a day (*ibid.*, s. 86 (3)); any officer or other person authorised in writing by the local authority has powers of access and inspection, under a penalty for obstructing him not exceeding £5 (*ibid.*, s. 86 (4)). The local authority must give public notice of the provisions of the section (*ibid.*, s. 86 (5)); see note (*l*), p. 544, *post*.

(*c*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 4. These summary proceedings are alternative to procedure by indictment (*ibid.*). As to summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 531 *et seq.*

(*d*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), ss. 4, 5, 8; see the text, *infra*. As to search warrants generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; POLICE, Vol. XXIII., p. 498.

(*e*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 6. The penalty for default is not exceeding £5 and not exceeding 10s. for every day after the first on which he continues to carry on business without having given such notice (*ibid.*). Provision is made for the case of removal from one petty sessional district to another (*ibid.*).

(*f*) *Ibid.*, s. 7.

of each purchase and sale of old metal; (2) he may not buy or receive old metal before 9 a.m. or after 6 p.m., or buy or receive old metal from any person apparently under the age of sixteen (*g*), or employ any person under sixteen to buy or receive old metal; (3) he must produce to the police, when required, his books and any old metal in his possession, including old metal placed in any house, outhouse, yard, garden, or place occupied by him, or removed with his knowledge and permission to any other place without a *bonâ fide* sale; (4) he must without delay give notice to the police of any articles then in his possession, or which come into his possession, answering to the description of stolen, embezzled, or fraudulently obtained articles of which printed or written information is given to him by the police; and (5) he must keep all old metals purchased or received by him without changing their form or disposing of them in any way for forty-eight hours after purchase or receipt (*h*).

SECT. 2.
Restraint
by Statute.

1055. It is an offence for an old metal dealer to purchase, receive, or bargain for lead, copper, brass, tin, pewter, or German silver or spelter, or any composite of which any of these metals is the principal ingredient, whether new or old, in any quantity at one time less than certain specified quantities, under a penalty not exceeding £5 (*i*). Provision as to quantity.

SUB-SECT. 8.—*Marine Store Dealers.*

1056. Any person dealing in or buying or selling any anchors, cables, sails, old junk, or old iron or other marine stores, must have his name, together with the words "Dealer in marine stores," distinctly painted in letters of not less than six inches in length on every warehouse or place of deposit belonging to him (*j*). In places where the Public Health Acts Amendment Act, 1907 (*k*), Part VII., is in force he must also register his place of abode and every place of business or store used by him in a book kept for the purpose by the local authority, and a person authorised by the local authority may inspect the premises and the books required to be Duties of marine store dealer.

(*g*) Compare the Children Act, 1908 (8 Edw. 7, c. 67), s. 116; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 172, 173.

(*h*) Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 8. The penalty for breach of the regulations for the first offence is not less than 20s. and not exceeding £5; and for every subsequent offence not less than £5 and not exceeding £20 (*ibid.*). As to the recovery of penalties and appeal, see *ibid.*, ss. 9—11; Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4; and title MAGISTRATES, Vol. XIX., pp. 643 *et seq.*

(*i*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 13, Schedule. The quantities specified are lead 112 lbs. and copper, brass, tin, pewter, and German silver or spelter 56 lbs. (*ibid.*). It is of the essence of the offence that the accused should be a dealer in old metals (*Adams v. McKenna* (1906), 8 F. (Justiciary) 79), and it is not enough to describe him in the complaint as a "general dealer" (*ibid.*).

(*j*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 538. The penalty is not exceeding £20 (*ibid.*). As to marine store dealers and dealers in metal, see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 172, 173; as to public stores found in the possession of dealers in marine stores and in old metals, see Public Stores Act, 1875 (38 & 39 Vict. c. 25), s. 9.

(*k*) 7 Edw. 7, c. 53; see titles LOCAL GOVERNMENT, Vol. XIX., p. 387; PUBLIC HEALTH AND LOCAL ADMINISTRATION Vol. XXIII. p. 364.

SECT. 2.
 Restraint
 by Statute.

Purchase from
 children.

Cutting up
 or unlaying
 cables.

Permit.

Advertise-
 ment of inten-
 tion to cut or
 unlay.

Necessity
 for proof.

kept there (*l*). He must keep proper books and enter therein an account of all marine stores of which he becomes possessed, the time he acquired each article, and the name, place of abode, and description of the person from whom he purchased or received the same (*m*).

A marine store dealer must himself or by his agents not purchase marine stores from any person apparently under the age of sixteen (*n*).

1057. A marine store dealer must not on any pretence cut up or unlay into twine or paper stuff any cable or other like article exceeding five fathoms in length unless he obtains a written permit. To obtain such permit he must make a declaration before a justice of the peace having jurisdiction where the dealer resides stating the quality and description of the article, the name and description of the person from whom he obtained the same, and that he purchased or acquired the article without fraud or without any knowledge or suspicion that it had been come by dishonestly. The justice of the peace before whom the declaration is made, or the receiver of wreck of the district upon the production of the declaration, may grant the necessary permit (*o*).

On obtaining the permit the marine store dealer must advertise for the space of one week at least in a newspaper circulating in the place where he resides the fact that he has a permit, the nature of the article, the place where it is deposited, and the time at which it is intended to cut it up or unlay it, before he can cut up or unlay the article (*p*). Any person suspecting that the article advertised is his property may, on a sworn statement, obtain from a justice of the peace a warrant for the production and inspection of the article and of the marine store dealer's books (*a*).

SUB-SECT. 9.—*Anchors and Chain Cables.*

1058. It is a misdemeanour for a maker of or dealer in anchors or chain cables to sell, or for any person to purchase, for use on any British ship (*b*) any chain cable or anchor exceeding in weight 168 lbs. unless it has been duly proved (*c*).

(*l*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 86. Public notice is to be given of the provisions of this section (*ibid.*, s. 86 (5)). As to whether the giving of such a notice is a condition precedent to a prosecution, see *Duncan v. Knill* (1907), 96 L. T. 911.

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 39. The penalty is, for a first offence a fine not exceeding £20; for subsequent offences, not exceeding £50. Under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 86, where it is in force, the penalty must not exceed £5 or 40s. daily.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 540. The penalty is, for a first offence, a fine not exceeding £5; for subsequent offences, not exceeding £20 (*ibid.*).

(*o*) *Ibid.*, ss. 541, 698. The penalty is, for a first offence, a fine not exceeding £20; for subsequent offences, not exceeding £50 (*ibid.*).

(*p*) *Ibid.*, s. 542 (1).

(*a*) *Ibid.*, s. 542 (2). The penalty for a breach of *ibid.*, s. 542, is the same as for a breach of *ibid.*, s. 541; see note (*o*), *supra*.

(*b*) For the meaning of "British ship," see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 16.

(*c*) Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 1; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 689, 690. Admiralty and

1059. Every contract for the sale of a chain cable or anchor exceeding the prescribed weight is, by statute, deemed, in the absence of express stipulation to the contrary, to imply a warranty that the article has been duly proved; and it lies upon the seller to prove the existence of any such express stipulation, and the testing and stamping (*d*). But no maker, dealer, shipowner, or other person is relieved by this provision from any responsibility in respect of any anchor or chain cable made, sold, or used by him to which he would, but for such provision have been subject (*e*).

SECT. 2.
Restraint
by Statute.

Implied
warranty.

1060. Provision is made for the licensing by the Board of Trade of certain specified bodies, and such other bodies as may be authorised by Order in Council, for the testing of anchors and chain cables with a view to their proof; and for the inspection of testing establishments (*f*). Every licensed tester must with all reasonable despatch test every anchor and chain cable brought for testing, in the order in which they are brought, unless, as regards the order, the persons interested agree otherwise (*g*).

Licensed
testers.

The tensile strain and the breaking strain are prescribed (*h*); and provision is made for the mode of testing (*i*) and mode and conditions of stamping (*k*), and the furnishing of a certificate that the anchor or chain cable has been duly proved (*l*). The Board of Trade issues a scale of maximum charges for such testing and stamping, which must be exhibited in a conspicuous part of the establishment, together with the actual charges made (*a*).

Mode and
conditions of
testing.

A licensed tester has a lien on an anchor or chain cable for his charges (*b*), and after three months from the testing may enforce it by sale (*c*).

Lien of
tester.

War Office contracts are not within the Act (Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 18). When a ship is detained as unsafe, the Board of Trade may direct an inquiry into the condition of her anchors and cables, and, if they have not been duly proved, may make such order as is requisite (*ibid.*, s. 4). Emigrant ships are required to be supplied with sufficient anchors and chains (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 290 (1) (*e*)); and see, generally, title SHIPPING AND NAVIGATION, Vol. XXVI., p. 335. The expressions "anchor" and "chain cable" include any shackle attached to or intended to be used in connexion with the anchor or chain cable (Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 19).

(*d*) *Ibid.*, s. 2; and compare *Hall v. Billingham* (1886), 54 L. T. 387.

(*e*) Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 3.

(*f*) *Ibid.*, ss. 5, 6. The bodies whose establishments may be licensed without an Order in Council are set out in *ibid.*, Sched. I. The licence is for a year, may be revoked or suspended at any time, and may be renewed, and the licence fee is such fee not exceeding £50 as the Board of Trade may, with the concurrence of the Treasury, appoint (*ibid.*, s. 5 (3), (4), (6)).

(*g*) *Ibid.*, s. 7.

(*h*) *Ibid.*, s. 8, Sched. II.

(*i*) *Ibid.*, s. 9.

(*k*) *Ibid.*, s. 10.

(*l*) *Ibid.*, s. 10 (7); called a "certificate of proof" (*ibid.*).

(*a*) *Ibid.*, s. 11. The Board of Trade may sanction alterations in the maximum charges in particular cases, subject to a condition ensuring notice of the intended alteration (*ibid.*, s. 11 (3)).

(*b*) *Ibid.*, s. 12 (1).

(*c*) *Ibid.*, s. 12 (2).

SECT. 2.

**Restraint
by Statute.**

Offence by
licensed
testers.

1061. It is a misdemeanour for a licensed tester to stamp any anchor or chain cable, or other chain or cable, with the distinctive mark denoting that it has been duly proved, or with any mark resembling that mark, or otherwise calculated to lead persons to suppose that it has been duly proved, unless it has been duly proved at his establishment; or to deliver a certificate of proof in respect of any anchor or chain cable which has not been duly proved at his establishment; or to make any false statement in a certificate of proof (*d*).

Offences
by other
persons.

It is a misdemeanour for any person other than a licensed tester to place on any anchor or chain cable, or on any chain or cable, any distinctive mark appointed by the Board of Trade for any testing establishment, or any mark resembling that mark, or otherwise calculated to lead persons to suppose that it has been duly proved; or to deliver any certificate or document of a like character relating to the proof or testing of any anchor or chain cable or other chain or cable resembling a certificate of proof delivered by a licensed tester, or otherwise calculated to lead persons to suppose that the anchor, chain cable, chain or cable, has been duly proved (*e*).

Private
testing.

1062. It is a misdemeanour to deliver a certificate or document of like character relating to the proof or testing of an anchor or chain cable or other chain or cable which is not an anchor or chain cable duly proved under the statutory provisions, or a chain or cable proved at a licensed testing establishment, without placing the words "privately tested" conspicuously on the certificate or document; or to place on any untested anchor or chain cable, or other chain or cable, any marks or deliver in relation thereto any certificate or like document, calculated to lead persons to suppose that it has been tested (*f*); or to sell or deliver for use any anchor or chain cable, or other chain or cable, with knowledge that it has been stamped or marked in contravention of the statutory provisions (*g*).

Manufac-
turers' marks.

1063. A manufacturer of anchors must mark on every anchor he manufactures in legible characters, and both on the crown and also on the shank under the stock, his name or initials, and must in addition mark on the anchor a progressive number and the weight of the anchor (*h*).

SUB-SECT. 10.—*Sale of Pistols (i).*

Restrictions
on sale.

1064. It is unlawful to sell by retail or by auction or let on hire a pistol (*j*) to any person, unless at the time of sale such person either

(*d*) Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 13 (1); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 689, 690, note (*k*). For forgery generally, see the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), which comes into operation on the 1st January, 1914.

(*e*) Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 14 (1).

(*f*) *Ibid.*, s. 15.

(*g*) *Ibid.*, s. 16.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 543 (1). The penalty for failure to comply without reasonable cause is not exceeding £5 for each offence (*ibid.*, s. 543 (2)).

(*i*) The proving of gun barrels before sale is provided for by the Gun Barrel Proof Act, 1868 (31 & 32 Vict. c. cxiii.), which regulates in detail the tests required and the stamps to be impressed.

(*j*) "Pistol" means a firearm or other weapon of any description from

produces a gun or game licence (*k*) then in force, or gives reasonable proof that he is entitled to use or carry a gun without such licence (*l*), or that, being a householder, he purposes to use such pistol only in his own house or the curtilage thereof (*m*), or that he is about to proceed abroad for a period of not less than six months and produces a statement to that effect signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace (*n*).

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Restraint
by Statute.

1065. Every person who sells by retail or lets on hire a pistol must, before delivery, enter or cause to be entered in a book kept for the purpose the description of the pistol, whether single barrel, magazine, revolver, pin, rim or centre fire, the date of sale or hire, the name and address of the purchaser or hirer, and the office from which the gun or game licence produced by the purchaser was issued, the date of the licence, or the circumstances exempting the purchaser or hirer from having such licence (*o*).

Register of
sales.

The penalty for contravention of any of the above provisions, or for knowingly making or causing to be made on the sale, purchase, or hire of a pistol any false entry or statement as to any matter concerning which an entry or statement is required, is a fine not exceeding £5 (*p*).

Penalty.

1066. It is an offence for any person under the age of eighteen years, and not exempt from incurring a penalty for using or carrying

Persons under
eighteen.

which any shot, bullet, or other missile can be discharged, and of which the length of barrel, not including any revolving, detachable, or magazine breach, does not exceed nine inches (Pistols Act, 1903 (3 Edw. 7, c. 18), s. 2). It does not include a mere toy; but it includes weapons other than firearms, and an air pistol may be a weapon as distinguished from a toy (*Bryson v. Gamage, Ltd.*, [1907] 2 K. B. 630); compare the definition of a gun in the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 2, which specifically includes an air-gun and in which a toy pocket pistol has been held to be included (*Campbell v. Hadley* (1876), 40 J. P. 756); and see title GAME, Vol. XV., p. 251, note (*f*). The provisions of the Pistols Act, 1903 (3 Edw. 7, c. 18), do not apply where an antique pistol is sold as a curiosity or ornament (*ibid.*, s. 8), but the term antique pistol does not include any pistol with which ammunition is sold, or which there is reasonable ground for believing is capable of being effectively used (*ibid.*, s. 2).

(*k*) Namely, a licence to use or carry a gun under the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), or a licence or certificate to kill game granted under the laws of excise in that behalf (Pistols Act, 1903 (3 Edw. 7, c. 18), s. 2); see title GAME, Vol. XV., pp. 246 *et seq.*

(*l*) As to the persons entitled to use or carry a gun without a licence, see Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7; and title GAME, Vol. XV., p. 251.

(*m*) See Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7; as to the meaning of "curtilage," see title GAME, Vol. XV., pp. 251, 252.

(*n*) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 3. The signed statement must be produced in all the three cases, in addition to the reasonable proof (*Matthews v. Gray*, [1909] 2 K. B. 89).

(*o*) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 3. The book must be produced for inspection on the request of any officer of police or of Inland Revenue (*ibid.*).

(*p*) *Ibid.*, s. 3. All offences under the Act may be prosecuted, and all fines in respect thereof may be recovered, and all summary orders may be made, in manner provided by the Summary Jurisdiction Acts (*ibid.*, s. 6). As to the procedure before magistrates, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

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Restraint
by Statute.

Drunken
persons and
lunatics.

a gun without a gun or game licence (*q*), to buy, hire, use, or carry a pistol under a penalty not exceeding 40s., and for any person knowingly to sell or deliver a pistol to any such person under a penalty not exceeding £5 (*s*).

1067. It is an offence to sell, knowingly, a pistol to any person who is intoxicated or is not of sound mind, the penalty being a fine not exceeding £25, or imprisonment with or without hard labour for not exceeding three months (*a*).

Part V.—Restraint of Trade by Agreement.

SECT. 1.—Introductory.

Public policy. **1068.** A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object (*b*); and in such a case the general principle that a man is entitled to exercise any lawful trade as and where he wills (*c*) must be applied with due regard to the principles that public policy requires for men of full age and understanding the utmost freedom to contract (*d*), and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on (*e*), and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his

(*q*) *I.e.*, under the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 7; see title GAME, Vol. XV., p. 251.

(*s*) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 4. The court may make such order as to the forfeiture or disposal of the pistol as it thinks fit (*ibid.*).

(*a*) *Ibid.*, s. 5. As to sales to a person who is intoxicated, see, further, title INTOXICATING LIQUORS, Vol. XVIII., p. 144.

(*b*) Apart from agreement a retiring partner or the vendor of a business is at liberty to start a competing business; see p. 595, *post*; and title PARTNERSHIP, Vol. XXII., p. 83.

(*c*) See p. 525, *ante*.

(*d*) *Printing and Numerical Registering Co. v. Sampson* (1875), L. R. 19 Eq. 462; *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A.; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 365; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, 452; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C.

(*e*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord WATSON, at p. 552; and compare *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per* VAUGHAN WILLIAMS, L. J., in his dissenting judgment, at p. 310; see also *Broad v. Jollyfe* (1620), Cro. Jac. 596; *Anon.* (1640), March, 77; *Prugnell v. Gosse* (1648), Aleyn, 67; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 187; 1 Smith, L. C., 11th ed., p. 406, at pp. 409, 410; *Homer v. Ashford* (1825), 3 Bing. 322; *Horner v. Graves* (1831), 7 Bing. 735, 742; *Mallan v. May* (1843), 11 M. & W. 653; *Leather Cloth Co. v. Lorsche* (1869), L. R. 9 Eq. 345; *Vernon v. Hallam* (1886), 34 Ch. D. 748. A trade or business may be sold even although it depends upon the personal character of the man who carries it on; see p. 565, *post*.

trade and its secrets without fear of their becoming his competitors (*f*).

Any restraint upon freedom of contract must be shown to be plainly necessary for the purpose of freedom of trade (*g*).

1069. Decisions upon public policy are subject to change and development with the change and development of trade and the means of communication (*h*), and the general principle once applicable to agreements in restraint of trade has consequently been considerably modified by later decisions, without, however, rendering the old cases on the subject obsolete on such questions as consideration (*i*), measurement of distance (*k*), severability (*l*), parties (*m*), and reasonableness of restraint generally (*n*).

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Introductory.

Development
of principle.

SECT. 2.—Classes of Agreements.

1070. Agreements in restraint of trade are, generally speaking, made (1) between vendors and purchasers of businesses; (2) between employers and employed; (3) between partners (*o*); (4) between

Classification.

(*f*) *Homer v. Ashford* (1825), 3 Bing. 322, 326; *Mallan v. May* (1843), 11 M & W. 653, per PARKE, B., at p. 666; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305, per ERLE, C.J., at p. 319.

(*g*) *Printing and Numerical Registering Co. v. Sampson* (1875), L. R. 19 Eq. 462, per JESSEL, M.R., at p. 465; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 365. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it (*Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A.). As to what may constitute such ground of public policy, see *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421 (where the area from which employers not parties to the agreement can obtain workmen is unreasonably restricted); and for an instance of an unlawful monopoly see *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K. B. 422, C. A.; and p. 528, *ante*. It is not in unlawful restraint of trade or contrary to public policy for a managing director of a company to agree to give to the company the exclusive benefit of all new inventions or improvements in respect of certain inventions and to communicate to the company particulars of all such new inventions or improvements (*Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (1892), 67 L. T. 469). "Unlawful," in the case of restraint of trade, means unenforceable, not criminal or unlawful in the sense of giving a cause of action to a third party; see note (*b*), p. 528, *ante*, p. 572, *post*, note (*w*), p. 601, *post*. As to tied house covenants between brewers and publicans, see title LANDLORD AND TENANT, Vol. XVIII., p. 573.

(*h*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, per LORD WATSON, at p. 553; *Archer v. Marsh* (1837), 6 Ad. & El. 959; *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., per FRY, L.J., at p. 396; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, 452; *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A.; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* *supra*, as reported, 107 L. T. 439, per FARWELL, L.J., at p. 445. As to public policy, see note (*h*), p. 525, *ante*; and title CONTRACT, Vol. VII., pp. 394 *et seq.*

(*i*) See pp. 564 *et seq.*, *post*.

(*k*) See pp. 560, 561, *post*.

(*l*) See pp. 572 *et seq.*, *post*.

(*m*) See p. 567, *post*.

(*n*) See pp. 553, 554, *post*.

(*o*) With regard to these three classes of agreements, though occasional distinctions are to be noted (see pp. 556 *et seq.*, *post*), the same general rules apply, and there is no sufficient reason for treating them in distinct categories. As to restraints imposed by vendors and lessors of land and

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Classes of
Agreement.

independent traders or groups of traders with a view to eliminating or reducing competition, regulating output, and the like (p); (5) between employers with a view to united action in relation to those whom they employ; and (6) between persons employed with a view to united action in relation to their employers (q).

SECT. 3.—*The Old Distinction between General and Partial Restraint.*

Early rule.

1071. In the earliest times it would probably have been held that all contracts in restraint of trade, whether general or partial, were void: but the severity of this principle was gradually relaxed (r), and it became the rule that a partial restraint might be good if reasonable (s), but a general restraint was of necessity void (t).

houses, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 515 *et seq.*; SALE OF LAND, Vol. XXV., pp. 428, 429, 454 *et seq.* These are restrictions upon the user of a particular house or piece of land rather than restraints of trade in the sense in which the term is used in this title; but the decisions on the subject are relevant on the questions, *e.g.*, of the meaning of trade and the acts which constitute breach of covenant; and see *Taff Vale Rail. Co. (Directors etc.) v. McNabb* (1873), L. R. 6 H. L. 169 (agreement on lease of a dock).

(p) See pp. 526 *et seq.*, *ante*.

(q) As to these two classes of agreements, see pp. 597 *et seq.*, *post*. As to restraints as between employers and employed, see also title MASTER AND SERVANT, Vol. XX., pp. 88, 127.

(r) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 541, 556, 564; S. C., [1893] 1 Ch. 630, 647, C. A.; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 309; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C.; *Dier's Case* (1414), Y. B. 2 Hen. 5, fo. 5, pl. 26; *Claygate v. Batchelor* (1601), Owen, 143; *sub nom. Colgate v. Batchelor* (1602), Cro. Eliz. 872; *Broad v. Jollyfe* (1620), Cro. Jac. 596; *Prugnell v. Gosse* (1648), Ayleyn, 67.

(s) *Rogers v. Parrey* (1613), 2 Bulst. 136; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406. The proposition will be found stated in practically all the cases on the subject.

(t) *Mitchel v. Reynolds*, *supra*; *Magna Charta* (1215), c. 20; *Dier's Case*, *supra* (where, however, there were fraud and compulsion; see *Mitchel v. Reynolds*, *supra*; *Broad v. Jollyfe*, *supra*); *Claygate v. Batchelor*, *supra*; *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53 a; *Anon.* (1640), March, 77; *Exeter Tailors' Co. v. Clarke* (1684), 2 Show. 345; *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234; *Gunmakers' Society (Master etc.) v. Fell* (1742), Willes, 384, 388; *Davis v. Mason* (1793), 5 Term Rep. 118; *Shackle v. Baker* (1808), 14 Ves. 468; *Morris v. Colman* (1812), 18 Ves. 437, *per* Lord ELDON, L.C., at p. 438; *Harrison v. Gardner* (1817), 2 Madd. 198; *Bryson v. Whitehead* (1822), 1 Sim. & St. 74, 77 (trade secret; see p. 557, *post*); *Homer v. Ashford* (1825), 3 Bing. 322; *Wickens v. Evans* (1829), 3 Y. & J. 318; *Hutton v. Parker* (1839), 7 Dowl. 739. The proposition will be found repeatedly stated in the cases, and it is unnecessary to refer further to them on this point. The doctrine that there was an essential distinction between a general and a partial restraint was finally repudiated in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, where a doubt was expressed (see *ibid.*, *per* Lord ASHBOURNE, at p. 557, and *per* Lord MACNAGHTEN, at p. 562) whether it had ever existed at any time. A similar doubt had been expressed in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 366—369; compare *Horner v. Graves* (1831), 7 Bing. 731; *Whittaker v. Howe* (1841), 3 Beav. 383 (restraint extending over Great Britain held good); *Jones v. Lees* (1856), 1 H. & N. 189 (covenant by licensee of patent, with no limit of space, held good); *Harms v. Parsons* (1862), 32 Beav. 328, as reported 32 L. J. (CH.) 247 (where ROMILLY, M.R., quoted *Whittaker v. Howe*, *supra*, without disapproval); *Leather Cloth Co. v.*

A restraint was regarded as general if it was unlimited as to space, that is, apparently, if it extended over the whole of the United Kingdom (*u*), even though limited as to time (*w*), but not if,

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between
General
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Restraint.

What
constitutes
general
restraint.

Lorsont (1869), L. R. 9 Eq. 345 (restraint extending over Europe held good; but, apparently, to be explained as a case of a trade secret; compare *Allsopp v. Wheateroft* (1872), L. R. 15 Eq. 59, *per* WICKENS, V.-C., at p. 64); *Harvey v. Corpe* (1885), 79 L. T. Jo. 246 (restraint covering Europe held reasonable in case of army meat contractor); *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., *per* FRY, L.J., at p. 398. The contrary view was expressed in *Mallan v. May* (1843), 11 M. & W. 653; *Nicholls v. Stretton* (1847), 10 Q. B. 346, *per* PATTESON, J., at p. 353; *Tallis v. Tallis* (1853), 1 E. & B. 391; compare *Vernon v. Hallam* (1886), 34 Ch. D. 748, 751, citing *Homer v. Ashford* (1825), 3 Bing. 322, *per* BEST, J., at p. 326; *Davies v. Davies*, *supra*, at pp. 382, 385, 386, 398; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord HERSCHELL, L.C., at p. 546. For *dicta* on the question since *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, see *Underwood (E.) & Son v. Barker*, [1899] 1 Ch. 300, C. A.; *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, 51, C. A.; *Beetham v. Fraser* (1904), 21 T. L. R. 8; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 520, C. A.; affirmed, [1912] A. C. 421; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K. B. 422, C. A., as reported, 107 L. T. 439, *per* FARWELL, L.J., at p. 445; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C. The statement in the text represents the view taken in the great majority of the cases, and it is described by Lord HERSCHELL, in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, at p. 548, as perhaps the sounder view. But there had grown up a wide diversity of judicial opinion, and the decision in this last case did not constitute any sudden change in the law, but merely adopted a principle which had been appearing in the cases from time to time, but without sufficient authority to secure general recognition.

(*u*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 182; 1 Smith, L. C., 11th ed., p. 406 (where in describing a general restraint the words used were "not to exercise a trade throughout the kingdom"). But the law was not clear as to this; and the above words were, in *Horner v. Graves* (1831), 7 Bing. 731, said to be rather an instance than a limit of the application of the rule. In *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch., "London and 600 miles" (*i.e.*, England, Wales and nineteen-twentieths of Scotland) was treated as general (London being held severable; see pp. 572 *et seq.*, *post*). In *Jones v. Lees* (1856), 1 H. & N. 189, "England" was treated as general. In *Harms v. Parsons* (1862), 32 Beav. 328, a restraint covering England but not Scotland was treated as partial. In *Leather Cloth Co. v. Lorsont* (1869), L. R. 9 Eq. 345, 351, Great Britain was referred to as the test; compare *Ward v. Byrne* (1839), 5 M. & W. 548. In *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 366, a restraint unlimited as to space was discussed on the basis that it extended to England and Wales; and in *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A., LINDLEY, L.J., at p. 648, and BOWEN, L.J., at p. 651, speak of England; though in S. C., [1894] A. C. 535, Lord HERSCHELL, at p. 550, and Lord MACNAGHTEN, at p. 574, seem to refer to the United Kingdom. In the same case Lord HERSCHELL, at p. 550, said that the courts in laying down the rule had reference only to the United Kingdom and would not have considered it against public policy to restrain a person who had sold his business from setting up a rival business in another country. But, apparently, while the rule existed that a restraint covering the whole of the United Kingdom was of necessity void, the extension of such restraint to foreign countries was immaterial; compare *Leather Cloth Co. v. Lorsont*, *supra*, at p. 351. The question only becomes important when it is admitted that the reasonableness of a general restraint is to be considered in determining its validity; see pp. 552, 560, *post*.

(*w*) *Dier's Case* (1414), Y. B. 2 Hen. 5, fo. 5, pl. 26; *Hunlocke v. Blacklowe* (1670), 2 Wms. Saund. 155 b, 156 b, n.; *Colmer v. Clark* (1734),

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Present rule.

though unlimited as to space, it was limited as to the persons with whom the covenantor might deal (*a*), or as to the manner in which or the name under which the trade might be carried on (*b*), or, it would appear, as to the capacity in which the covenantor might engage in the trade (*c*). The mere fact that it was unlimited as to time did not constitute it a general restraint (*d*).

1072. The rule now is clear that, whether a restraint is general or partial, its validity is to be determined by the consideration whether it exceeds what is reasonably necessary for the protection of the covenantee (*e*), that is, the criterion of reasonableness which was formerly applied only to partial restraints must now be applied to restraints of every kind.

7 Mod. Rep. 230; *M'Allen v. Churchill* (1826), 11 Moore (C. P.), 483; *Ward v. Byrne* (1839), 5 M. & W. 548; *Proctor v. Sargent* (1840), 2 Man. & G. 20, 33; *Hinde v. Gray* (1840), 1 Man. & G. 195; *Davies v. Davies* (1887), 36 Ch. D. 359, C. A.; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 543, 553; but see, *contra*, *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, *per* CHITTY, J., at p. 450; *Davies v. Davies*, *supra*, *per* COTTON, L.J., at p. 382, and *per* BOWEN, L.J., at p. 391.

(*a*) *Hunlocke v. Blacklowe* (1670), 2 Wms. Saund. 155 b; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 185; 1 Smith, L. C., 11th ed., p. 406, at p. 410; *Gale v. Reed* (1806), 8 East, 80; *Nicholls v. Stretton* (1843), 7 Beav. 42; (1847), 10 Q. B. 346, 350; *Rannie v. Irvine* (1844), 7 Man. & G. 969; *May v. O'Neill* (1875), 44 L. J. (CH.) 660; *Collins v. Locke* (1879), 4 App. Cas. 674, P. C.; *Baines v. Geary* (1887), 35 Ch. D. 154; *Mills v. Dunham*, [1891] 1 Ch. 576, C. A.

(*b*) *Jones v. Lees* (1856), 1 H. & N. 189; see *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A., *per* BOWEN, L.J., at pp. 654, 657; compare the distinction between rules in restraint of and rules regulating trade, as to which see note (*o*), p. 531, *ante*. As to a restriction as to name, see *Vernon v. Hallam* (1886), 34 Ch. D. 748 (covenant not to carry on the business of a manufacturer anywhere for five years under a particular name is not a general restraint or void); *Wolmershausen v. O'Connor* (1877), 36 L. T. 921 (covenant not to hold out as formerly connected in trade with another is not in general restraint or void).

(*c*) *Wallis v. Day* (1837), 2 M. & W. 273 (covenant by vendor of a carrier's business, in consideration of weekly payments, never to trade as a carrier except as the servant of the covenantee: held good).

(*d*) *Clerke v. Comer* (1734), Lee temp. Hard. 53; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch.; *Archer v. Marsh* (1837), 6 Ad. & El. 959; *Elves v. Croft* (1850), 10 C. B. 241; *Tallis v. Tallis* (1853), 1 E. & B. 391; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Davies v. Davies*, *supra*, *per* BOWEN, L.J., at p. 390.

(*e*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 548; *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, 484, C. A.; *Trego v. Hunt*, [1896] A. C. 7, 27; *Stride v. Martin* (1897), 77 L. T. 600; *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, 455, C. A.; *Haynes v. Doman*, [1899] 2 Ch. 13, 17, C. A.; *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, 304, C. A.; *Marshalls, Ltd. v. Leek* (1900), 17 T. L. R. 26; *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, 52, 53, 55, C. A.; *Tivoli, Manchester, Ltd. v. Colley* (1904), 20 T. L. R. 437; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A.; *Beetham v. Fraser* (1904), 21 T. L. R. 8; *Hooper and Ashby v. Willis* (1906), 94 L. T. 624, C. A.; *Mouchell v. Cubitt (William) & Co.* (1907), *Times*, 14th February; *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64; *White, Tomkins and Courage v. Wilson* (1907), 23 T. L. R. 469;

SECT. 4.—*Requisites of a Valid Restraint.*SUB-SECT. 1.—*In General.*

1073. An agreement in restraint of trade must satisfy the following conditions :—(1) It must be reasonable ; (2) it must be founded on good consideration ; (3) it must not be too vague.

SUB-SECT. 2.—*Reasonableness.*

1074. It is for the judge to decide, as a matter of law, (1) whether a contract is or is not in restraint of trade (*f*) ; (2) whether, if in restraint of trade, it is reasonable (*g*). It is for the jury to decide any disputed questions as to the nature of the business, as to what is customary in it, as to the number and situation of its customers, as to any particular dangers requiring precautions and the like, all which matters are relevant to the question of reasonableness (*h*).

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conditions.Functions of
judge and
jury.

United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330, P. C., explaining and distinguishing *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535 ; *Bromley v. Smith*, [1909] 2 K. B. 235 ; *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 766, C. A. ; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 521, C. A. ; affirmed, [1912] A. C. 421 ; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K. B. 422, C. A., as reported, 107 L. T. 439, per FARWELL, L.J., at p. 445 ; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308 ; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C. ; *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A. C. 724, 733. For a criticism of the whole doctrine of the permissibility of a restraint of trade, see *Leatham (Henry) & Sons, Ltd. v. Johnstone-White*, [1907] 1 Ch. 189, per NEVILLE, J., at p. 194 ; commented upon, S. C. [1907] 1 Ch. 322, 325, C. A. ; *Dottridge Brothers, Ltd. v. Crook* (1907), 23 T. L. R. 644.

(*f*) *United Shoe Machinery Co. of Canada v. Brunet*, *supra*, at p. 341.

(*g*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 195 ; 1 Smith, L. C., 11th ed., p. 406, at p. 416 ; *Chesman v. Nainby* (1727), 2 Stra. 739 ; (1728) 1 Bro. Parl. Cas. 234 ; *Davis v. Mason* (1793), 5 Term Rep. 118 ; *Horne v. Graves* (1831), 7 Bing. 731 ; *Proctor v. Sargent* (1840), 2 Man. & G. 20 ; *Mallan v. May* (1843), 11 M. & W. 653 ; *Tallis v. Tallis* (1853), 1 E. & B. 391 ; *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A. ; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, 368, C. A. ; *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, *supra*, per FLETCHER MOULTON, L.J., at p. 770, and per FARWELL, L.J., at p. 772 ; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*, at p. 522 ; affirmed, but without reference to this point, [1912] A. C. 421 ; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*, as reported, 107 L. T. 439, per FARWELL, L.J., at p. 445 ; as to the admissibility of evidence of contracts between the covenantee and other persons, see *ibid.*, at p. 440 ; *A.-G. of Australia v. Adelaide Steamship Co.*, *supra*, at p. 263 ; *Mason v. Provident Clothing and Supply Co., Ltd.*, *supra* ; and note (*r*), p. 527, *ante*.

(*h*) *Haynes v. Doman*, [1899] 2 Ch. 13, 24, C. A. ; *Dowden and Pook, Ltd. v. Pook*, *supra*, at pp. 52, 54 ; *Lamson Pneumatic Tube Co. v. Phillips*, *supra* ; *Mason v. Provident Clothing and Supply Co., Ltd.*, *supra* ; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305. It is also for a jury to say whether a business alleged to be carried on by the covenantor is in fact his business (*Clark v. Howard* (1860), 2 F. & F. 125) ; but whether there has been a breach is a question of law (*Kemp v. Sober* (1851), 1 Sim. (N. S.) 517 ; *Turner v. Evans* (1852), 2 De G. M. & G. 740, C. A. ; *Wickenden v. Webster* (1856), 6 E. & B. 387). It has been said that the number of inhabitants in the area of restriction is irrelevant (*Mallan v. May*, *supra*, per PARKE, B., at p. 667 ; but see *contra*, *Hitchcock v. Coker* (1837), 6 Ad.

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Test to be applied.

Agreement to be considered as a whole.

1075. In estimating reasonableness, extravagant possibilities should not be taken into account (*i*). Evidence as to the mode in which the agreement has been carried out is not relevant on the question of its construction (*j*), nor is evidence that the covenantee or other persons think it reasonably necessary (*k*). That it is unusual is evidence to show that it is unreasonable (*l*), and, conversely, that it is customary is evidence that it is reasonable (*m*); and if a covenant was reasonable when made, subsequent events do not affect its validity (*n*).

1076. It is the covenant as a whole which must be considered, not the particular breach complained of, and the court will not decide on the reasonableness of the covenantor's conduct in each particular case as it arises (*o*). Where, however, the covenant includes trades

& El. 438, Ex. Ch. *per* TINDAL, C.J., at p. 454; *Proctor v. Sargent* (1840), 2 Man. & G. 20, as reported 10 L. J. (C. P.) 34, *per* MAULE, J., and TINDAL, C.J., at p. 36, and *per* BOSANQUET, J., at p. 39, referring, however, to proceedings upon demurrer and the impossibility of the court taking judicial notice of the population of a district without evidence).

(*i*) *Rannie v. Irvine* (1844), 7 Man. & G. 969 (where the restraint is upon trading as a baker with a limited number of customers, it is not necessary to consider the possibility of one of them going to a village where the covenantor is the only baker); *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord MACNAGHTEN, at p. 574; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per* LINDLEY, M.R., at p. 306; *Haynes v. Doman*, [1899] 2 Ch. 13, C. A., *per* LINDLEY, M.R., at p. 26 (where the covenant is intended to prevent a servant from betraying business methods, it is not necessary to consider the possibility of his leaving his employment so soon as to have acquired no knowledge of such methods). As to construction of the contract generally, see pp. 569, 570, *post*.

(*j*) *Elves v. Crofts* (1850), 10 C. B. 241; *Jacoby v. Whitmore* (1883), 49 L. T. 335, C. A., *per* BRETT, M.R., at p. 337; *Perls v. Saalfeld*, [1892] 2 Ch. 149, 151, 153, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 522, C. A.; affirmed, but without reference to this point, [1912] A. C. 421; *Lovell and Christmas, Ltd. v. Wall* (1911), 27 T. L. R. 236, C. A.

(*k*) *Haynes v. Doman*, *supra*, at p. 24; *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 772, C. A.

(*l*) *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, *supra*, at pp. 767, 770 (restraint upon a newspaper reporter from ever being connected with any other newspaper within twenty miles; no instance proved of a similar restriction in the trade: held, unreasonable. But the covenant was held unreasonable in itself, and the covenantor was an infant at the date of the agreement); *Pearks, Ltd. v. Cullen* (1912), 28 T. L. R. 371; *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, 728, H. L.

(*m*) *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, *supra*, *per* FLETCHER MOULTON, L.J., at p. 770; *Catt v. Towrie* (1869), 4 Ch. App. 654, 659; *Cornwall v. Hawkins* (1872), 41 L. J. (CH.) 435, 436.

(*n*) *Elves v. Croft*, *supra*; *Jacoby v. Whitmore*, *supra*, at pp. 337, 338; *Townsend v. Jarman*, [1900] 2 Ch. 698, 703; *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A., *per* COZENS-HARDY, L.J., at p. 55; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 367; and compare *Keppell v. Bailey* (1834), 2 My. & K. 517, 530; *Kimberley v. Jennings* (1836), 6 Sim. 340, 350; *Jones v. Lees* (1856), 1 H. & N. 189.

(*o*) *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., *per* COTTON, L.J., at p. 387; *Baker v. Hedgecock* (1888), 39 Ch. D. 520. In *Tallis v. Tallis* (1853), 1 E. & B. 391, Lord CAMPBELL, C.J., at p. 412, said: "We have limited our judgment to the parts of the contract to which these breaches relate, because if these are valid, the invalidity of other parts of the contract is immaterial"; but this, apparently, must be taken in relation to the rules as to severability: see pp. 572 *et seq.*, *post*.

or places or persons, and in respect of some of them it is reasonable while in respect of others it is not, the part which is reasonable, if it can be severed from the rest, will be enforced in the event of a breach of that part (*p*).

1077. In estimating the reasonableness of a restraint, the paramount consideration which has to be taken into account is whether it is reasonably necessary for the protection of the interest of the covenantee (*q*), unless, it seems, there can be established some specific ground of public policy which must be taken to override the interest of the covenantee (*r*).

1078. There cannot be a restraint of trade in gross—the restraint must be for the protection of a business in which the covenantee is interested(*s*); but a company controlling or controlled by or

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Protection of covenantee's interest.

No restraint in gross.

(*p*) *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234; *Mallan v. May* (1843), 11 M. & W. 653; *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch.; *Baines v. Geary* (1887), 35 Ch. D. 154; *Hooper and Ashby v. Willis* (1905), 21 T. L. R. 691, *per* KEKEWICH, J., at p. 692; affirmed (1906), 22 T. L. R. 451, C. A.; *Lievre v. Mayonnet* (1913), 2 L. J. County Courts Reporter, 4; as to severability, see pp. 572 *et seq.*, *post*.

(*q*) The proposition will be found stated in practically all the cases on the subject. For cases subsequent to *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, see note (*t*), p. 551, *ante*. Before that case the rule was, with occasional exceptions, held applicable only to partial restraints; see p. 560, *post*.

(*r*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per* LINDLEY, M.R., at p. 305 ("Where an agreement restraining a person from carrying on business is entered into with another person engaged in a similar business for the purpose of protecting him from rivalry in that business and is no wider than is reasonably necessary for his protection in that business, it is difficult to imagine the circumstances which can render such an agreement injurious to the public interests of this country. I do not understand him [Lord MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, at pp. 566, 567] as saying that a restriction which is reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established. . . . Of course I am not speaking of contracts induced by fraud, duress or undue influence, or impeachable on any other recognised ground of invalidity"); see *Underwood (E.) & Son, Ltd. v. Barker*, *supra*, *per* LINDLEY, M.R., at p. 305, suggesting that some pernicious monopoly may afford such ground; *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A. (see p. 528, *ante*); and compare *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A., *per* LINDLEY, L.J., at pp. 646, 650; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 516, 520, C. A.; S. C., [1912] A. C. 421, 430, 435; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, 263, P. C.; *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, 728, H. L.; *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 190; 1 Smith, L. C., 11th ed., p. 406, at p. 410; *Davis v. Mason* (1793), 5 Term Rep. 118; *Wickens v. Evans* (1829), 3 Y. & J. 318; *Horner v. Graves* (1831), 7 Bing. 735, 743; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch.; *Archer v. Marsh* (1837), 6 Ad. & El. 959; *Whittaker v. Howe* (1841), 3 Beav. 383, 394; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305; *May v. O'Neill* (1875), 44 L. J. (CH.) 660, 661; *Collins v. Locke* (1879), 4 App. Cas. 674, 688, P. C.; *Mills v. Dunham*, [1891] 1 Ch. 576, 589, C. A.; *Haynes v. Doman*, [1899] 2 Ch. 13, 17, C. A.; *Tivoli, Manchester, Ltd. v. Colley* (1903), 20 T. L. R. 437; *Toby and Offer v. Major* (1899), 107 L. T. Jo. 489; *Leng Sir (W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 766, 773, C. A.; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310; and see pp. 526 *et seq.*, *ante*.

(*s*) *Mitchel v. Reynolds*, *supra*, at p. 190 ("It would be unreasonable to

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Varieties of
 subject-
 matter.

Contracts of
 employment.

interested in another company, or in which another company has an interest, cannot impose upon a servant an area of restraint which is wider than is necessary for the protection of its own business in the attempt to protect the business of such other company (t).

1079. The degree of permissible restraint may vary according to the subject-matter of the contract.

1080. A contract of service is invalid if and in so far as there are attached to it any servile incidents (a), but an employer may of course secure the whole time of his servant during the period of service (b), which may last for the servant's lifetime (c). If,

fix a certain loss on one side without any benefit to the other"); *Horner v. Graves* (1831), 7 Bing. 731, 743; *Townsend v. Jarman*, [1900] 2 Ch. 698, per FARWELL, J., at p. 702; *Leetham (Henry) & Son, Ltd. v. Johnstone-White*, [1907] 1 Ch. 322, 326, C. A. Apparently, therefore, a mere sentimental interest on the part of the covenantee will not justify a restraint, and the only suggestion in the cases that this is possible occurs in *Kimberley v. Jennings* (1836), 6 Sim. 340, per SHADWELL, V.-C., at p. 351 ("I remember a case in which a nephew wanted to go on the stage and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant on the ground that a valuable consideration had been given for it"); but see *Upton v. Henderson* (1912), 106 L. T. 839; and note (h), p. 525, ante. As to the correlative case of a restraint upon a person who is not, and has not been, engaged in the trade, see note (i), p. 564, post. As to what may constitute an interest in a business, see *Everton v. Longmore* (1899), 15 T. L. R. 356, C. A. (a body of the nature of a friendly society held entitled to enforce a covenant by a doctor); *Ballachulish Slate Quarries Co. v. Grant* (1903), 5 F. (Ct. of Sess.) 1105 (quarry company engaging a doctor to attend its employees with liberty to take other practice held entitled to enforce a covenant against his practising in the district on termination of his employment); and compare *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887), 36 Ch. D. 465, 469, C. A.

(t) *Leetham (Henry) & Sons, Ltd. v. Johnstone-White*, supra; and see *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310.

(a) Compare *Davies v. Davies* (1887), 36 Ch. D. 359, 393, C. A.; as to slavery, see p. 533, ante.

(b) *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, C. A., per LINDLEY, M.R., at p. 455, and per CHITTY, L.J., at p. 458; compare the covenants in *Homer v. Ashford* (1825), 3 Bing. 322 (not to work for any other person during term of service); *King v. Hansell* (1860), 5 H. & N. 106 (commission agent not during term of service to engage in same trade within ten miles); *Allsopp v. Wheatcroft* (1872), L. R. 15 Eq. 59 (not during the term of service to engage in the sale of any other articles or goods whatsoever); *Welstead v. Hadley* (1904), 21 T. L. R. 165, C. A.; *Tivoli Manchester, Ltd. v. Colley* (1904), 20 T. L. R. 437; *Hartley v. Cummings* (1847), 5 C. B. 247 (an agreement to serve the employer and his partners for seven years, and not during the term to serve anybody else or join any workmen's union without consent; to give instruction gratis if required; the employer to make minimum weekly payments, and if necessary provide work to keep the wage up to the minimum, with power, in case of servant's illness or misconduct or employers' discontinuance of business, to employ any other person and to cease to pay wages: held no restraint of trade); *Pilkington v. Scott* (1846), 15 M. & W. 657 (an agreement to serve for seven years at certain wages when and so long as the servant should be employed, and not to work for any other person during the term, with liberty to employers to employ any

(c) For note (c) see p. 557, post.

however, a restraint, though it is reasonable if applied during the period of service, may be unreasonably wide if applied after the termination of that period, and if the covenantor has during the period left the service without having been dismissed, the restraint will only be enforced by injunction for the residue of the period, subject to the rules as to reasonableness which would be applied in the case of a restraint coming into operation on the termination of the period (*d*).

1081. A restraint may be unreasonable as between employer and employed which would be reasonable as between the vendor and purchaser of a business (*e*).

1082. In the case of the sale of a business a wider restraint upon the vendor will be allowed, for the covenant must be valid where the full benefit of the purchase cannot otherwise be secured to the purchaser (*f*); and the same principle applies where a retiring partner sells his share (*g*).

1083. A contract not to divulge a trade secret may be reasonable though unlimited as to space or time, and a restraint imposed in order to give effect to such a contract would apparently be treated

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between
employment
and sale of
business.

Sale of
business.

Sale of trade
secret.

other person in case of illness and an option to dismiss at one month's notice: held mutual, reasonable, and made on good consideration; held, also, that there was an undertaking to employ for the seven years; and compare *Phillips v. Stevens* (1899), 15 T. L. R. 325. *Quære*, whether an agreement between a master and a servant to keep him out of work for a number of years would be void; see *Hartley v. Cummings* (1847), 5 C. B. 247, 260; and title MASTER AND SERVANT, Vol. XX., pp. 86 *et seq.* As to the enforcing by injunction of express and implied negative covenants in contracts of service, see title INJUNCTION, Vol. XVII., pp. 242 *et seq.* As to actions for harbouring a servant, see title MASTER AND SERVANT, Vol. XX., pp. 269, 270; and see *Pilkington v. Scott* (1846), 15 M. & W. 657.

(*c*) *Wallis v. Day* (1837), 2 M. & W. 273; 15 Vin. Abr., p. 322, tit. Master and Servant (N); and see title MASTER AND SERVANT, Vol. XX., p. 72. An injunction will not be granted to enforce a covenant applicable during the period of the covenantor's engagement if the granting of such injunction would be equivalent to enforcing specifically an agreement for personal service (*Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, 455, 456, C. A.; compare *Ehrman v. Bartholomew*, [1898] 1 Ch. 671, 674; and see title INJUNCTION, Vol. XVII., pp. 242, 243). As to the consideration necessary to support an agreement of service, see *Young v. Timmins* (1831), 1 Cr. & J. 331; but this case was decided under the influence of the old rule (before *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch.) that the court will consider the adequacy of the consideration in a case of restraint of trade); see, further, p. 566, *post*.

(*d*) *Robinson (William) & Co., Ltd. v. Heuer*, *supra*; compare *Ehrman v. Bartholomew*, *supra*.

(*e*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord MACNAGHTEN, at p. 566; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, 305, C. A.; compare *ibid.*, *per* VAUGHAN WILLIAMS, L.J., at p. 310 (dissenting, but not on this point); *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L., *per* Lord SHAW OF DUNFERMLINE, at p. 728.

(*f*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, *per* Lord HERSCHELL, L.C., at p. 548. As to an agreement on the purchase of the output of a business for a limited period, see *Southland Frozen Meat and Produce Export Co. v. Nelson Brothers*, [1898] A. C. 442, P. C.

(*g*) *Williams v. Williams* (1818), 2 Swan. 253; and see title PARTNERSHIP, Vol. XXII., p. 84.

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Confidential
employment.

Reasonable-
ness as to
space.

in the same way, but in no case has an absolutely unlimited restriction been under consideration (*h*).

1084. An employer may be entitled to insist upon special protection where from the nature of the business or of the employment the servant has special opportunities of becoming acquainted with the customers and of acquiring confidential information as to trade methods or secrets (*i*).

1085. The reasonableness of an area of restraint depends upon the nature of the business to be protected and the manner in which it is carried on. Where it is a business carried on by a small number of people with clients widely distributed a very large area will be allowed (*k*); and a wider restraint may be reasonable

(*h*) *Bryson v. Whitehead* (1822), 1 Sim. & St. 74 (in settling terms of deed to give effect to agreement to sell a dyer's business with a trade secret, LEACH, V.-C., directed a covenant unlimited as to space to restrain the use of the secret for twenty years—i.e., a general covenant when general covenants were regarded as of necessity void; see p. 550, *ante*); *Leather Cloth Co. v. Lorisont* (1869), L. R. 9 Eq. 345, *per* JAMES, V.-C., at p. 354; *Allsopp v. Wheatcroft* (1872), L. R. 15 Eq. 59, *per* WICKENS, V.-C., at p. 64, commenting on *Leather Cloth Co. v. Lorisont*, *supra*; *Hagg v. Darley* (1878), 47 L. J. (CH.) 567 (where there was no limit of space, but a limit of time to fourteen years); *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., *per* COTTON, L.J., at p. 384, commenting on *Leather Cloth Co. v. Lorisont*, *supra*; compare *Haynes v. Doman*, [1899] 2 Ch. 13, C. A.; *Caribonum Co., Ltd. v. Le Couch* (1913), 135 L. T. Jo. 370, C. A.

(*i*) *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887), 36 Ch. D. 465, 471, C. A.; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, 453; *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, 455, C. A. (confidential clerk); *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, 307, C. A., distinguishing *Ward v. Byrne* (1839), 5 M. & W. 548; *Haynes v. Doman*, *supra*, at pp. 17, 18 (traveller); *Barr v. Craven* (1903), 20 T. L. R. 51, C. A. (insurance agent); *White, Tomkins and Courage v. Wilson* (1907), 23 T. L. R. 469; *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64 (solicitor's clerk); *Bromley v. Smith*, [1909] 2 K. B. 235, 240 (milk seller); *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308; compare *Proctor v. Sargent* (1840), 2 Man. & G. 20 (milk seller); *Cornwall v. Hawkins* (1872), 41 L. J. (CH.) 435 (milk seller); *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A. (vendor of oil by men in the street); but a reporter on a newspaper is not in a similar confidential position (*Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, C. A., *per* COZENS-HARDY, M.R., at p. 768, and *per* FLETCHER MOULTON, L.J., at p. 771); nor is a shop assistant (*Pearks, Ltd. v. Cullen* (1912), 28 T. L. R. 371); and for a case where a canvasser was held not to be in such a position, see *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A. C. 724. As to the prevention of the disclosure of confidential information generally, see title INJUNCTION, Vol. XVII., p. 254; *Amber Size and Chemical Co., Ltd. v. Menzel*, [1913] 2 Ch. 239.

(*k*) *Tallis v. Tallis* (1853), 1 E. & B. 391 (publisher: London and 150 miles reasonable); *Harms v. Parsons* (1862), 32 Beav. 328 (horsehair manufacturers: 200 miles reasonable); *Harvey v. Corpe* (1885), 79 L. T. Jo. 246 (army meat contractors: restraint over Europe reasonable); *Moerich v. Fenestre* (1892), 67 L. T. 602, C. A. (agent and commission merchant: United Kingdom reasonable); *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 263, C. A. (eastern hemisphere reasonable in case of a new invention to be used in large shops); but in *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A., a world-wide restraint was held unreasonable in view of the limited nature of the

in the case of a business carried on by agents or correspondence (*l*) than in the case of one necessitating constant attendance in person (*m*).

The restraint may be reasonable though its area is apparently greater than the area of the business of the covenantee (*n*).

1086. A restraint against residing in a neighbourhood, apart from actually carrying on business there, may be in some cases a necessary measure of protection, as, for instance, in the case of a doctor's practice (*o*).

A traveller may reasonably be restrained from travelling for a rival firm over the same ground (*p*).

SECT. 4.
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of a Valid
Restraint.

Residence.

covenantees' business; and in *Stuart and Simpson v. Halstead* (1911), 55 Sol. Jo. 598, the United Kingdom was held too wide in the case of an advertising agent; see also *Caribonum Co., Ltd. v. Le Couch* (1913), 135 L. T. Jo. 370, C. A.

(*l*) As in the case of a solicitor (*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord MACNAGHTEN, at p. 573, approving *Whittaker v. Howe* (1840), 3 Beav. 383 (solicitor: England and Scotland reasonable); *Bunn v. Guy* (1803), 1 Smith, K. B. 1 (150 miles round London reasonable); *Galsworthy v. Strutt* (1848), 1 Ex. Ch. 659 (fifty miles from Ely Place reasonable); *Austen v. Boys* (1858), 2 De G. & J. 626 (100 miles: but question of area not in issue); *Howard v. Woodward* (1865), 10 Jur. (N. S.) 1123 (fifty miles reasonable); but in *Woodbridge & Sons v. Bellamy*, [1911] 1 Ch. 326, C. A., COZENS-HARDY, M.R., at p. 327, doubted the reasonableness of restraining a solicitor's clerk from doing business for any client within an area, as opposed to carrying on business within the area (see p. 578, *post*)); or an accountant (*Isitt v. Ganson* (1899), 107 L. T. Jo. 423 (England reasonable)); or a stockbroker (*Lyddon v. Thomas* (1901), 17 T. L. R. 450 (fifty miles reasonable)); see further, the list of trades, professions etc. set out at pp. 583 *et seq.*, *post*; and compare title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*; as to solicitors, generally, see title SOLICITORS, Vol. XXVI., pp. 705 *et seq.*

(*m*) As, for instance, a doctor (*Davis v. Mason* (1793), 5 Term Rep. 118 (ten miles reasonable); *Hayward v. Young* (1818), 2 Chit. 407 (twenty miles reasonable); *Giles v. Hart* (1859), 1 L. T. 154 (five miles reasonable); *Hastings v. Whitley* (1848), 2 Exch. 611 (ten miles reasonable); *Sainter v. Ferguson* (1849), 7 C. B. 716 (seven miles reasonable); *Everton v. Longmore* (1899), 15 T. L. R. 356, C. A. (five miles reasonable)), or a dentist (*Horner v. Graves* (1831), 7 Bing. 731 (100 miles unreasonable); *Mallan v. May* (1843), 11 M. & W. 653 (London (then containing 1,500,000 inhabitants) reasonable; but any of the towns in England or Scotland where covenantees might have been practising during term of service unreasonable)), or a schoolmaster (*Smith v. Hawthorn* (1897), 76 L. T. 716 (nine miles reasonable)), or a canvasser in a local area (*Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A. C. 724 (twenty-five miles of London, or of any place where he was employed by the covenantees, unreasonable)); and see the list of trades, professions etc. set out at pp. 583 *et seq.*, *post*.

(*n*) *Tallis v. Tallis* (1853), 1 E. & B. 391, *per* Lord CAMPBELL, C.J., at p. 411; compare *Gale v. Reed* (1806), 8 East, 80; *Whittaker v. Howe*, *supra*; *Harms v. Parsons* (1862), 32 Beav. 328.

(*o*) *Atkins v. Kinnier* (1850), 4 Exch. 776 (surgeon); compare *Rawlinson v. Clarke* (1845), 14 M. & W. 187 (surgeon: the validity of the covenant against residing was not in issue). In *Dendy v. Henderson* (1855), 11 Exch. 194, *per* ALDERSON, B., at p. 199, the point was raised but not decided. In *Wilkinson v. Wilkinson* (1871), L. R. 12 Eq. 604, a condition in a will requiring a legatee to reside elsewhere than at the place where her husband had to live was held void; see title WILLS; and compare *Edmundson v. Render*, [1905] 2 Ch. 320, *per* BUCKLEY, J., at p. 323.

(*p*) *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305; *Parsons v. Cotterill*

SECT. 4.

Requisites
of a Valid
Restraint.Outside
United
Kingdom.Measurement
of distance.

1087. A restraint extending beyond the United Kingdom, and even over the whole world, may be reasonable if the covenantee's business is such as to require so extensive a protection (*q*); but it is uncertain whether a restraint unlimited in terms or expressly extending beyond the United Kingdom, and reasonable if only applied to the United Kingdom, is to be considered void because such extension is unreasonable (*r*).

1088. In measuring distance, unless the contract contain words

(1887), 56 L. T. 839 (traveller to wine and spirit merchant; fifty miles of Burton-on-Trent; no limit of time: held reasonable, the covenantee's business extending over the whole area); *Cussen v. O'Connor* (1893), 32 L. R. Ir. 330 (traveller restrained from travelling in any county in which he had travelled for covenantee).

(*q*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535 (manufacture of guns and ammunition with a limited number of customers all over the world); see *ibid.*, per Lord HERSCHELL, L.C., at p. 550, and per Lord WATSON, at p. 554; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A. (hay and straw merchants with business in United Kingdom, France, Belgium, and Canada may, apparently, restrain a servant from engaging in the business in those countries; but if the extension beyond the United Kingdom is unreasonable, the covenant is severable); *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A.; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308 (rubber tyre company: restraint as to United Kingdom held good; extensions to France and Germany severable); for instances of world-wide restraints held good, see *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447; for a restraint as to Europe held good, see *Leather Cloth Co. v. Lorscheid* (1869), L. R. 9 Eq. 345; compare title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*

(*r*) *Leather Cloth Co. v. Lorscheid*, *supra*, per JAMES, V.-C., at p. 351 ("If the covenant is good as to Great Britain we need not concern ourselves with its extension to France and Germany"); *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A., per LINDLEY, L.J., at p. 651 (it is not contrary to public policy to give effect to a covenant entered into for the purpose of preventing a man from assisting foreigners to compete with an English trader who has bought his business); S. C., [1894] A. C. 535, per Lord HERSCHELL, at p. 550, and per Lord MACNAGHTEN, at p. 574 (see note (*u*), p. 551, *ante*); *Underwood (E.) & Son, Ltd. v. Barker*, *supra*, per LINDLEY, M.R., at p. 307 ("If the restraint is unreasonable as to the foreign countries named, which I do not think it is, still the agreement as to them is clearly severable from that part of it which relates to this country"); and compare *ibid.*, per RIGBY, L.J., at p. 308. In *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A., a covenant unlimited as to space was treated as covering the whole world, and therefore unreasonably wide. But in *Lamson Pneumatic Tube Co. v. Phillips*, *supra* (where the manager of a business having by its nature few and scattered customers covenanted not to be engaged in a similar business in the eastern hemisphere), the Court of Appeal (COZENS-HARDY, L.J., *dissentiente*) treated the question as open, and, as the covenant was held to be reasonable to its fullest extent, no decision was necessary; compare *ibid.*, per VAUGHAN WILLIAMS, L.J., at p. 367 ("I want to say a word about whether this rule as to contracts which are in restraint of trade not being enforceable is a rule that will be given effect to because there is too wide an area to which the contract may extend outside the United Kingdom. I do not propose to decide that question. I do not propose to say whether Lord Herschell or Lord Macnaghten in the House of Lords in the *Nordenfelt Case* [*supra*] did or did not decide that question in the negative, and I do not propose to say whether the Court of Appeal in *Dowden v. Pook* [*supra*] did decide that question the other way").

to the contrary(s), the measurement is to be made not by the nearest accessible way, but in a straight line on a map, disregarding actual inequalities of the surface (t).

When the distance between houses is in question, the measurement should be between the nearest points of each, not between the doors (a).

If by the contract the distance is to be measured by the usual streets or ways of approach, it must be measured by any usual public way, not necessarily by that which is most frequented (b).

1089. A limit of time is an important matter for consideration (c); but the absence of such a limit will not make a restraint void if it is otherwise reasonable (d), for it is reasonable that a restraint

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Restraint.

Restraint as
to time.

(s) As in *Atkyns v. Kinnier* (1850), 4 Exch. 776 (two and a half miles "measuring by the usual streets or ways of approach"); *Smith v. Hancock*, [1894] 2 Ch. 377, C. A. ("measured by the nearest cart road").

(t) *Mouflet v. Cole* (1872), L. R. 8 Exch. 32, Ex. Ch., following *Leigh v. Hind* (1829), 9 B. & C. 774, per PARKE, J., at p. 779, *R. v. Saffron Walden (Inhabitants)* (1846), 9 Q. B. 76, *Stokes v. Grissell* (1854), 14 C. B. 678, *Lake v. Butler* (1855), 5 E. & B. 92, *Jewel v. Stead* (1856), 6 E. & B. 350, and *Duignan v. Walker* (1859), John. 446, and disapproving *Woods v. Dennett* (1817), 2 Stark. 89, and the view of the majority of the court in *Leigh v. Hind*, *supra*. There is no distinction in this respect between statutes and contracts (*Mouflet v. Cole*, *supra*, at p. 33, disapproving *Wing v. Earle* (1591), Cro. Eliz. 212, 267). In *Robertson v. Buchanan* (1904), 73 L. J. (CH.) 408, C. A., the words "as the crow flies" were used. As to the measurement of distance generally, see title WEIGHTS AND MEASURES.

(a) *Mouflet v. Cole*, *supra*.

(b) *Atkyns v. Kinnier*, *supra*; compare *Hares v. Curtin*, [1913] 2 K. B. 328.

(c) *Proctor v. Sargent* (1840), 2 Man. & G. 20; *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, C. A., per FLETCHER MOULTON, L.J., at p. 771, and per FARWELL, L.J., at p. 774; see *Dayer-Smith v. Hadsley* (1913), 135 L. T. Jo. 118, C. A.

(d) *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234 (linen-draper; half mile; no time limit: good); *Clerke v. Comer* (1734), Lee temp. Hard. 53 (within bills of mortality; no time limit: good); *Hayward v. Young* (1818), 2 Chit. 407 (surgeon; twenty miles; no time limit: good); *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch. (druggist; three miles; no time limit: good); *Archer v. Marsh* (1837), 6 Ad. & El. 959 (carrier; not to compete; no time limit: good); *Mallan v. May* (1843), 11 M. & W. 653 (dentist; London; no time limit: good); *Nicholls v. Stretton* (1847), 10 Q. B. 346 (solicitor; not to act for clients of covenantee; no time limit: good); *Elves v. Croft* (1850), 10 C. B. 241 (butcher; five miles; no time limit: good); *Giles v. Hart* (1859), 1 L. T. 154 (surgeon; five miles; no time limit: good); *Catt v. Tourle* (1869), 4 Ch. App. 654 (publican; tied house covenant on conveyance of land; no time limit: good); *Jacoby v. Whitmore* (1883), 49 L. T. 535, C. A. (oil and colour man; no time limit: good); *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., per BOWEN, L.J., at p. 390; *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169 (corn dealer; two miles; no time limit: good); *Haynes v. Doman*, [1899] 2 Ch. 13, C. A., per STIRLING, J., at p. 13, and per LINDLEY, L.J., at p. 23. Sometimes the time limit is "so long as the covenantee carries on business," or similar words; see note (g), p. 576, *post*; and compare *Shorthorn Dairy Co. v. Hall* (1887), 83 L. T. Jo. 45, where the carrying on of a company's business by a receiver and manager in a debenture-holder's action was held not to be carrying on business within the meaning of the covenant; see also title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*

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imposed, in respect of the limit as to time, for the protection of a business, should be wide enough to protect that business not only in the hands of the covenantee, but also of his legatee, representative, or assignee, and with this object the restraint may be co-extensive with the lifetime of the covenantor (e), and is not affected by the fact that the original covenantee has ceased to carry on business (f), or is dead (g).

Where a covenant in restraint of trade accompanies an assignment of the term of a lease, it is not limited to the length of the term (h), unless, of course, it be expressly so provided (i).

Restraint as
to customers.

1090. A restraint may be reasonable because it is limited to dealings with particular persons, as, for instance, the persons who were customers of a business during the period of the covenantor's service (k), or a particular trade rival (l).

(e) *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, 454, Ex. Ch.; *Haynes v. Doman*, [1899] 2 Ch. 13, C. A., per STIRLING, J., at p. 18; compare *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234; *Bunn v. Guy* (1803), 1 Smith, K. B. 1; *Hayward v. Young* (1818), 2 Chit. 407; *Williams v. Williams* (1818), 2 Swan. 253; *Bryson v. Whitehead* (1822), 1 Sim. & St. 74; *Wickens v. Evans* (1829), 3 Y. & J. 318; *Archer v. Marsh* (1837), 6 Ad. & El. 259; *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch. (covenant enforced by executor of covenantee); *Pemberton v. Vaughan* (1847), 10 Q. B. 87; *Atkyns v. Kinnier* (1850), 4 Exch. 776; *Avery v. Langford* (1854), Kay, 663; *Benwell v. Inns* (1857), 24 Beav. 307; *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518; *Jacoby v. Whitmore* (1883), 49 L. T. 335, C. A.; *Smith v. Hawthorn* (1897), 76 L. T. 716; *Baines v. Geary* (1887), 35 Ch. D. 154 (assigns mentioned); *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169; but see *Berlitz School of Languages v. Duchêne* (1903), 6 F. (Ct. of Sess.) 181; and title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*

(f) *Elves v. Croft* (1850), 10 C. B. 241 (where the business had ceased to be carried on either by the covenantee or by any assign, the plaintiff being the original covenantee); *Jacoby v. Whitmore*, *supra*; *Automobile Carriage Builders, Ltd. v. Sayers* (1909), 101 L. T. 419 (where the benefit of a restrictive covenant with partners who assigned to a company was held to pass to the assignee); *Townsend v. Jarman*, [1900] 2 Ch. 698, 703; see also title PARTNERSHIP, Vol. XXII., pp. 15, 83, 104, 105.

(g) *Hastings v. Whitley* (1848), 2 Exch. 611 (action by executors of covenantee on covenant not to carry on business as a surgeon at S. at any time); *Smith v. Hawthorn* (1897), 76 L. T. 716.

(h) *Elves v. Croft*, *supra*.

(i) As in *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406 (restraint limited to term (five years) of lease assigned); *Hinde v. Gray* (1840), 1 Man. & G. 195 (restraint limited to term of lease; but held void because unlimited as to space); *Rannie v. Irvine* (1844), 7 Man. & G. 969.

(k) *Nicholls v. Stretton* (1847), 10 Q. B. 346 (restraint on solicitor's clerk against acting for (i.) persons who had been clients during term of service, (ii.) persons who might thereafter become clients: (i.) held reasonable, and (ii.) severable); *Baines v. Geary*, *supra* (restraint on a milk-carrier against serving "any of the customers served by or belonging at any time" to the covenantee: held divisible into (i.) customers during the term of service, (ii.) customers at any other time; of which (i.) was held reasonable, and (ii.) severable); but, as to severability, see pp. 572 *et seq.*, *post*; and *quære* whether such a distinction is now valid; see *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A.; and compare *Lewis and Lewis v.*

(l) For note (l) see p. 563, *post*.

1091. The position of the covenantor in the business may also be a matter for consideration, as the danger of competition in the case, for instance, of a manager may be greater than in the case of a clerk (*m*).

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Restraint.

1092. A person may reasonably be restrained from carrying on business anywhere under a particular name (*n*), or in a particular capacity (*o*), or from representing himself, even though truly, to have been connected in trade with the covenantee (*p*).

Restraint as
to name.

1093. A restraint otherwise unobjectionable may be unreasonably wide if it restrains the covenantee from carrying on any business whatsoever (*q*), or a business different in character from that carried on by the covenantee (*r*); or a business of a like

What
constitutes
unreason-
ableness.

Durnford (1907), 24 T. L. R. 64, where the question of the reasonableness of a restraint against soliciting any person who "for the time being" is a client of the covenantees was left open. But it may be unreasonable if the restraint, though limited as to persons, covers all business whatever (*Morris & Co. v. Ryle* (1910), 26 T. L. R. 678, C. A.).

(*l*) *Howard v. Danner* (1901), 17 T. L. R. 548 (where a covenant by a restaurant waiter not during the year to enter the service of a specified rival restaurant was held good).

(*m*) Compare *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A., *per* ROMER, L.J., at p. 368; *Pearks, Ltd. v. Cullen* (1912), 28 T. L. R. 371; and title MASTER AND SERVANT, Vol. XX., pp. 89, 90.

(*n*) *Vernon v. Hallam* (1886), 34 Ch. D. 748. As to the application of this principle to companies, see title COMPANIES, Vol. V., pp. 85, 86.

(*o*) *Wallis v. Day* (1837), 2 M. & W. 273 (covenant never to trade on own account, but only as assistant to covenantee for weekly payments).

(*p*) *Wolmershausen v. O'Connor* (1877), 36 L. T. 921 (covenant by retiring partner not to carry on business within ten miles of O., and not by publication, advertisement, circular or otherwise to hold himself out as formerly connected with the covenantee: held reasonable, and a breach to describe himself as "late of O. and formerly of M.," at which places the partners had carried on, and the covenantee continued to carry on, business).

(*q*) *Baker v. Hedgecock* (1888), 39 Ch. D. 520; *Perls v. Saalfeld*, [1892] 2 Ch. 149, C. A. (covenant by clerk to an oil-importer and agent not to take a situation or establish himself within fifteen miles of London for three years without consent of covenantee, such consent not to be withheld if it were proved to covenantee's satisfaction that the situation or business was not in respect of the class of goods sold by covenantee: held void); *Woods v. Thornburn* (1897), 103 L. T. Jo. 421 ("any other business": too wide); *Ehrman v. Bartholomew*, [1898] 1 Ch. 671 ("any other business": too wide); compare *Reeve v. Marsh* (1906), 23 T. L. R. 24, *per* PARKER, J., at p. 25; *Morris & Co. v. Ryle* (1910), 103 L. T. 545, C. A. (restraint on hop merchant's traveller from any dealing in any goods whatever with persons whom he had dealt with during his employment: held unreasonable); compare title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*

(*r*) *Rogers v. Maddocks*, [1892] 3 Ch. 346, C. A., *per* LINDLEY, L.J., at p. 355 (but the selling of an article wholesale and retail does not constitute two distinct businesses, but one business carried on in different ways, and though a traveller has during his employment only dealt with wholesale agents, a covenant to restrain him from both wholesale and retail trade may be reasonable (*ibid.*)); *Bromley v. Smith*, [1909] 2 K. B. 235 (baker's employee; covenant not to carry on business of restaurant keeper held unreasonable, though covenantee at time of covenant contemplated the keeping of a restaurant; it was suggested (*ibid.*, *per* CHANNELL, J., at p. 241) that if the covenantor's engagement had been for the contemplated as well as for the existing business, the restraint might have been reasonable); and compare *Beetham v. Fraser* (1904), 21 T. L. R. 8.

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character to that carried on by the covenantee but subsequently set up in a different place(s); or a business which, though carried on by the covenantee, is not the business in which the covenantor was employed(t); or a business not carried on by the covenantee in a place to which the restraint purports to extend(a). Where the restraint is as to dealing with particular persons, it is in general reasonable that it should apply to persons who were customers during the covenantor's employment, but not to persons who became such after its termination(b).

Change of
locality.

1094. A business, though of the same character, is a different business if it is subsequently set up in a wholly different locality(c), but not if the business is merely removed to another place in the same neighbourhood(d).

SUB-SECT. 3.—*Consideration.*

Necessity for
valuable
consideration.

1095. There must be a valuable and legal consideration(e), even

(s) *Davies, Turner & Co. v. Lowen* (1891), 64 L. T. 655 (covenant as to any business similar to the business "now or hereafter to be carried on" by covenantee: held unreasonable, but severable); *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A.; *Beetham v. Fraser* (1904), 21 T. L. R. 8 (where it was admitted that a restraint from competition with the business of the covenantee at any addresses in the future was void); compare *Berlitz School of Languages v. Duchêne* (1903), 6 F. (Ct. of Sess.) 181; *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234 (restraint within half a mile (i.) of the covenantee's house, or (ii.) of any house to which he should remove; the validity of (ii.) was not expressly decided upon, but its presence did not invalidate the whole).

(t) *Leetham (Henry) & Sons, Ltd. v. Johnstone-White*, [1907] 1 Ch. 322, C. A., per FARWELL, J., at p. 327; but in *Stewart v. Stewart* (1899), 1 F. (Ct. of Sess.) 1158, it was held that a restraint from carrying on a business by a person not employed in it was good.

(a) *Davies, Turner & Co. v. Lowen*, *supra* (carrier's clerk; time twelve months; area, London, Birmingham, Liverpool, and New York; and fifty miles of each; Birmingham held void as covenantees had no business there, but severable); *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310 (traveller for tyre company; time, one year; area, United Kingdom, Germany, France: Germany and France void for the like reason, but severable).

(b) *Nicholls v. Stretton* (1847), 10 Q. B. 346; *Baines v. Geary* (1887), 35 Ch. D. 154; *Dubowski & Sons v. Goldstein*, *supra* (where, however, RIGBY, L.J., held, and Lord ESHER, M.R., thought, that a restriction as to both classes of customers was reasonable, doubting the applicability of *Baines v. Geary*, *supra*, in view of the modern rule); and see note (k), p. 562, *ante*.

(c) *Dubowski & Sons v. Goldstein*, *supra*; *Doe d. Calvert v. Reid* (1830), 10 B. & C. 849. As to the point in relation to covenants in brewers' leases, see title LANDLORD AND TENANT, Vol. XVIII., pp. 573, 574.

(d) *Jacoby v. Whitmore* (1883), 49 L. T. 335. In *Marshall and Murray, Ltd. v. Jones* (1913), 29 T. L. R. 351, the restraint was specifically limited to customers served by and from a named diary, and it was held that this could not be taken to refer to the same business set up in a different place.

(e) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406; *Colmer v. Clark* (1734), 7 Mod. Rep. 230; *Gunmakers' Society (Master etc.) v. Fell* (1742), Willes, 384, 388; and see *Re Tovey, Ex parte Lyne* (1841), 5 Jur. 1088. The proposition will be found stated in practically all the cases on the subject, and it is unnecessary to set them out.

though the covenant be by deed (*f*). The consideration may be shown either on the face of the agreement or by extrinsic evidence (*g*), or may be reasonably inferred from the agreement (*h*).

SECT. 4.
Requisites
of a Valid
Restraint.

1096. That the consideration must be legal is obvious (*i*). There is no illegality in the sale of a business which depends upon the personal character of the man who carries it on, even though the vendor is induced by a mere pecuniary consideration to recommend the purchaser to the clients (*k*).

Legality of
consideration.

1097. A consideration is sufficient if it has some value and is not merely illusory (*l*). Mere employment at will is a sufficient consideration (*m*); so is the continuation of an existing employment at will (*n*). If the covenantor is already in the employment of the

What
constitutes
consideration.

(*f*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 192; 1 Smith, L. C., 11th ed., p. 406, at p. 407; *Davis v. Mason* (1793), 5 Term Rep. 118; *Homer v. Ashford* (1825), 3 Bing. 322; *Mallan v. May* (1843), 11 M. & W. 653, *per* PARKE, B., at p. 665; *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518; compare *Bunn v. Guy* (1803), 1 Smith, K. B. 1, 11. It is, however, to be noted that this point has not been really considered in any case decided under more modern conditions, and for an argument against the proposition that consideration would now be required in the case of a deed, see Matthews and Adler, *Restraint of Trade*, 1907, p. 69. As to covenants by deed generally, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.*; SALE OF LAND, Vol. XXV., pp. 285 *et seq.* As to price, generally, see title SALE OF LAND, Vol. XXV., pp. 285 *et seq.*

(*g*) *Mitchel v. Reynolds*, *supra*; *Homer v. Ashford*, *supra*; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch.; *Hutton v. Parker* (1839), 7 Dowl. 739; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305; *Cooper v. Southgate* (1894), 10 R. 552.

(*h*) *Gravelly v. Barnard*, *supra*.

(*i*) *Hitchcock v. Coker*, *supra*.

(*k*) *Bunn v. Guy*, *supra* (solicitor's business); *Hutton v. Lewis* (1794), 5 Term Rep. 639 (schoolmaster's business); *Bozon v. Farlow* (1816), 1 Mer. 459 (attorney's business); *Candler v. Candler* (1821), Jac. 225, *per* Lord ELDON, L. C., at p. 231; *Gilfillan v. Henderson* (1833), 2 Cl. & Fin. 1, H. L.; *Whittaker v. Howe* (1841), 3 Beav. 383, 389, 393; *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554; as to public policy generally, see note (*h*), p. 525, *ante*; and title CONTRACT, Vol. VII., pp. 394 *et seq.*

(*l*) *Austen v. Boys* (1858), 2 De G. & J. 626 (affirming (1857), 24 Beav. 598), *per* Lord CHELMSFORD, L. C., at p. 637; *Benwell v. Inns* (1857), 24 Beav. 307 (agreement to employ for one month and thereafter at one month's notice at such wages as may from time to time be agreed upon: held sufficient consideration); *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169 (commission in addition to wages is consideration, as is the mere continuation of a pre-existing engagement). In the case of a waiter, who receives tips, 4s. a week is not merely a colourable consideration (*Howard v. Danner* (1901), 17 T. L. R. 548). Employment at one or two weeks' notice is sufficient consideration, even in the case of an infant covenantor (*Evans v. Ware*, [1892] 3 Ch. 502, 504; *Cornwall v. Hawkins* (1872), 41 L. J. (CH.) 435; *Fellows v. Wood* (1888), 59 L. T. 513).

(*m*) *Davis v. Mason* (1793), 5 Term Rep. 118; *Saintier v. Ferguson* (1849), 7 C. B. 716, *per* WILDE, C. J., at p. 726; *Gravelly v. Barnard*, *supra*; *Cooper v. Southgate* *supra*, *per* WRIGHT, J., at p. 553.

(*n*) *Gravelly v. Barnard*, *supra*; compare *Hitchcock v. Coker*, *supra*, where the covenantor entered into the covenant after he had entered the service of the covenantee.

- SECT. 4.
Requisites of a Valid Restraint. —
 Partnership. **1098.** A partnership determinable at any time on one month's notice is a sufficient consideration (*q*). In the case of a restraint upon a retiring partner the consideration is the whole of the partnership agreement (*r*).
 Adequacy. **1099.** When once it is established that there is a consideration of some value, the court will not inquire into its adequacy (*s*).
 Contract executed. **1100.** In an action for the sum payable in consideration of a covenant in restraint of trade, if the covenantor has submitted to the restraint, it is no defence to say that the restraint is unreasonably wide (*t*).

(*o*) See *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305 (verbal agreement by covenantor to serve as traveller, it being arranged that the agreement was to be reduced to writing: covenantor served for three or four weeks, then signed covenant: held, that till then the employment was only inchoate, and that if he had refused to sign the plaintiffs could have refused to employ him); *Woodbridge & Sons v. Bellamy*, [1911] 1 Ch. 326, C. A., per EVE, J., at p. 332 (A. engaged B. on the 4th April, telling him to begin work on the 17th; covenant signed on the 16th: held, it was part of the contract of service. The judgment was reversed in the Court of Appeal, but on another point); compare title MASTER AND SERVANT, Vol. XX., pp. 89, 90.

(*p*) *Woodbridge & Sons v. Bellamy*, *supra*, per EVE, J., at pp. 332, 333; but see *Coleborne v. Kearns* (1912), 46 I. L. T. 305, C. A., per HOLMES, L. J., at p. 306.

(*q*) *Leighton v. Wales* (1838), 3 M. & W. 545.

(*r*) *Austen v. Boys* (1858), 2 De G. & J. 626 (affirming (1857), 24 Beav. 598), per Lord CHELMSFORD, L. C., at p. 637. As to when a partner will be restrained, see title PARTNERSHIP, Vol. XXII., pp. 80 *et seq.*

(*s*) *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch., overruling on this point the previous cases in which the adequacy or fairness of the consideration had been regarded as matter to be taken into account, namely, *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406; *Davis v. Mason* (1793), 5 Term Rep. 118; *Gale v. Reed* (1806), 8 East, 80, 86; *Homer v. Ashford* (1825), 3 Bing. 322, 327; *Horner v. Graves* (1831), 7 Bing. 731; *Young v. Timmins* (1831), 1 Cr. & J. 331; and *Keppell v. Bailey* (1834), 2 My. & K. 517, 529. For the present rule, see *Archer v. Marsh* (1837), 6 Ad. & El. 959; *Leighton v. Wales* (1838), 3 M. & W. 545; *Pilkington v. Scott* (1846), 15 M. & W. 657; *Saintier v. Ferguson* (1849), 7 C. B. 716, per COLTMAN, J., at p. 727; *Tallis v. Tallis* (1853), 1 E. & B. 391; *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518, 522; *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A.; *Collins v. Locke* (1879), 4 App. Cas. 674, 686, P. C.; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 359, 363; *Davies v. Davies* (1887), 36 Ch. D. 359, C. A.; *Evans v. Ware*, [1892] 3 Ch. 502; *Howard v. Danner* (1901), 17 T. L. R. 548; *Tivoli, Manchester, Ltd. v. Colley* (1903), 20 T. L. R. 437; and compare *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch.; see also title CONTRACT, Vol. VII., p. 384; and compare titles SPECIFIC PERFORMANCE, p. 42, *ante*; TRUSTS AND TRUSTEES.

(*t*) *Bishop v. Kitchen* (1868), 38 L. J. (Q. B.) 20 (covenant by a commercial traveller, who had sold his business connexion, never to solicit orders from any persons in the West of England or in South Wales, or in any district

SUB-SECT. 4.—*Certainty.*

SECT. 4.
Requisites
of a Valid
Restraint.
Certainty.

1101. The agreement must not be too vague (*a*), and the parties cannot leave it to the court to frame their agreement to meet a particular breach (*b*).

SECT. 5.—*Parties.*SUB-SECT. 1.—*In General.*

1102. The ordinary rules of contract apply in all questions as to parties to an agreement in restraint of trade (*c*), and it is only necessary to notice here the cases of infancy, and assignment and devolution on death (*d*). General principles.

SUB-SECT. 2.—*Infants.*

1103. A fair and reasonable restrictive covenant in a contract of service or apprenticeship entered into by an infant will be enforced Infants.

whatever, in consideration of an annuity : held, that the agreement having been executed and the covenantor having submitted to the restraint, he was entitled to recover the annuity). As to restraints in respect of contracts of service, see title MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*

(*a*) *Catt v. Tourle* (1869), 4 Ch. App. 654 (tied house covenant in brewer's lease not void for uncertainty); *Stride v. Martin* (1897), 77 L. T. 600 (covenant on sale of milk business: "in the neighbourhood" means immediate neighbourhood, where there could be competition, and is not too vague); *Marshalls, Ltd. v. Leek* (1900), 17 T. L. R. 26 (covenant not to enter into business competition either for himself, or as manager or assistant: held not too vague); *Barr v. Craven* (1903), 89 L. T. 574, C. A. (covenant by insurance agent "not to interfere directly or indirectly with any of the business": held limited to business in a particular locality, and injunction limited to procuring transfers from the covenantees to a rival society of policies which were in the agent's books during his employment); *Beetham v. Fraser* (1904), 21 T. L. R. 8 (covenant not to enter into any business arrangement in competition with, or that would in any way interfere with, business of covenantee: held too vague; but, apparently, similar words may be operative in modifying a covenant otherwise too wide (*Leather Cloth Co. v. Lorson* (1869), L. R. 9 Eq. 345, 355)); *Reeve v. Marsh* (1906), 23 T. L. R. 24 (covenant not to "interfere with, prejudice or in any manner affect" a business: regarded as too vague; but the case was decided on the ground that it did not forbid the setting up of a rival business); *Coleborne v. Kearns* (1912), 46 I. L. T. 305, C. A. ("should we leave your employment" considered too vague); and compare *Maxim Nordenfellt Guns and Ammunition Co. v. Nordenfellt* (1892), 67 L. T. 469 (covenant to give exclusive benefit of all new inventions and improvements and to communicate all such: held not too vague); *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L.; and see title MASTER AND SERVANT, Vol. XX., pp. 9 *et seq.*

(*b*) A covenant to retire from a trade "so far as the law allows" is void, (*Davies v. Davies* (1887), 36 Ch. D. 359, C. A.); see p. 554, *ante*; and title CONTRACT, Vol. VII., p. 518.

(*c*) See title CONTRACT, Vol. VII., p. 335. A receiver and manager of a business has authority to enter into agreements with the employees containing covenants in restraint of trade (*Howard v. Danner* (1901), 17 T. L. R. 548; see title RECEIVERS, Vol. XXIV., p. 430).

(*d*) As to infants' contracts of apprenticeship and service, see titles INFANTS AND CHILDREN, Vol. XVII., pp. 70 *et seq.*; MASTER AND SERVANT, Vol. XX., pp. 71 *et seq.*

SECT. 5.
Parties.

against him after he comes of age (e), and the presence of a penalty or liquidated damages clause does not invalidate the whole agreement (f); but the burden lies on the covenantee to show that the contract as a whole is for the infant's benefit, and that the covenant is only what is usual in such cases (g).

A reasonably limited covenant is binding upon an infant even

(e) *Fellows v. Wood* (1888), 59 L. T. 513 (dairyman; covenant by infant not to serve persons who were customers during term of service; time, two years: held for benefit of infant); *Evans v. Ware*, [1892] 3 Ch. 502 (dairyman; covenant by infant not to compete; five miles; two years: held for infant's benefit); *Gadd v. Thompson*, [1911] 1 K. B. 304 (covenant by architect's apprentice; ten miles; ten years: held reasonable), following *Bromley v. Smith*, [1909] 2 K. B. 235, 242; compare *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229. If after coming of age an infant continues for a substantial time in the service of an employer under a contract void because not for his benefit, a new contract on the same terms will, apparently, be inferred, and its reasonableness will be decided by the rules applicable in the case of an adult (*Hooper and Ashby v. Willis* (1905), 21 T. L. R. 691, *per* KEKEWICH, J.; affirmed (1906), 22 T. L. R. 451, C. A., but not on this point, as the restraint was held unreasonable irrespective of infancy); compare *Cornwall v. Hawkins* (1872), 41 L. J. (CH.) 435 (subject to the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2); *Brown v. Harper* (1893), 68 L. T. 488. As to infants' contracts being binding if beneficial as a whole, see *Roberts v. Gray*, [1913] 1 K. B. 520, C. A.; and title MASTER AND SERVANT, Vol. XX., pp. 72 *et seq.*; and compare *Hooper and Ashby v. Willis*, *supra* (a contract containing a restrictive covenant, signed by an infant employee but not by the employer, is not apparently a contract for the benefit of the infant). An injunction will not be granted to restrain a breach of a contract of apprenticeship during the apprenticeship (see title INFANTS AND CHILDREN, Vol. XVII., p. 72), though an apprentice may be held liable to pay the premium as the price of necessities; see *ibid.*, p. 68; *Walter v. Everard*, [1891] 2 Q. B. 369, C. A. *Quære*, whether an injunction would be granted, during infancy, to restrain a breach of a restrictive covenant in a contract of service; see title INFANTS AND CHILDREN, Vol. XVII., p. 73; *Gadd v. Thompson*, *supra*, where PHILLIMORE, J., at p. 308, said that the price need not necessarily be money, but may consist in part of a restrictive covenant. In *Morrison, Fleet & Co., Ltd. v. Fletcher* (1900), 17 T. L. R. 95, an injunction was granted by Sir F. JEUNE restraining a covenantor while apparently still under age, and although the contract contained a liquidated damages clause. In *Richards v. Whitham* (1892), 66 L. T. 695, C. A., it was suggested that in the absence of a covenant by an infant articled clerk a person who had entered into a bond for securing that the clerk should not practise within a certain area, and was sued on the bond, might have a remedy over by injunction against the clerk. As to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(f) *Morrison, Fleet & Co., Ltd. v. Fletcher* *supra*; compare *Hayne v. Burchell* (1890), 35 Sol. Jo. 88, C. A., where such a clause was present in an infant's covenant, but there being no breach the question was not raised.

(g) *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, C. A., *per* COZENS-HARDY, M.R., at p. 769 (but the covenant was there held unreasonable even for an adult); compare *Leslie v. Fitzpatrick* (1877), 3 Q. B. D. 229, 232. In *Capes v. Hutton* (1826), 2 Russ. 357, an injunction was refused where in articles of clerkship (solicitor's), entered into by an infant, the infant covenanted not to practise within twelve miles, and his father covenanted that on coming of age he should enter into a bond to that effect, and no bond having been executed, the covenantor broke the covenant after coming of age. But, apparently, the case was decided on the ground that the remedy, if any, lay against the father.

though it contain restrictions which are void, if those restrictions can be severed from the valid part of the covenant (*h*).

SECT. 5.
Parties.

SUB-SECT. 3.—*Representatives and Assignees.*

1104. A covenant imposed for the protection of a business and its goodwill (*i*) is for the benefit of the business, and not merely of the individual covenantee. The benefit of it passes, therefore, to the representatives or assignees of the covenantee, whether they are expressly mentioned or not (*k*). It forms part of the goodwill which passes on an assignment of the business (*l*), and it passes to the assignee of part of the business of the original covenantee (*n*). Assignment on death.

On the construction of the covenant, however, a different intention may appear; a covenant, for instance, not to trade so as directly or indirectly to affect continuing partners is personal to such partners (*n*).

SECT. 6.—*Construction of the Contract.*

SUB-SECT. 1.—*In General.*

1105. In construing a contract which is in restraint of trade the ordinary rules applicable to contracts must be applied (*o*). Intention of the parties.

(*h*) *Bromley v. Smith*, [1909] 2 K. B. 235, 242, explaining *Corn v. Matthews*, [1893] 1 Q. B. 310, 314, C. A. If a stipulation in an apprenticeship deed makes the whole contract unfair to the infant, the whole contract is void; but "the whole contract" means "the whole contract so far as it was operative" (*Bromley v. Smith, supra, per CHANNELL, J.*, at p. 243); compare *Gadd v. Thompson*, [1911] 1 K. B. 304.

(*i*) As to the meaning of "goodwill," see pp. 590 *et seq.*, *post*; and title PARTNERSHIP, Vol. XXII., pp. 104 *et seq.*

(*k*) See p. 562, *ante*; and the cases there referred to; compare *Martin v. Brunsten* (1894), 98 L. T. Jo. 237; *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169 (plaintiffs the assignees of covenantee); *Marshall and Murray, Ltd. v. Jones* (1913), 29 T. L. R. 351, where, however, the restraint was as to customers served by and from a specified dairy, and it was held not to apply to customers of the same business transferred to another place. As to tied house covenants in brewers' leases, see title LANDLORD AND TENANT, Vol. XVIII., pp. 573, 574; and see, generally, titles CONTRACT, Vol. VII., pp. 494 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq.*, 293 *et seq.*

(*l*) *Jacoby v. Whitmore* (1883), 49 L. T. 335, 337, C. A.; *Showell v. Winkup* (1889), 60 L. T. 389; *Batho v. Tunks*, [1892] W. N. 101; *Automobile Carriage Builders, Ltd. v. Sayers* (1909), 101 L. T. 419; *John Brothers Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Townsend v. Jarman*, [1900] 2 Ch. 698, 703; *Welstead v. Hadley* (1905), 21 T. L. R. 165, C. A.; and see *Smith v. Hawthorn* (1897), 76 L. T. 716. As to the sale of partnership goodwill generally, see title PARTNERSHIP, Vol. XXII., pp. 104 *et seq.*

(*m*) *Benwell v. Inns* (1867), 24 Beav. 307; *Baines v. Geary* (1887), 35 Ch. D. 154, 159.

(*n*) *Davies v. Davies* (1887), 36 Ch. D. 359, 388, 394, C. A. (where the covenant in question was in addition to a covenant intended to protect the goodwill), distinguishing *Jacoby v. Whitmore, supra*; for an instance of a covenant not to "affect" a business being held bad, see *Reeve v. Marsh* (1906), 23 T. L. R. 24. As to the burden of a restrictive covenant, see *Bird v. Lake* (1863), 1 Hem. & M. 111, 338; compare *Cooke v. Colcroft* (1773), 2 Wm. Bl. 856 (personal representative not bound by covenant of testator). It is submitted that, on principle, the burden of a covenant does not pass to the assignee of the covenantor, though there appears to be no reported case on the subject; compare title PARTNERSHIP, Vol. XXII., pp. 104 *et seq.*

(*o*) *Mills v. Dunham*, [1891] 1 Ch. 576, C. A.; *Dubowski & Sons v.*

SECT. 6.
Construction of the
Contract.

The court ascertains what was the intention of the parties from the whole agreement and the circumstances at the time at which it was entered into (*p*), including any other agreements which may exist between the covenantor and other persons which may show the nature of the covenantor's interest which it is intended to protect (*q*).

SUB-SECT. 2.—*Limitation of General Terms.*

Construction
by context.

1106. Where a clause is ambiguous the maxim *ut res magis valeat quam pereat* will apply (*r*). Consequently words which are general and might impose an unreasonable restraint have frequently, by reference to the context and the circumstances, been construed as having a limited meaning (*s*), and a restraint on the face of it

Goldstein, [1896] 1 Q. B. 478, C. A.; *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169; *Haynes v. Doman*, [1899] 2 Ch. 13, C. A. As to the rules relating to the construction of contracts, see title CONTRACT, Vol. VII., pp. 509 *et seq.*, 528.

(*p*) *Keppell v. Bailey* (1834), 2 My. & K. 517, 530; *Kimberley v. Jennings* (1836), 6 Sim. 340, 350; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305; *Clarkson v. Edge* (1863), 33 Beav. 227; *Taff Vale Rail. Co. (Directors, etc.) v. McNabb* (1873), L. R. 6 H. L. 169, *per* Lord COLONSAY, at p. 179; *Palmer v. Mallet* (1887), 36 Ch. D. 411, C. A.; ("set up or carry on the profession or business of a surgeon" in recital of a bond construed in the light of words "as assistant of any other person" in the defeasance clause. But, apparently, apart from this, acting as assistant to a surgeon is "carrying on the profession"; see p. 577, *post*). But an absolute covenant in a bond will not be qualified by a recital, in the absence of an application to rectify; see *Bird v. Lake* (1863), 1 H. & M. 111, 338, *per* WOOD, V.-C., at p. 341 ("Covenants of this kind are sometimes held to be restricted by the recitals in the deed, but I never knew of a case in which such a covenant was enlarged by the recital"); *Mills v. Dunham*, [1891] 1 Ch. 576, C. A.; *Perls v. Saalfeld*, [1892] 2 Ch. 149, 154, C. A.; *Moenich v. Fenestre* (1892), 67 L. T. 602, C. A., *per* LINDLEY, L.J., at p. 604; *Rogers v. Maddocks*, [1892] 3 Ch. 346, 354, 356, C. A.; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, 452; *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A.; *Hood and Moore's Stores, Ltd. v. Jones*, *supra*; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A.; *Marshalls, Ltd. v. Leek* (1900), 17 T. L. R. 26; *Leetham (Henry) & Sons, Ltd. v. Johnstone-White*, [1907] 1 Ch. 322, C. A. (contract with agent for a number of interdependent companies construed as a separate contract with the company in whose service the covenantor acted; and, apparently, would have been a separate contract with any company to whose service he might have been transferred); *Cavendish v. Tarry* (1908), 52 Sol. Jo. 726; *Coleborne v. Kearns* (1912), 46 L. T. 305, C. A. ("leave employment" held not to cover dismissal); compare *Cave v. Horsell*, [1912] 3 K. B. 533, C. A. (meaning of "adjoining"). As to estimating reasonableness from the circumstances of the time when the contract was made, see p. 554, *ante*.

(*q*) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A.; and see p. 527, *ante*.

(*r*) *Mills v. Dunham*, *supra*; *Perls v. Saalfeld*, *supra*; *Cattermoul v. Jared* (1909), 53 Sol. Jo. 244.

(*s*) *Gale v. Reed* (1806), 8 East, 80 (covenant against dealing with any persons except public bodies and to employ covenantor exclusively to make all articles ordered by or for covenantor's friends, held not to include persons whom covenantor introduced, but covenantor refused to supply); *Avery v. Langford* (1854), Kay, 663 ("any trading establishment" limited to trade likely to interfere with that of the covenantor); *Rousillon*

general may be construed as being limited to the term of the covenantor's service (*t*), or of a licensee's licence (*a*), and, conversely, it may obviously be intended to apply after the expiration of the term (*b*).

SECT. 6.
Construction of the Contract.

1107. Words must be construed in their ordinary business meaning (*c*). The ordinary rules for the construction of contracts apply in determining, for instance, whether the covenant is joint or joint and several (*d*), whether an infant is or not is bound (*e*), whether parol evidence may be admitted to prove that a term has a

Ordinary meaning of words.

v. Rousillon (1880), 14 Ch. D. 451 ("the champagne trade" construed to mean the importing and exporting of wines from Champagne and not necessarily to include also the making of wine in Champagne); *Hayne v. Burchell* (1890), 35 Sol. Jo. 88, C. A. ("client" construed as "client during term of articles"; "business" construed as "business of a solicitor"; being a "client" construed as "a person habitually employing" the solicitor); *Mills v. Dunham*, [1891] 1 Ch. 576, C. A. ("transact business" held to refer to business similar to that of covenantee); *Moerich v. Fenestre* (1892), 67 L. T. 602, C. A. ("any trade or business" held to mean "any trade or business of a commission merchant"; "at any time previously" held to refer only to the term of the covenantor's employment); *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A. ("the said business" construed as the business then carried on at a certain place); *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169 ("business" held to mean business of the same nature as that in which the covenantor was employed); *Barr v. Craven* (1903), 89 L. T. 574, C. A. ("the business" construed as the business of the agency in the locality worked by the covenantor, an insurance agent); *Reeve v. Marsh* (1906), 23 T. L. R. 24 (covenant not to affect or interfere with or prejudice a business held not to prohibit the setting up of a rival business); *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64 (covenant not to act as a solicitor for any person who is or has within the previous five years been a client of the covenantees, held to refer to clients at the time of termination of the service or within five years before); *Cattermoul v. Jared* (1909), 53 Sol. Jo. 244 ("house" construed as "public-house"); and compare *Southland Frozen Meat and Produce Export Co. v. Nelson Brothers, Ltd.*, [1898] A. C. 442, P. C. But see *Baker v. Hedgecock* (1888), 39 Ch. D. 520, where the court declined to put a limited meaning on "any business whatsoever"; *Ehrman v. Bartholomew*, [1898] 1 Ch. 671 ("any other business"); *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310 ("india-rubber goods").

(*t*) *King v. Hansell* (1860), 5 H. & N. 106 (covenant to serve as agent to wine merchant and not to engage in any business in the same trade within ten miles); compare *Kimberley v. Jennings* (1836), 6 Sim. 340; *Carnes v. Nesbitt* (1862), 7 H. & N. 778.

(*a*) *Mouchel v. Cubitt (William) & Co.* (1907), *Times*, 14th February, ("at any time" held to be limited to the period of a licence).

(*b*) Compare *Mumford v. Gething* (1859), 7 C. B. (N. S.) 30 (covenant by traveller not to travel for any other house in the same trade over the same ground); *Marshall's, Ltd. v. Leek* (1900), 17 T. L. R. 26 (covenant not to enter into business competition).

(*c*) *Cory (William) & Sons, Ltd. v. Harrison*, [1906] A. C. 274; and compare the cases cited at pp. 575 *et seq.* As to the meaning of "London," see *Provident Clothing and Supply Co., Ltd. v. Mason*, [1913] 1 K. B. 65, C. A., *per* BUCKLEY, L. J., at p. 75; reversed, *sub nom. Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L., but apparently without affecting this point; *Sutcliffe and Bingham, Ltd. v. Holwill* (1912), 134 L. T. Jo. 157; and titles METROPOLIS, Vol. XX., pp. 392 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 432 *et seq.*

(*d*) *Palmer v. Mallet* (1887), 36 Ch. D. 411, C. A.; see title CONTRACT, Vol. VII., p. 339.

(*e*) See pp. 567 *et seq.*, *ante*; and title INFANTS AND CHILDREN, Vol. XVII., pp. 72, 73.

SECT. 6.
Construction of the Contract.

Burden of proof.

secondary meaning (*f*), whether the contract may be rectified (*g*), or whether the agreement is harsh and unconscionable (*h*).

SUB-SECT. 3.—*No Presumption of Illegality.*

1108. Illegality is not to be presumed (*i*), for there is no rule that a restraint is *primâ facie* bad and that the burden is on the person supporting it to show that it is reasonable. The contract must first be construed without any leaning either way; and then its legality must be inquired into (*k*).

If when so construed it appears reasonable, the burden is on the covenantor to show that it clearly extends beyond what is required for the covenantee's protection (*l*), except where the covenantor is an infant, in which case the burden of proving reasonableness lies on the covenantee (*m*).

SECT. 7.—*Severability.*

Effect of illegality.

1109. An unreasonable restraint of trade is unlawful in the sense that the law will not enforce it, but not in the sense that it is

(*f*) *Lovell and Christmas, Ltd. v. Wall* (1911), 104 L. T. 85, C. A.; and see, generally, title EVIDENCE, Vol. XIII., p. 566.

(*g*) *Lovell and Christmas, Ltd. v. Wall, supra*; see titles MISREPRESENTATION AND FRAUD, Vol. XX., p. 743; MISTAKE, Vol. XXI., pp. 20 *et seq.*

(*h*) *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A.; and compare *Kimberley v. Jennings* (1836), 6 Sim. 340; *Croft v. Haw* (1836), 5 L. J. (CH.) 305. But mere inadequacy of consideration is no objection; see p. 566, *ante*. As to the construction of contracts, generally, see title CONTRACT, Vol. VII., pp. 509 *et seq.*

(*i*) *Proctor v. Sargent* (1840), 2 Man. & G. 20, *per* TINDAL, C.J., at p. 28; *Mills v. Dunham*, [1891] 1 Ch. 576, C. A.; *Moenich v. Fenestre* (1892), 67 L. T. 602, C. A., *per* LINDLEY, L.J., at p. 604. As to illegality of contract generally, see title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*k*) *Mallan v. May* (1843), 11 M. & W. 653, 667; *Tallis v. Tallis* (1853), 1 E. & B. 391, disapproving a *dictum* in *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 191; 1 Smith, L. C., 11th ed., p. 406, at p. 413 ("that wherever such contract *stat indifferenter*, and for aught appears may be either good or bad, the law presumes it *primâ facie* to be bad"); *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 364, 365; *Mills v. Dunham, supra*, at pp. 586, 587; *Perls v. Saalfeld*, [1892] 2 Ch. 149, C. A.; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord MACNAGHTEN, at p. 566; *Haynes v. Doman*, [1899] 2 Ch. 13, 31, C. A.; *Lyddon & Co. v. Thomas* (1901), 111 L. T. Jo. 10; see *contra*, *Beetham v. Fraser* (1904), 21 T. L. R. 8, *per* Lord ALVERSTONE, C.J.; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A., *per* VAUGHAN WILLIAMS, L.J., who dissented from the rest of the court, at p. 309; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 363. In *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A., FARWELL, L.J., at p. 444, used language which suggested a return to the old doctrine expressed in *Mitchel v. Reynolds, supra*; but it is submitted that this view was not necessary to the decision of the case. As to the construction of contracts generally, see title CONTRACT, Vol. VII., pp. 509 *et seq.*

(*l*) See the cases referred to in note (*k*), *supra*; *Horner v. Graves* (1831), 7 Bing. 731, 744; *Printing and Numerical Registering Co. v. Sampson* (1875), L. R. 19 Eq. 462; *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447, *per* CHITTY, J., at p. 452; *Caribonum Co., Ltd. v. Le Couch* (1913), 135 L. T. Jo. 370, C. A.

(*m*) *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 771, C. A.; see p. 568, *ante*; and title INFANTS AND CHILDREN, Vol. XVII., p. 73.

contrary to law and indictable or that it gives any cause of action to a third party injured by its operation (*n*). Its presence does not necessarily vitiate the whole contract (*o*), and parts of an agreement in restraint of trade may be severable and effect may be given to that part which, whether in respect of subject-matter, or of space, or of time, or of persons who may be dealt with, is reasonable (*p*).

SECT. 7.
Sever-
ability.

(*n*) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (1912), 107 L. T. 439, C. A., per FARWELL, L.J., at p. 444; *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 39, 46; S. C. (1889), 23 Q. B. D. 598, per BOWEN, L.J., at p. 619, C. A., disapproving *Hilton v. Eckersley* (1855), 6 E. & B. 47, Ex Ch., per CROMPTON, J., at p. 53, and *Cousins v. Smith* (1807), 13 Ves. 542; compare *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406; *Nicholls v. Stretton* (1847), 10 Q. B. 346; *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch.; *Hornby v. Close* (1867), L. R. 2 Q. B. 153; *Farrer v. Close* (1869), L. R. 4 Q. B. 602. The court takes notice of the illegality even though it is not pleaded (*North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, *supra*; and see p. 528, *ante*).

(*o*) *Baines v. Geary* (1887), 35 Ch. D. 154, 158; compare *M'Allen v. Churchill* (1826), 11 Moore (C. P.), 483; *Dendy v. Henderson* (1855), 11 Exch. 194, per MARTIN, B., at p. 201.

(*p*) *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234 (not to trade within half a mile of (i.) covenantee's house; or (ii.) any house he might remove to: held severable); *Mallan v. May* (1843), 11 M. & W. 653 (dentist's assistant not to practise (i.) in London; (ii.) in any of the towns or places in England or Scotland where the covenantees might have been practising during the period of service: held severable); *Rannie v. Irvine* (1844), 7 Man. & G. 969 (see note (*i*), p. 554, *ante*); *Price v. Green*, *supra* (on sale of share of partnership in perfumer's business, restraint to (i.) London and Westminster; (ii.) 600 miles therefrom: held severable; there is no distinction in this respect between a covenant and a bond); *Nicholls v. Stretton* (1847), 10 Q. B. 346 (solicitor's clerk: restraint as to (i.) clients of covenantee before or during term of service; (ii.) clients who became so thereafter: held severable; compare S. C. in Chancery (1843), 7 Beav. 42; but see *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A.; and note (*k*), pp. 562, 563, *ante*); *Tallis v. Tallis* (1853), 1 E. & B. 391 (restraint to London and 150 miles held reasonable: Edinburgh and Dublin held severable, if unreasonable); *Dendy v. Henderson*, *supra*, per MARTIN, B., at p. 201; *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305; *Leather Cloth Co. v. Lorisont* (1869), L. R. 9 Eq. 345, per JAMES, V.-C., at p. 351; *Baines v. Geary*, *supra* (milk carrier: restraint as to customers belonging at any time to covenantee held good as to those who were customers during the term of service; but see *Dubowski & Sons v. Goldstein*, *supra*; *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310); *Davies v. Davies* (1887), 36 Ch. D. 359, C. A., per KEKEWICH, J., at p. 372; reversed by the Court of Appeal, but not so as to affect the general proposition that covenants may be severed in a proper case; *Parsons v. Cotterill* (1887), 56 L. T. 839 (restraint as to business of wine and spirit merchant, or any branch thereof: apparently, the sale of beer, if included, may be severable); *Baker v. Hedgecock* (1888), 39 Ch. D. 520 (where CHITTY, J., refused to sever; see note (*q*), p. 574, *post*); *Mills v. Dunham*, [1891] 1 Ch. 576, C. A., per CHITTY, J., at p. 581 (covenant not to (i.) call upon or solicit orders from, or (ii.) deal with, customers: apparently, severable); *Davies, Turner & Co. v. Lowen* (1891), 64 L. T. 655 (town in which covenantees had no business: held severable; also restraint as to business "hereafter to be carried on"); *Rogers v. Maddocks*, [1892] 3 Ch. 346, C. A. (restraint as to selling (i.) ale, beer etc.; (ii.) aerated waters: held severable); *Moenich v. Fenestre* (1892), 67 L. T. 602, C. A., per STIRLING, J., at p. 604 (apparently, goods with which the covenantee dealt might be severed from goods with which he had ceased to deal); *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A.

SECT. 7.

Severability.

When severance possible.

The covenant must, however, be so expressed that it is severable without making a new contract between the parties for the sake of validating an instrument otherwise void; the test is, whether it can be stated as two or more distinct covenants (q).

(restraint as to (i.) business of manufacturer of guns etc.; (ii.) any business competing with that for the time being carried on by covenantees: held severable; compare S. C., [1894] A. C. 535, *per* Lord MACNAGHTEN, at p. 560); *Clements v. London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A.; *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, 483, C. A. (restraint as to (i.) customers during term of service; (ii.) customers thereafter: held severable, if (ii.) unreasonable; but *quære*, whether (ii.) is unreasonable; see note (k), p. 562, *ante*); *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, C. A. (restraint as to (i.) any business similar to that of covenantee; (ii.) any business whatever: held severable; as was a power to extend the term of the restraint); *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A. (hay and straw merchant; restraint as to (i.) United Kingdom; and (ii.) certain foreign countries: held severable, if (ii.) unreasonable; but *quære*, whether (ii.) was unreasonable; see notes (q), (r), p. 560, *ante*); *Haynes v. Doman*, [1899] 2 Ch. 13, 24, C. A. (restraint as to (i.) same kind of business as covenantee, or (ii.) any part thereof: held severable, if (ii.) unreasonable); *Beetham v. Fraser* (1904), 21 T. L. R. 8 (where the court refused to sever; see note (q), *infra*); *Hooper and Ashby v. Willis* (1905), 21 T. L. R. 691; affirmed (1906), 22 T. L. R. 451, C. A. (restraint as to (i.) business of builders' merchant; (ii.) manufacturer of or dealer in cement and other materials manufactured by covenantees during term of service or any other business of a like nature to the business carried on or which might be carried on during the term: held severable; but an area of thirty miles was unreasonable and could not be severed; see note (q), *infra*); *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64 (solicitor's clerk; covenant (i.) not to solicit "any person who for the time being is or who has within five years previously been a client of" the covenantees; (ii.) not to act for "any person who is or has within the previous five years been a client" of the covenantees: (ii.) held to refer to date of termination of service, therefore reasonable; and (i.) if unreasonable, was severable); *Bromley v. Smith*, [1909] 2 K. B. 235 (restraint as to business of (i.) baker; (ii.) confectioner or other businesses: held severable); *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308 (traveller for rubber tyre company; restraint as to "indiarubber goods whether wholesale or retail": held not severable; also as to the United Kingdom, Germany or France: Germany and France held severable); *Lievre v. Mayonnet* (1913), 2 L. J. County Courts Reporter, 4 (restraint as to Bradford and ten miles, and also as to certain other places: Bradford held severable); *Caribonum Co., Ltd. v. Le Couch* (1913), 135 L. T. Jo. 370, C. A.; compare *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 766, C. A. (where the court refused to treat the covenant as severable); see 1 Smith, L. C., 11th ed., pp. 428, 429. As to the general principle, see *Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 a; *Wallis v. Day* (1837), 2 M. & W. 273 (if a party make several contracts, one of which is illegal, he is, nevertheless, liable to perform the others); and title CONTRACT, Vol. VII., p. 408. As to severing in the case of bye-laws, see note (o), pp. 531, 532, *ante*.

(q) *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch.; *Baker v. Hedgecock* (1888), 39 Ch. D. 520 (restraint as to "any business whatsoever": CHITTY, J., refused to hold this good in so far as it referred to the business of a tailor). In *Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L., Lord MOULTON, at p. 729, said that when the part enforceable was clearly severable, yet even so it ought only to be enforced where the excess was trivial or merely technical and not a part of the main purport and substance of the clause. But where the words permit, general words will be construed as limited; compare *Avery v. Langford* (1854), Kay, 663; and see pp. 570, 571, *ante*); *Woods v. Thornburn* (1897), 103 L. T. Jo. 421 (restraint as to "any other business" not severable and too wide);

It is not permissible to sever a proviso from the rest of the covenant when the proviso affects the meaning of the whole (*r*); and one part of a covenant may not be severed from another unless an enforceable contract remains (*s*).

SECT. 7.
Severability.

On a similar principle, where a covenant is so worded as to cover cases which may possibly arise, but to which it cannot reasonably be applied, the unreasonable and hypothetical cases may be treated as severable and the covenant will not be void as a whole (*t*).

SECT. 8.—*Formalities.*

1110. An agreement in restraint of trade is governed by the ordinary rules of contract as to the necessity for writing, but otherwise no special formalities are required (*a*). Formalities.

SECT. 9.—*Breach.*

SUB-SECT. 1.—*In General.*

1111. The question whether there has been a breach of a contract in restraint of trade turns frequently upon narrow distinctions between particular words and phrases, and depends upon the agreement and the circumstances in each case. Question of construction and circumstances.

In deciding whether a person is engaged in a business similar to

Hooper and Ashby v. Willis, *supra* (thirty miles from either the Town Hall at Bournemouth or the Bargate at Southampton, held not severable), and see *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308, 310.

(*r*) *Perls v. Saalfeld*, [1892] 2 Ch. 149, 157, C. A. (covenant by clerk to oil importer etc. not to accept a situation or establish himself within fifteen miles for three years without permission, which was not to be withheld if covenantee was satisfied that the situation was not in a competing business: held, unreasonable); *Haynes v. Doman*, [1899] 2 Ch. 13, C. A., *per* LINDLEY, M.R., at p. 25 ("I am not considering restrictions so worded as to be partly good and partly bad, and in which the good parts are dependent on the bad. Such restrictions are void *in toto*, the bad parts infecting and destroying the whole"); compare *Card v. Hope* (1824), 2 B. & C. 661, 672.

(*s*) *Beetham v. Fraser* (1904), 21 T. L. R. 8.

(*t*) *Haynes v. Doman*, *supra*, *per* LINDLEY, M.R., at pp. 24, 25; compare *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 197; 1 Smith, L. C., 11th ed., p. 406, at p. 413; *Rannie v. Irvine* (1844), 7 Man. & G. 969, 976; *Taff Vale Rail. Co. (Directors etc.) v. McNabb* (1873), L. R. 6 H. L. 169, *per* Lord COLONSAY, at pp. 178, 179; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 366; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 574; and see note (*i*), p. 554, *ante*.

(*a*) See title CONTRACT, Vol. VII., p. 365. A question under the Statute of Frauds (29 Car. 2, c. 3) was raised but not decided in *Coleborne v. Kearns* (1912), 46 I. L. T. 305, C. A. As to the application of the Statute of Frauds (29 Car. 2, c. 3) generally, see titles CONTRACT, Vol. VII., pp. 361 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., pp. 372 *et seq.*, 384; SALE OF GOODS, Vol. XXV., pp. 127, 128; SALE OF LAND, Vol. XXV., pp. 292 *et seq.* For a case in which an injunction was granted on the basis of an understanding not reduced to writing, see *Harrison v. Gardner* (1817), 2 Madd. 198; compare *Shackle v. Baker* (1808), 14 Ves. 468 (where in the absence of a written covenant an interlocutory injunction was refused: though, apparently, a final injunction might be granted on proof of fraud or bad faith); but see *Crutwell v. Lye* (1810), 17 Ves. 335; and note (*q*), p. 596, *post*; and title PARTNERSHIP, Vol. XXII., pp. 83, 84, 105; and compare the cases where a positive covenant not to trade is inferred from the words of a bond or from its recitals, referred to in note (*q*), p. 582, *post*.

SECT. 9.
Breach.

another business, the test is whether his business is so like the other as seriously to compete with it (b).

SUB-SECT. 2.—*In Particular Cases.*

Director.

1112. A person who is a director of a company carrying on a business carries on or is engaged, concerned, or interested in that business (c).

Manager at
fixed salary.

A person who is engaged as an assistant or manager at a fixed salary not depending on profits or gross returns is not "directly or indirectly interested" in the business (d), since an "interest" means a proprietary or pecuniary interest (e), though it does not include the case of a person who is merely a creditor of a person who carries on the business (f); nor is such an assistant or manager thereby "exercising or carrying on" a business (g), but he is "engaged" or "concerned" in the business (h).

(b) *Drew v. Guy*, [1894] 3 Ch. 25, C. A. (covenant in lease; the supply of chops, steaks etc. is "similar" to the supply of hot meals and alcoholic drinks); *Castelli v. Middleton* (1901), 17 T. L. R. 373 (covenant by vendor of business of manufacturing "annatto" (a vegetable colouring matter) and food preservatives; business mainly concerned in manufacturing dairy utensils, but also to a limited extent in selling by retail "annatto" and food preservatives, chiefly bought wholesale from covenantee: held to be a competing business); *Automobile Carriage Builders, Ltd. v. Sayers* (1909), 101 L. T. 419; and see *Provident Clothing and Supply Co., Ltd. v. Mason*, [1913] 1 K. B. 65, C. A., per VAUGHAN WILLIAMS, L.J., at pp. 70, 71; reversed, but not on this point, *sub nom. Mason v. Provident Clothing and Supply Co., Ltd.* (1913), 29 T. L. R. 727, H. L. As to covenants in leases, see title LANDLORD AND TENANT, Vol. XVIII., pp. 515 *et seq.*

(c) *Castelli v. Middleton*, *supra*. As to the meaning of "carry on business" generally, see p. 512, *ante*.

(d) *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950, applying *Smith v. Hancock*, [1894] 2 Ch. 377, C. A.; compare *Newling v. Dobell* (1868), 38 L. J. (CH.) 111, per MALINS, V.-C., at p. 112.

(e) *Smith v. Hancock*, *supra*, at pp. 386, 390; *Gophir Diamond Co. v. Wood*, *supra*; compare *Hill & Co. v. Hill* (1886), 35 W. R. 137 ("interested" means entitled to profits; "concerned" means having something to do with it).

(f) *Cory (William) & Son, Ltd. v. Harrison*, [1906] A. C. 274; compare *Smith v. Hancock*, *supra*; and see S. C., [1894] 1 Ch. 209, per KEKEWICH, J., at p. 217; *Southland Frozen Meat and Produce Export Co. v. Nelson Brothers*, [1898] A. C. 442, 446, P. C.; *Bird v. Lake* (1863), 1 Hem. & M. 111, 338. But a person who lends money on the terms of receiving as interest a share of the profits of a business is "directly or indirectly engaged" in that business (*Cooper v. Page* (1876), 34 L. T. 90; see title PARTNERSHIP, Vol. XXII., p. 48).

(g) *Allen v. Taylor* (1870), 18 W. R. 888; 19 W. R. 35, per Lord HATHERLEY, L.C., at p. 36 (sale of business of rag merchant; covenant not to "exercise or carry on the trade . . . either in his own name or that of any other person"); *Clarke v. Watkins* (1863), 11 W. R. 319 (chemist's assistant: covenant not to carry on the business "in his own name or for his own benefit or in the name or names or for the benefit of any person or persons in D.": held no breach to act as servant and take orders within the area for persons carrying on business outside the area). As to the expression "so long as the covenantee shall carry on business," see p. 561, *ante*; *Lewis v. Graham* (1888), 22 Q. B. D. 1, C. A. As to the meaning of "carry on business" in relation to the Mayor's Court jurisdiction, see title MAYOR'S COURT, LONDON, Vol. XX., p. 287; in relation to bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 173; in relation to county court jurisdiction, see title COUNTY COURTS, Vol. VIII., pp. 449, 450.

(h) *Rolfe v. Rolfe* (1846), 15 Sim. 88, 90 (dissolution of tailor's partner-

A distinction, however, has been drawn in this respect between a trade and a profession, for an assistant to a surgeon or architect carries on the profession (i).

SECT. 9.
Breach.

1113. A man does not carry on and is not interested in a business which is *bonâ fide* carried on by and belongs to his wife (k); nor is a woman interested or concerned in a business by marrying a man who carries it on and assisting him therein (l). Husband and wife.

1114. Where the question is whether the covenantor is carrying on a certain specified trade or business, the words describing the trade Business falling within description.

ship; covenant not to engage in, either alone or with any other person: held a breach to act as foreman to a tailor); *Newling v. Dobell* (1868), 19 L. T. 408 (sale of tailor's business; covenant not to carry on or be concerned or interested; covenantor took employment as a journeyman with a nephew: held a breach); *Jones v. Heavens* (1877), 4 Ch. D. 636 (covenant not to carry on or be concerned in carrying on the business of a saddler, or sell goods in any way connected with that trade: held a breach to act as a journeyman); *Baxter v. Lewis* (1886), 30 Sol. Jo. 705, 754 (sale of tobacco-nist's business; covenant not to carry on or be concerned directly or indirectly; covenantor first became manager for a company, then a shop-man, there being strong suspicion of bad faith: held a breach); *Hill & Co. v. Hill* (1886), 35 W. R. 137 (sale of butcher's business; covenant not to "engage in or be in any way concerned or interested in" any similar business: employment in the business held a breach); *Cade v. Calfe* (1906), 22 T. L. R. 243 (covenant not to be "directly or indirectly engaged, concerned or interested": held a breach to enter into the service of another); *Watts v. Smith* (1890), 62 L. T. 453 (covenant by draper's assistant not to engage in a similar business: held a breach to become an assistant at a salary); *Cavendish v. Tarry* (1908), 52 Sol. Jo. 726 (covenant not to be "concerned or interested" broken by becoming a weekly servant); *Pearks, Ltd. v. Cullen* (1912), 28 T. L. R. 371 (covenant not to be engaged in a business held broken by being employed as an assistant; but whole covenant was held bad). But in *Ramoneur Co., Ltd. v. Brixey* (1911), 104 L. T. 809, a covenant by a chimney-sweep not to undertake any work or orders of any kind except for the covenantees, or to carry on or be concerned in the business either by himself or in conjunction with any person, was held not to apply to employment as a servant; compare *Dales v. Weaver* (1870), 18 W. R. 993 ("with the assistance of any other person" held to mean "as assistant of any other person" where covenantor had set up a business in the area of restraint, and then sold that business to another person and became his manager); and compare the old cases under stat. (1562—3) 5 Eliz. c. 4, referred to in note (n), pp. 511, 512, *ante*. In *Lievre v. Mayonnet* (1913), 2 L. J. County Courts Reporter, 4, it was held that the words "not to teach or give instructions nor advertise himself as a teacher of any language" did not mean "set up for himself" only; to enter the service of another was a breach.

(i) *Palmer v. Mallet* (1887), 36 Ch. D. 411, 422, C. A., distinguishing *Allen v. Taylor* (1871), 19 W. R. 556; followed in *Robertson v. Willmott* (1909), 25 T. L. R. 681 (assistant to architect). As to architects generally, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 153 *et seq.*

(k) *Smith v. Hancock*, [1894] 2 Ch. 377, C. A. (even though he helps her by writing a circular inviting "old friends" to be customers, and by introducing her to dealers, and in other ways). Apparently, he is not "interested" by merely taking a friendly interest in forwarding a business set up by a stranger; see *ibid.*, *per* A. L. SMITH, L.J., at p. 391. But, apparently, it is not unreasonable to require a covenantor "not to induce or assist any other person to commence the business" (*Lyddon v. Thomas* (1901), 17 T. L. R. 450 (where such a covenant (*inter alia*) was held reasonable)).

(l) *Loe v. Lardner* (1856), 4 W. R. 597 (licensed house).

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Breach.

or business must be taken in their ordinary business meaning, subject to the general rules applicable as to the admission of evidence of a secondary meaning (*m*).

Though the subject-matter may be the same, the business of a merchant or dealer is distinct from that of a manufacturer (*n*) and the business of a stockbroker from that of a stock-dealer (*o*); but the selling of goods wholesale is not a distinct business from the selling of the same goods retail (*p*).

Business
within pro-
hibited area.

1115. A solicitor does not carry on business in an area by writing from without the area to persons, and on behalf of persons, within it (*q*), though he carries on business or practises within an area if he

(*m*) *May v. O'Neill* (1875), 44 L. J. (CH.) 660 (the business of a solicitor includes practice in every court in which a solicitor may appear, including a court in which he has to enter his name specially on a roll before practising); *McFarlane v. Hulton*, [1899] 1 Ch. 884 (covenant not to publish a sporting paper not broken by publication of a paper recording amateur sports, but with no racing intelligence or betting odds). As to the meaning of a covenant by a retiring partner not to attend as a dentist any patients of the remaining partners, see *Harris v. Mansbridge* (1900), 17 T. L. R. 21; and compare the distinctions between "beerhouse" and "public-house," sale of liquor "on" and "off," as to which see titles INTOXICATING LIQUORS, Vol. XVIII., pp. 7, 8; LANDLORD AND TENANT, Vol. XVIII., pp. 518, 519.

(*n*) *Lovell and Christmas, Ltd. v. Wall* (1911), 104 L. T. 85, C. A. ("provision merchant" includes a margarine dealer, but not a margarine manufacturer, even though he sells his products within the area of restraint); *Josselyn v. Parson* (1872), L. R. 7 Exch. 127 (covenant not to travel for any porter, ale or spirit merchant: held no breach to travel for a brewer, for a merchant is one who buys and sells, not one who sells his own manufactures); see *Automobile Carriage Builders Ltd. v. Sayers* (1909), 101 L. T. 419 (covenant with motor carriage builders not to carry on or be engaged in any business "similar to or including the business" of the covenantees held broken by selling motor carriages, though the covenantor contended that he did not manufacture; but he had held himself out as a manufacturer); but compare *Harms v. Parsons* (1862), 32 Beav. 328 (where a covenant not to carry on the trade of a horsehair manufacturer was held to cover buying and selling manufactured horsehair); *Castelli v. Middleton* (1901), 17 T. L. R. 373; note (*a*), p. 509, *ante*.

(*o*) Admitted without argument in *Lyddon v. Thomas* (1901), 17 T. L. R. 450.

(*p*) *Rogers v. Maddocks*, [1892] 3 Ch. 346, C. A.

(*q*) *Woodbridge & Sons v. Bellamy*, [1911] 1 Ch. 326, C. A., *per* COZENS-HARDY, M.R., at p. 336; compare *ibid.*, *per* FLETCHER MOULTON, L.J., at p. 338 (the expression "carry on business" refers to "that which a solicitor does at his place of business"), distinguishing *Edmundson v. Render*, [1905] 2 Ch. 320 (where the covenant was not to do within the area any work or act usually done by solicitors, and it was held, by Buckley, J., a breach for the covenantor, instructed outside the area, to send a solicitor's letter to a person within the area). A demand made, or advice given, by letter is an act done at the address of the addressee, and the post office is the agent of the sender (*ibid.*); see title CONTRACT, Vol. VII., p. 353; see also *Edmundson v. Render* (1904), 90 L. T. 814 (the same covenant as above, but different breaches alleged), where it was held by Kekewich, J., as follows:—To obtain probate of the will of a person who died within the area, apparently a breach; to correspond with a witness within the area for the purpose of obtaining probate of a will of a person who died without the area, *quære* whether a breach, but apparently not; to advertise the letting of a farm within the area in a paper published without, but circulating within, the area, no breach; to take proceedings in a county court within the area,

appears regularly at courts in the area (*r*); nor does he “take away clients” from another solicitor if he acts for persons who have been clients of the other but have left him (*s*).

A doctor who attends a few patients at their own request within the area of restraint, but has no residence or premises there, does not “set up in practice” there, but he does “practise” there (*t*); and it seems that a trader who applies for orders or supplies goods within an area carries on business there, though he has no premises there (*a*).

though without attending there either in person or by a clerk, a breach, for the registrar is the agent of the plaintiff's solicitor for the purpose; to attend at the execution of a will within the area, a breach, unless, apparently, this is done as a friendly act without fee; but no breach to prepare a will for a person within the area on instructions received without the area, and to send it for execution within the area; compare *Freeman v. Fox* (1911), 55 Sol. Jo. 650 (covenant not to practise or act as a solicitor held not broken by doing one act of a solicitor and writing several letters to persons within the area). Similarly a patent agent may communicate by post with the Patent Office within the area (*Lake v. Harrison* (1897), 13 T. L. R. 568).

(*r*) *Llewellyn v. Simpson* (1891), 91 L. T. Jo. 9. As does a patent agent if he appears personally or by clerk on applications at the Patent Office, but not if he appears by an agent (*Lake v. Harrison, supra*).

(*s*) *Hayne v. Burchell* (1890), 35 Sol. Jo. 88, C. A. Where solicitors in partnership agree that on dissolution neither is to do business with “original clients” of the other, “original clients” comprise those who were clients of either before the partnership and those who during the partnership were by arrangement particularly the clients of either (*Badham v. Williams* (1900), 83 L. T. 141).

(*t*) *Robertson v. Buchanan* (1904), 73 L. J. (CH.) 408, C. A. But, apparently, it would be “setting up in practice” to drive regularly round the area (*ibid.*, per VAUGHAN WILLIAMS, L.J., at p. 410), or to attend a large number of patients at their invitation (*ibid.*, per STIRLING, L.J., at p. 411). In *Rogers v. Drury* (1888), 57 L. J. (CH.) 504, a doctor who had covenanted not to practise or reside in the area or otherwise directly or indirectly to enter into competition with the purchaser of his business was held to have committed a breach by attending patients who summoned him and stated that in no event would they have called in the purchaser. But a dentist retiring from partnership who covenants not to attend any patients of the other partners may attend such persons as during the partnership were particularly his patients (*Harris v. Mansbridge* (1900), 17 T. L. R. 21), and, apparently, a dentist who by his articles of partnership is on dissolution in certain circumstances expressly entitled to practise may attend patients of the old firm (*Clifford v. Phillips* (1907), 51 Sol. Jo. 748); but *quære* whether he may solicit such patients (*ibid.*); compare title PARTNERSHIP, Vol. XXII., pp. 84, 92.

(*a*) *Turner v. Evans* (1852), 2 De G. M. & G. 740, C. A. (sale of wine merchant's business; covenant never “by himself, his partner or agent, or otherwise howsoever, directly or indirectly” to “set up, embark in, or carry on” the business); *Brampton v. Beddoes* (1863), 13 C. B. (N. S.) 538 (sale of drapery business; covenant not to carry on or assist in carrying on: held a breach to supply to customers within the area from a place beyond it); *Dayer-Smith v. Hadsley* (1913), 108 L. T. 897, C. A. (covenant by retiring partner in firm of auctioneers not to carry on or be engaged or interested within an area, apparently broken by taking an office without, but setting up boards and systematically communicating with persons within, the area). Apparently a stockbroker who has covenanted not to carry on business within an area may start an office without the area and deal with clients within it, but not tout for clients within the area (*Lyddon v. Thomas* (1901), 17 T. L. R. 450, per FARWELL J.).

SECT. 9.
Breach.

A person, however, does not carry on, and is not interested or concerned in, a business within an area by merely acting, outside the area, for a person carrying on business within it (*b*); but a newspaper is published within an area if substantial numbers of it are distributed from an office within the area, though the chief place of printing and publishing is without the area (*c*).

SUB-SECT. 3.—*Waiver and Release.*Waiver and
release.

1116. It is no breach if the act complained of is done with the assent and for the benefit of the assignee (*d*).

A consent given on one occasion to the covenantor's engaging in the trade is not a release of the covenant for the future (*e*).

SECT. 10.—*Remedies for Breach.*SUB-SECT. 1.—*Injunction.*Alternative
remedy.

1117. A valid covenant in restraint of trade will be enforced by injunction notwithstanding that it provides for the payment of a sum by way of liquidated damages (*f*); the covenantee cannot, however, obtain both the damages and an injunction, but must elect between the two (*g*). Such election may be made in the statement of claim,

(*b*) *Fairbrother v. England* (1891), 40 W. R. 220 (dissolution of auctioneers' and estate agents' partnership: covenant not to carry on "directly or indirectly on his own account or as agent or assistant of, or in partnership with, any other person," or to be "interested or concerned": no breach to advertise outside the area houses within the area on behalf of a person carrying on business within the area). As to auctioneers generally, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 499 *et seq.*

(*c*) *McFarlane v. Hulton*, [1899] 1 Ch. 884.

(*d*) *Rawlinson v. Clarke* (1845), 14 M. & W. 187; and see *Maythorn v. Palmer* (1864), 11 L. T. 261.

(*e*) *Showell v. Winkup* (1889), 60 L. T. 389 (covenant by a brewer's traveller, limited as to area and time, not released by an agreement by the covenantees that the covenantor should be employed by a company to whom they sold their business). As to waiver generally, see title CONTRACT, Vol. VII., pp. 423, 424; as to release, see *ibid.*, pp. 454 *et seq.*

(*f*) *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, C. A., *per* CHITTY, J., at p. 458; *Fox v. Scard* (1863), 33 Beav. 327. In *Jones v. Heavens* (1877), 4 Ch. D. 636, the contrary proposition was argued, but the point was ignored in the judgment; see, further, title INJUNCTION, Vol. XVII., pp. 236, 237. For instances of enforcement of injunction by committal, see *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A.; *Dott-ridge Brothers, Ltd. v. Crook* (1907), 23 T. L. R. 644; and title INJUNCTION, Vol. XVII., p. 291. The court has, apparently, a discretion to limit the extent of the injunction; compare *Cussen v. O'Connor* (1893), 32 L. R. Ir. 330. The injunction should, it seems, specify so far as possible the precise nature of the acts prohibited (*Provident Clothing and Supply Co., Ltd. v. Mason*, [1913] 1 K. B. 65, 77, C. A.; reversed, without affecting this point, *sub nom. Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A. C. 724).

(*g*) *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377; *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112, C. A.; *Sainter v. Ferguson* (1849), 1 Mac. & G. 286; *Coles v. Sims* (1854), 5 De G. M. & G. 1, C. A.; *Carnes v. Nesbitt* (1862), 7 H. & N. 778; *Fox v. Scard*, *supra*; *Howard v. Woodward* (1864), 10 Jur. (N. S.) 1123; *Young v. Chalkley* (1867), 16 L. T. 286; compare *French v. Macale* (1842), 2 Dr. & War. 269, 276; *Robb v. Green*, [1895] 2 Q. B. 315, C. A.; *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64.

and is not affected by the fact that both remedies have been claimed in the writ (*h*).

SECT. 10.
Remedies
for Breach.

Perform-
ance by
covenantee.

1118. A covenant in restrain of trade will not be enforced by injunction, nor will damages be awarded for its breach (*i*), unless the covenantee has performed and is willing and able to perform in future his part of the contract of which the covenant forms a part, if the stipulations of the covenantee and covenantor are mutually dependent (*k*). Such a covenant will, however, be enforced even though the agreement contains other covenants which cannot be specifically enforced, if such other covenants are capable of being separated (*l*).

SUB-SECT. 2.—*Damages.*

1119. Where liquidated damages are fixed by the agreement the covenantee is entitled to the agreed sum, unless he has waived his

Liquidated
sum.

(*h*) *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64; compare *Cargill v. Bower* (1878), 10 Ch. D. 502, 508. In *Sainter v. Ferguson* (1849), 1 Mac. & G. 286, the covenantee had recovered judgment for the liquidated damages and costs at law, and proved for the costs only in bankruptcy, and it was held that he had elected, though, apparently, the court might on a proper application have made an order so limited as to keep his right alive; compare *Fox v. Scard* (1863), 33 Beav. 327 (if a plaintiff recovered only nominal damages at law in a case where a court of equity had sent him to law to try his right, he did not lose his right to an injunction; otherwise, if he obtained substantial damages). Occasionally the court has refused costs to a defendant who has successfully established that his covenant is in restraint of trade (*Allsopp v. Wheatecroft* (1872), L. R. 15 Eq. 59; *Ehrman v. Bartholomew*, [1898] 1 Ch. 671, 674; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A. (where, however, as the judgment was reversed in the Court of Appeal, no question as to the costs arose in that court)).

(*i*) *Measures Brothers, Ltd. v. Measures*, [1910] 2 Ch. 248, C. A., per KENNEDY, L.J., at p. 262; compare title INJUNCTION, Vol. VII., p. 247.

(*k*) *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118; *Measures Brothers, Ltd. v. Measures*, *supra* (a compulsory winding-up order operates as a wrongful dismissal of a covenantor releasing him from his covenant); see title COMPANIES, Vol. V., pp. 220, 420; MASTER AND SERVANT, Vol. XX., pp. 110, 114; but compare *Welstead v. Hadley* (1904), 21 T. L. R. 165, C. A. (appointment of receiver for debenture-holders, and dismissal by him of the managing director, does not release the latter from a covenant not to trade). But if a servant is paid a week's salary in lieu of notice and dismissed, that is not a wrongful dismissal releasing him from a restrictive covenant (*Dennis (W.) & Sons, Ltd. v. Tunnard Brothers* (1911), 56 Sol. Jo. 162). As to the question whether stipulations are dependent or independent, see titles CONTRACT, Vol. VII., pp. 434, 435; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 489; as to the effect of the plaintiff's conduct on the right to an injunction, see title INJUNCTION, Vol. XVII., p. 247.

(*l*) *Whittaker v. Howe* (1841), 3 Beav. 383, 395; *Rolfe v. Rolfe* (1846), 15 Sim. 88 (A., a retiring partner (tailor's business), covenanted with B. not to trade within certain limits; B. covenanted to employ A. so long as B. continued in the business: injunction granted against A., though B.'s covenant could not have been specifically enforced); *Daggett v. Ryman* (1868), 17 L. T. 486; compare *Kemble v. Kean* (1829), 6 Sim. 333, *per SHADWELL, V.-C.*, at p. 535. As to the enforcement of positive and negative covenants, and the cases in which negative covenants will be implied, see title INJUNCTION, Vol. XVII., pp. 242 *et seq.*; as to the general principles on which the court will interfere by injunction, see *ibid.*, p. 236.

SECT. 10.
Remedies
for Breach.

Offer to pay
no release.

right(*m*), and unless the sum is in reality a penalty and not liquidated damages(*n*); but it seems clear that he cannot recover the agreed sum more than once(*o*).

1120. A covenantor cannot, by offering to pay the liquidated damages agreed, release himself from an express covenant not to trade(*p*), nor from such a covenant inferred from the whole agreement(*q*).

SECT. 11.—*Miscellaneous.*

Stamp duty.

1121. The penalty, if any, inserted in the agreement is not the subject-matter of the agreement for the purposes of stamp duty(*r*).

Judicial
notice of
illegality.

1122. The court will take notice of the illegality of a covenant in restraint of trade even though it be not pleaded(*s*).

Not "usual"
covenant.

1123. Covenants in restraint of trade in a lease in a trading locality are not "usual covenants"(*t*), and a covenant on the sale

(*m*) As, for instance, by suing for unliquidated damages; see title DAMAGES, Vol. X., p. 348; and compare *Denton v. Richmond* (1833), 1 Cr. & M. 734.

(*n*) *Shackle v. Baker* (1808), 14 Ves. 468; *Davies v. Penton* (1827), 6 B. & C. 216; *Leighton v. Wales* (1838), 3 M. & W. 545; *Boys v. Ancell* (1839), 7 Scott, 364; *Beckham v. Drake* (1841), 9 M. & W. 79; *Horner v. Flintoff* (1842), 9 M. & W. 678; *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch.; *Galsworthy v. Strutt* (1848), 1 Exch. 659; *Atkyns v. Kinnier* (1850), 4 Exch. 776; *Marshall, Ltd. v. Leek* (1900), 17 T. L. R. 26; compare *Astley v. Weldon* (1801), 2 Bos. & P. 346, per Lord ELDON, C.J., at p. 352, disapproving *Hardy v. Martin* (1783), 1 Bro. C. C. 419, n.; *Pemberton v. Vaughan* (1847), 10 Q. B. 87; *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112, C. A., per COTTON, L.J., at p. 116. In *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 187, 194; 1 Smith. L. C., 11th ed., p. 406, at pp. 410, 416, it was said that the enforcement of a contract in lawful restraint of trade by a penalty was lawful, but the penalty was in fact treated as liquidated damages. A sum may be recovered as liquidated damages though described as a penalty (*Saintier v. Ferguson* (1849), 7 C. B. 716; see, generally, title DAMAGES, Vol. X., pp. 328 *et seq.*; *Upton v. Henderson* (1912), 106 L. T. 839; *Webster v. Bosanquet*, [1912] A. C. 394, P. C.).

(*o*) Compare *Galsworthy v. Strutt*, *supra*, per PARKE, B., at p. 663.

(*p*) *Bird v. Lake* (1863), 1 Hem. & M. 111, 338; even though a recital of the bond suggests an inference that such was the intention of the parties, unless the bond be rectified (*ibid.*).

(*q*) As, for instance, where an agreement not to trade is to be inferred from a recital in a bond, there being no express covenant (*Howard v. Woodward* (1864), 10 Jur. (N. S.) 1123), or from the words of the bond itself, without any recitals (*London and Yorkshire Bank, Ltd. v. Pritt* (1887), 56 L. J. (CH.) 987, following *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518; *National Provincial Bank of England v. Marshall*, *supra*). It is a question depending on the intention of the parties in each case, whether there was an agreement not to trade, or merely an agreement to pay for the right to trade; see, generally, title INJUNCTION, Vol. XVII., p. 236.

(*r*) *Pemberton v. Vaughan* (1847), 10 Q. B. 87; see titles CONTRACT, Vol. VII., p. 539; REVENUE, Vol. XXIV., p. 712.

(*s*) *North-Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K. B. 422, C. A.; see p. 528, *ante*.

(*t*) *Propert v. Parker* (1832), 3 My. & K. 280; see title LANDLORD AND TENANT, Vol. XVIII., p. 390.

of a business restricting the vendor from carrying on a like business is not mere common form, and a demand for such a covenant amounts to a reopening of negotiations (*u*).

SECT. 11.
Miscellaneous.

1124. The rules which govern contracts in restraint of trade are as applicable to foreigners trading in England as to English traders (*a*); and if the contract is void as against the public policy of England, it will not be enforced in an English court though made in a country where no objection could be raised to it (*b*).

Conflict of laws.

SECT. 12.—*Particular Trades, Businesses, and Professions.*

1125. Restrictive covenants have been under consideration in relation to the following trades, businesses, and professions:—Accountant (*c*), actor (*d*), agent and commercial traveller (*e*), archi-

Examples of restrictive covenants.

(*u*) *Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616.

(*a*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 369.

(*b*) *Ibid.*; and see title CONFLICT OF LAWS, Vol. VI., p. 244.

(*c*) *Brown v. Harper* (1893), 68 L. T. 488 (clients during the term of service; no time limit; infant covenantor: good); *Isitt v. Ganson* (1899), 107 L. T. Jo. 423 (England; seven years: good).

(*d*) *Kemble v. Kean* (1829), 6 Sim. 333.

(*e*) *Homer v. Ashford* (1825), 3 Bing. 322 (stated towns; fourteen years: question of consideration); *Kimberley v. Jennings* (1836), 6 Sim. 340 (restraint during term of service); *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305 (travelling for rival over same ground; no time limit: good); *King v. Hansell* (1860), 5 H. & N. 106 (term of service); *Bishop v. Kitchin* (1868), 38 L. J. (Q. B.) 20 (customers in West of England, South Wales, or any district whatsoever: validity not decided; question of recovery of consideration for a restraint by a covenantor who had submitted to it); *Josselyn v. Parson* (1872), L. R. 7 Exch. 127 (twenty-five miles; twelve months: question of breach only); *Allsopp v. Wheatcroft* (1872), L. R. 15 Eq. 59 (no limit of space; two years: bad); *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A. (eight miles; twelve months: good); *Rousillon v. Rousillon*, *supra* (see note (*n*), p. 586, *post*); *Parsons v. Cotterell* (1887), 56 L. T. 839 (see note (*n*), p. 586, *post*); *Showell v. Winkup* (1889), 60 L. T. 389 (twenty miles; two years: good); *Mills v. Dunham*, [1891] 1 Ch. 576, C. A. (customers during term of service: good); *Moenich v. Fenestre* (1892), 67 L. T. 602, C. A. (competing business in United Kingdom; five years: good); *Perls v. Saalfeld*, [1892] 2 Ch. 149, C. A. (fifteen miles; three years: but bad as applying to all businesses whatever); *Rogers v. Maddocks*, [1892] 3 Ch. 346, C. A. (100 miles; two years: good, but part severable); *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447 (no limit of space; three years: good); *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377 (fifty miles; one year: good; question of election between damages and injunction); *Barr v. Craven* (1903), 89 L. T. 574, C. A. (district in which agent had acted; no time limit: good); *Leetham (Henry) & Sons, Ltd. v. Johnstone-White*, [1907] 1 Ch. 322, C. A. (United Kingdom and Ireland; five years: bad; question as to restraint in gross; see p. 555, *ante*); *Morris & Co. v. Kyle* (1910), 103 L. T. 545, C. A. (sale of any goods whatever to, or any dealings with, persons whom covenantor called on during term of service; five years: bad); *Stuart and Simpson v. Halstead* (1911), 55 Sol. Jo. 598 (United Kingdom; no time limit: bad); *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A. C. 724 (twenty-five miles of London where the covenantees carry on business; three years: bad); *Sutcliffe and Bingham, Ltd. v. Holwill* (1912), 134 L. T. Jo. 157 (districts in which covenantor travelled for covenantees; twelve months: good; meaning of "London"); *Coleborne v. Kearns* (1912), 46 I. L. T. 305, C. A. (meaning

SECT. 12.
Particular
Trades,
Businesses,
and
Professions.

tect and surveyor (*f*), auctioneer and estate agent (*g*), author (*h*), baker (*i*), bank manager and clerk (*k*), barrister practising in place where the professions of barrister and solicitor are fused (*l*), bill-poster (*m*), brassfounder (*n*), brewer (*o*), butcher (*p*), carrier (*q*), cheesemonger (*r*), chemist (*s*), chimney-sweep (*t*), dairyman and

of "leave employment"); *Continental Tyre and Rubber (Great Britain) Co., Ltd. v. Heath* (1913), 29 T. L. R. 308 (United Kingdom, Germany or France; one year; "india-rubber goods whether wholesale or retail": good as to United Kingdom; Germany and France severable); compare *Cussen v. O'Connor* (1893), 32 L. R. Ir. 330 (similar business in counties travelled by covenantor for covenantee; twelve years, or two years from determination of engagement: good, but injunction limited to two years from determination of engagement).

(*f*) *Robertson v. Willmott* (1909), 25 T. L. R. 681 (ten miles; five years: good; question of breach only); *Gadd v. Thompson*, [1911] 1 K. B. 304 (ten miles; ten years; infant covenantor: good).

(*g*) *Fairbrother v. England* (1891), 40 W. R. 220 (two miles; three years: but no breach); *Dayer-Smith v. Hadsley* (1913), 135 L. T. Jo. 118, C. A. (one mile; ten years: *quære*, whether good).

(*h*) *Morris v. Colman* (1812), 18 Ves. 437 (covenant in partnership articles not to write for any but covenantee's theatre: good).

(*i*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., p. 406 (parish of A.; five years (term of lease): good); *Rannie v. Irvine* (1844), 7 Man. & G. 969 (one mile; term of lease: good; also, customers then dealing at the premises; same time: good); *Clark v. Howard* (1860), 2 F. & F. 125 (limit as to any new baking business in certain town; no time limit: good; question of breach only); *Toby and Offer v. Major* (1899), 107 L. T. Jo. 489 (three miles; no time limit: *quære*, bad); *Bromley v. Smith*, [1909] 2 K. B. 235 (ten miles; three years: good).

(*k*) *London and Yorkshire Bank, Ltd. v. Pritt* (1887), 56 L. J. (CH.) 987 (five miles; twelve months: good); *National Provincial Bank of England v. Marshall* (1888), 40 Ch. D. 112, C. A. (two miles; two years: good).

(*l*) *Home v. Douglas* (1912), *Times*, 15th November, P. C.

(*m*) *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118 (fifty miles; two years: apparently good, but the question discussed related to the determination of whole contract by wrongful dismissal; see p. 581, *ante*).

(*n*) *Young v. Timmins* (1831), 1 Cr. & J. 331 (question of consideration).

(*o*) *Hinde v. Gray* (1840), 1 Man. & G. 195 (no limit of space; ten years: bad); *Allsopp v. Wheateroft* (1872), L. R. 15 Eq. 59; *Showell v. Winkup* (1889), 60 L. T. 389; *Rogers v. Maddocks*, [1892] 3 Ch. 346, C. A.

(*p*) *Elves v. Croft* (1850), 10 C. B. 241 (five miles; no time limit: good); *Hill & Co. v. Hill* (1886), 35 W. R. 137 (ten miles; so long as covenantee should carry on the business: good; question of breach only); *Cooper v. Southgate* (1894), 10 R. 552 (one mile; no time limit: apparently good, but question of consideration only).

(*q*) *Archer v. Marsh* (1837), 6 Ad. & El. 959 (not to compete; no time limit: good, but question of consideration only); *Wallis v. Day* (1837), 2 M. & W. 273 (unlimited as to space and time, but limited as to capacity in which covenantor might trade: good); *Davies, Turner & Co. v. Lowen* (1891), 64 L. T. 655 (London, and other places, and fifty miles of each: good as to London, bad as to place where covenantee had no business; bad also as to "business to be hereafter carried on"); *Macfarlane v. Dumbarton Steamboat Co.* (1899), 36 Sc. L. R. 771 (United Kingdom; ten years: bad; canvassing customers of business sold: injunction granted).

(*r*) *Woods v. Dennett* (1817), 2 Stark. 89 (one mile; no time limit: good, but question of measurement only), overruled by *Moufflet v. Cole* (1872),

milk seller (*u*), dancer (*a*), dentist (*b*), doctor and surgeon (*c*), draper and hosier (*d*), dyer (*e*), fishmonger (*f*), glass maker (*g*), glove

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L. R. 8 Exch. 32, Ex. Ch.; *Harrison v. Gardner* (1817), 2 Madd. 198 (injunction granted on ground of fraud: no written agreement).

(s) *Hitchcock v. Coker* (1837), 6 Ad. & El. 438, Ex. Ch. (three miles; no time limit: good); *Clarke v. Watkins* (1863), 11 W. R. 319 (seven miles; so long as covenantee had any interest in the business: good, but question of breach only); *Marshalls, Ltd. v. Leek* (1900), 17 T. L. R. 26 (not to enter into competition; no time limit: good).

(t) *Ramoneur Co., Ltd. v. Brixey* (1911), 104 L. T. 809 (three miles; no time limit: question of breach only).

(u) *Proctor v. Sargent* (1840), 2 Man. & G. 20 (five miles; two years: good); *Benwell v. Inns* (1857), 24 Beav. 307 (three miles; two years: good); *Cornwall v. Hawkins* (1872), 41 L. J. (CH.) 435 (two miles; two years; infant covenantor: good); *Baines v. Geary* (1887), 35 Ch. D. 154 (customers during term of service; no time limit: good); *Shorthorn Dairy Co., Ltd. v. Hall* (1887), 83 L. T. Jo. 45 (question of breach); *Fellows v. Wood* (1888), 59 L. T. 513 (customers during term of service; two years; infant covenantor: good); *Evans v. Ware*, [1892] 3 Ch. 502 (five miles; two years; infant covenantor: good); *Batho v. Tunks*, [1892] W. N. 101 (customers during term of service; no time limit: good); *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, C. A. (customers during term of service; no time limit: good; *quære* as to customers at any time); *Stride v. Martin* (1897), 77 L. T. 600 (neighbourhood of S. or N.; no time limit: good); *Merriott v. Martin* (1899), 107 L. T. Jo. 369 (Southampton; one year: good); *Morrison, Fleet & Co., Ltd. v. Fletcher* (1900), 17 T. L. R. 95 (two miles; no time limit; infant covenantor: good); *Marshall and Murray, Ltd. v. Jones* (1913), 29 T. L. R. 351 (question of breach; "customers served by and from" a particular dairy).

(a) *De Francesco v. Barnum* (1889), 43 Ch. D. 165 (question of action against apprenticeship during term of apprenticeship).

(b) *Horner v. Graves* (1831), 7 Bing. 735 (100 miles; no time limit: bad); *Mallan v. May* (1843), 11 M. & W. 653 (London, or any place in England or Scotland where covenantees might have been practising during term of service; no time limit: good as to London; bad as to the rest); *Harris v. Mansbridge* (1900), 17 T. L. R. 21 (question of breach); *Clifford v. Phillips* (1907), 51 Sol. Jo. 748 (question of breach).

(c) *Davis v. Mason* (1793), 5 Term Rep. 118 (ten miles; fourteen years: good); *Hayward v. Young* (1818), 2 Chit. 407 (twenty miles; no time limit: good); *Davies v. Penton* (1827), 6 B. & C. 216 (five miles; no time limit: good); *Rawlinson v. Clarke* (1845), 14 M. & W. 187 (three miles; no time limit: good; question of breach); *Hastings v. Whitley* (1848), 2 Exch. 611 (ten miles; no time limit: good); *Sainter v. Ferguson* (1849), 7 C. B. 716 (seven miles; no time limit: good); *Atkins v. Kinnier* (1850), 4 Exch. 776 (two and a half miles; no time limit: good); *Carnes v. Nesbitt* (1862), 7 H. & N. 778 (five miles; no time limit: good; question of damages or injunction); *Giles v. Hart* (1859), 1 L. T. 154 (five miles; no time limit: good); *Fox v. Scard* (1863), 33 Beav. 327 (twelve miles; life of covenantee and ten years: good; question of damages or injunction); *Gravelly v. Barnard* (1874), L. R. 18 Eq. 518 (ten miles; so long as covenantee or assignee should practise: good); *Palmer v. Mallet* (1887), 36 Ch. D. 411 (ten miles; no time limit: good); *Rogers v. Drury* (1888), 57 L. J. (CH.) 504 (question of breach only); *Everton v. Longmore* (1899), 15 T. L. R. 356, C. A. (five miles; three years: good); *Ballachulish Slate Quarries Co. v. Grant* (1903), 5 F. (Ct. of Sess.) 1105 (the district in which the covenantor had been employed; no time limit: good); *Robertson v. Buchanan* (1904), 73 L. J. (CH.) 408, C. A. (two miles; ten years: good; question of breach only).

(d) *Broad v. Jollyfe* (1620), Cro. Jac. 596; *Chesman v. Nainby* (1728), 1 Bro. Parl. Cas. 234 (half a mile of covenantee's house; no time limit:

(e), (f), (g) For notes (e), (f), (g), see p. 586, *post*.

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maker (*h*), greengrocer and fruiterer (*i*), grocer (*k*), insurance company (*l*), manufacturer (*m*), merchant and dealer (*n*), milliner (*o*),

good; but half a mile of any house to which covenantee might move, apparently bad); *Brampton v. Beddoes* (1863), 13 C. B. (N. S.) 538 (two miles; no time limit: good; question of breach only); *Watts v. Smith* (1890), 62 L. T. 453 (half a mile; six months: good; question of breach only); *Bailey v. Skinner* (1898), 105 L. T. Jo. 473 (covenant in lease: carrying on part of a business not a breach).

(*e*) *Dier's Case* (1414), Y. B. 2 Hen. 5, fo. 5, pl. 26; *Bryson v. Whitehead* (1822), 1 Sim. & St. 74 (no limit of space; twenty years; trade secret: good).

(*f*) *Woods v. Thornburn* (1897), 103 L. T. Jo. 421 (three miles; no time limit: bad, as applying to "any other business").

(*g*) *Pilkington v. Scott* (1846), 15 M. & W. 657 (question of consideration in contract of employment); *Hartley v. Cummings* (1847), 5 C. B. 247 (question of mutuality in contract of employment); *Phillips v. Stevens* (1899), 15 T. L. R. 325 (question of mutuality in contract of employment).

(*h*) *Daggett v. Ryman* (1868), 17 L. T. 486 (W. or neighbourhood; no time limit: question of enforcement).

(*i*) *Cavendish v. Tarry* (1908), 52 Sol. Jo. 726 (twenty miles; twenty years: good).

(*k*) *Smith v. Hancock*, [1894] 2 Ch. 377, C. A. (five miles; ten years: question of breach only); *Pearks, Ltd. v. Cullen* (1912), 28 T. L. R. 371 (shop assistant and occasional canvasser; not to "establish, carry on or be engaged in or interested in a business of a similar character" to that of covenantees; two miles of any shop of covenantees at which he had been employed within twelve months; two years: bad).

(*l*) *General Accident Insurance Corporation v. Noel*, [1902] 1 K. B. 377; *Barr v. Craven* (1903), 89 L. T. 574, C. A.; see note (*e*), p. 583, *ante*.

(*m*) *Jones v. Lees* (1856), 1 H. & N. 189 (covenant as to use of patent with machine: good); *Harms v. Parsons* (1862), 32 Beav. 328 (200 miles; no time limit: good); *Clarkson v. Edge* (1863), 33 Beav. 227 (twenty miles; no time limit: good); *Maythorn v. Palmer* (1864), 11 L. T. 261 (question of breach only); *Leather Cloth Co. v. Lorisont* (1869), L. R. 9 Eq. 345 (Europe; no time limit: good); *Hagg v. Darley* (1878), 47 L. J. (CH.) 567 (no limit of space; fourteen years; trade secret: good); *Vernon v. Hallam* (1886), 34 Ch. D. 748 (covenant not to trade in particular name: good); *Davies v. Davies* (1887), 36 Ch. D. 359, C. A. (restraint so far as the law allows: bad); *Mills v. Dunham*, [1891] 1 Ch. 576, C. A. (customers during term of service: good); *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447; *Nordenfellt v. Maxim Nordenfellt Guns and Ammunition Co.*, [1894] A. C. 535 (whole world; twenty-five years: good); *Robinson (William) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451, C. A. (question of covenant applicable during term of service; see p. 556, *ante*); *Haynes v. Doman*, [1899] 2 Ch. 13, C. A. (twenty-five miles; no time limit: good); *Elliman, Sons & Co. v. Carrington & Son, Ltd.*, [1901] 2 Ch. 275 (sale of goods; restraint against selling below certain prices: good); *Castelli v. Middleton* (1901), 17 T. L. R. 373 (no limit of space or time: good, but decision was as to breach only); *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A. (no limit of space; five years: bad); *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363, C. A. (Eastern Hemisphere; five years: good); *White, Tomkins and Courage v. Wilson* (1907), 23 T. L. R. 469 (no limit of space, but limit to special business; five years: good); *Automobile Carriage Builders, Ltd. v. Sayers* (1909), 101 L. T. 419 (twenty miles; ten years from date of engagement: good); *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C. (conditions attached to lease of machines: good); *Caribonum Co., Ltd. v. Le Couch* (1913), 35 L. T. Jo. 370, C. A. (trade secret).

(*n*) *Hardy v. Martin* (1783), 1 Bro. C. C. 419, n. (brandy merchant; London and five miles; nineteen years; limit as to quantity sold: good; but

(*o*) For note (*o*) see p. 587, *post*.

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music-hall artiste (*p*), newspaper proprietor, reporter or employee (*q*),

question was penalty or damages; see note (*n*), p. 582, *ante*; *Ward v. Byrne* (1839), 5 M. & W. 548 (coal merchant; no limit of space; nine months: bad; but limited as to customers; two years: apparently, good); *Turner v. Evans* (1852), 2 De G. M. & G. 740 (wine merchant; Carnarvon, Anglesey and Merioneth; no time limit: good; but question of breach only); *Avery v. Langford* (1854), Kay, 663 (general merchant; large part of Cornwall; no time limit: good); *Mumford v. Gething* (1859), 7 C. B. (N. S.) 305 (lace merchants; see note (*e*), p. 583, *ante*); *King v. Hansell* (1860), 5 H. & N. 106 (wine and spirit merchants); *Bishop v. Kitchin* (1868), 38 L. J. (Q. B.) 20 (hop merchant; see note (*e*), p. 583, *ante*); *Allen v. Taylor* (1870), 39 L. J. (CH.) 627 (rag merchant; ten miles; five years: good; question of breach only); *Josselyn v. Parson* (1872), L. R. 7 Exch. 127 (ale and spirit merchant; see note (*e*), p. 583, *ante*); *Rousillon v. Rousillon* (1880), 14 Ch. D. 351 (wine merchant; no limit of space; two years' limit as a traveller, ten years' limit as to establishing himself in the trade: good); *Webb v. Clark* (1884), 78 L. T. Jo. 96 (provision dealer; one mile; no time limit: good); *Harvey v. Corpe* (1885), 79 L. T. Jo. 246 (see note (*k*), p. 558, *ante*); *Parsons v. Cotterill* (1887), 56 L. T. 839 (wine merchant; fifty miles; no time limit: good); *Perls v. Saalfeld*, [1892] 2 Ch. 149, C. A. (oil merchant; see note (*e*), p. 583, *ante*); *Moenich v. Fenestre* (1892), 67 L. T. 602, C. A. (commission merchant; see note (*e*), p. 583, *ante*); *Ehrman v. Bartholomew*, [1898] 1 Ch. 671 (wine merchant; "any other business" during term of service, ten years; covenantor left service at end of seven months in breach of contract: bad); *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, C. A. (hay and straw merchant; United Kingdom, France, Belgium, Holland and Canada; twelve months: good); *Hood and Moore's Stores, Ltd. v. Jones* (1899), 81 L. T. 169 (hay and corn merchants; two miles; no time limit: good); *Townsend v. Jarman*, [1900] 2 Ch. 698 (seed and corn merchant; forty miles; twenty-one years: question of covenant in gross: see p. 555, *ante*); *Delius v. Müller* (1901), 111 L. T. Jo. 369 (wool merchant; fifty miles; ten years: good); *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950 (jeweller; twenty miles; three years: no dispute as to validity; question of breach); *Servais Bouchard v. Prince's Hall Restaurant, Ltd.* (1904), 20 T. L. R. 574, C. A. (contract to take wine exclusively from one firm not in restraint of trade); *Hooper and Ashby v. Willis* (1906), 22 T. L. R. 451, C. A. (builders' merchant; thirty miles from either of two places; fourteen years: bad); *Cade v. Calfe* (1906), 22 T. L. R. 243 (coal merchant; three miles; two years: good, but question of breach); *Reeve v. Marsh* (1906), 23 T. L. R. 24 (coal and corn merchant; no limit of space; two years; "directly or indirectly interfere with prejudice or in any manner affect" business of covenantee: held not to prohibit setting up rival business; and *quære* whether too vague); *Cory (William) & Son, Ltd. v. Harrison*, [1906] A. C. 274 (coal merchant; Great Britain and Isle of Man; no limit of time: validity of covenant not questioned: question of breach); *Leatham (Henry) & Sons, Ltd. v. Johnstone-White*, [1907] 1 Ch. 322, C. A. (hay and corn dealer; see note (*e*), p. 583, *ante*); *Morris & Co. v. Ryle* (1910), 26 T. L. R. 678, C. A. (hop merchant; see note (*e*), p. 583, *ante*); *Lowell and Christmas, Ltd. v. Wall* (1911), 104 L. T. 85, C. A. (provision merchant; London, Liverpool and Manchester; no time limit: good; but question of breach only).
(*o*) *Shackle v. Baker* (1808), 14 Ves. 468 (no writing: interlocutory injunction refused).

(*p*) *Tivoli, Manchester, Ltd. v. Colley* (1904), 20 T. L. R. 437 (twenty miles; term of engagement and six months afterwards: good); *London Music Hall, Ltd. v. Austin* (1908), *Times*, 16th December (engagement for different weeks over a long period: agreement not to perform at halls in given area within eight months prior to completion of engagement held to refer to each separate week).

(*q*) *McFarlane v. Hulton*, [1899] 1 Ch. 884 (question of breach only); *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, C. A. (twenty miles; no time limit; infant covenantee: bad).

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oil and colourman (*r*), newspaper seller (*s*), opera singer (*t*), optician (*a*), patent agent (*b*), patentee (*c*), perfumer (*d*), photographer (*e*), publican (*f*), publisher (*g*), restaurant keeper (*h*), retail dealer (*i*), rope maker (*k*), saddler (*l*), schoolmaster and teacher (*m*), solicitor (*n*), stage coach proprietor (*o*), stevedore (*p*), stockbroker (*q*),

(*r*) *Jacoby v. Whitmore* (1883), 49 L. T. 335, C. A. (one mile ; no time limit : good).

(*s*) *Cooke v. Colcroft* (1773), 2 Wm. Bl. 856 (question of burden of covenant passing to executors).

(*t*) *Lumley v. Wagner* (1852), 1 De G. M. & G. 604.

(*a*) *Dales v. Weaver* (1870), 18 W. R. 993 (five miles ; no time limit : good ; question of breach only).

(*b*) *Lake v. Harrison* (1897), 13 T. L. R. 568 (four miles ; two years : good : question of breach).

(*c*) *Jones v. Lees* (1856), 1 H. & N. 189 ; *Printing and Numerical Registering Co. v. Sampson* (1875), L. R. 19 Eq. 462 (covenant to assign future patent rights : good) ; *Mouchel v. Cubitt (William) & Co.* (1907), *Times*. 14th February (covenant by licensee not to execute work in competition with the patent during term of licence : good).

(*d*) *Price v. Green* (1847), 16 M. & W. 346, Ex. Ch. (London and Westminster ; no time limit : good ; but 600 miles bad).

(*e*) *Stewart v. Stewart* (1899), 1 F. (Ct. of Sess.) 1158 (twenty miles ; no time limit ; good, but question of covenant by a person not employed in the business to be protected ; see p. 555, *ante*).

(*f*) *M'Allen v. Churchill* (1826), 11 Moore (C. P.), 483 (no limit of space ; five years : apparently bad) ; *Loe v. Lardner* (1856), 4 W. R. 597 (one mile ; no time limit : question of breach only) ; *Mouflet v. Cole* (1872), L. R. 8 Exch. 32, Ex. Ch. (half a mile ; no time limit : good, but question of measurement only), overruling *Leigh v. Hind* (1829), 9 B. & C. 774 ; *Clegg v. Hands* (1890), 44 Ch. D. 503, C. A. (tied house covenant) ; *Cattermoul v. Jared* (1909), 53 Sol. Jo. 244 (question of construction).

(*g*) *Tallis v. Tallis* (1853), 1 E. & B. 391 (London, Middlesex, Surrey, 150 miles from General Post Office ; Edinburgh, Dublin, and fifty miles from each ; any place in Great Britain or Ireland where covenantee or his successors might carry on business or have carried on business within the past six months ; no time limit : good as to London and 150 miles and other places where covenantee carried on business) ; *Welstead v. Hadley* (1904), 21 T. L. R. 165, C. A. (London and twenty miles ; ten years : good).

(*h*) *Bird v. Lake* (1863), 1 Hem. & M. 111, 338 (one mile ; no time limit : good, but question of breach only) ; *Drew v. Guy*, [1894] 3 Ch. 25, C. A. (meaning of "similar business").

(*i*) *Pemberton v. Vaughan* (1847), 10 Q. B. 87 (maker and seller of ginger beer ; one mile ; no time limit : good) ; *Middleton v. Brown* (1878), 47 L. J. (CH.) 411, C. A. (oil vendor in street ; eight miles ; twelve months : good).

(*k*) *Gale v. Reed* (1806), 8 East, 80 (question of consideration in contract for exclusive employment).

(*l*) *Jones v. Heavens* (1877), 4 Ch. D. 636 (ten miles ; no time limit : good, but question of breach only).

(*m*) *Smith v. Hawthorn* (1897), 76 L. T. 716 (nine miles ; twelve years : good) ; *Berlitz School of Languages v. Duchêne* (1903), 6 F. (Ct. of Sess.) 181 (any town where covenantor employed, or where there is a branch of covenantee's business, or within ten miles thereof ; two years : *quære* whether good) ; *Lievre v. Mayonnet* (1913), 2 L. J. County Courts Reporter, 4 (ten miles of Bradford and at certain other places ; five years : *quære* whether too wide, but severable).

(*n*) *Bunn v. Guy* (1803), 1 Smith, K. B. 1 (150 miles ; no time limit : good) ; *Capes v. Hutton* (1826), 2 Russ. 357 (question of infancy : covenant

tailor (r), tallyman (s), tobacconist (t), trade protection society or association (a), undertaker (b), waiter (c).

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by father of apprentice); *Whittaker v. Howe* (1841), 3 Beav. 383 (Great Britain; twenty years: good); *Nicholls v. Stretton* (1847), 10 Q. B. 346 (clients during term of service; no time limit: good, and severable); *Galsworthy v. Strutt* (1848), 1 Exch. 659 (seven years; fifty miles: good; decision as to liquidated damages or penalty); *Dendy v. Henderson* (1855), 11 Exch. 194 (twenty-one years; twenty-one miles: good); *Duignan v. Walker* (1859), John. 446 (seven miles; no time limit: good; question of measurement); *Howard v. Woodward* (1864), 10 Jur. (N. S.) 1123 (fifty miles; no time limit: good); *May v. O'Neill* (1875), 44 L. J. (CH.) 660 (London, Middlesex and Essex; no time limit: good; also, clients of covenantee during term of service; no limit of space or time: good); *Hayne v. Burchell* (1890), 35 Sol. Jo. 88, C. A. (not to take away or transact business for clients of covenantee; life of covenantee: apparently good, but no breach); *Llewellyn v. Simpson* (1891), 91 L. T. Jo. 9 (question of breach only); *Richards v. Whitham* (1892), 66 L. T. 695 (question of enforcement of covenant by infant apprentice, and remedy of covenantor who has undertaken liability on account of infant); *Badham v. Williams* (1900), 83 L. T. 141 (question of breach only); *Edmundson v. Render*, [1905] 2 Ch. 320 (fifteen miles; no time limit: good); *Lewis and Lewis v. Durnford* (1907), 24 T. L. R. 64; *Woodbridge & Sons v. Bellamy*, [1911] 1 Ch. 326, C. A.; *Freeman v. Fox* (1911), 55 Sol. Jo. 650 (question of breach). An English barrister practising in a colony or dependency where the functions of barristers and solicitors are fused may be restrained from practice (*Home v. Douglas* (1912), *Times*, 15th November, P. C.).

(o) *Williams v. Williams* (1818), 2 Swan. 253 (any coach between Reading and London; no time limit: good); *Leighton v. Wales* (1838), 3 M. & W. 545 (not to compete; so long as covenantee carried on the business: good, but question of consideration only).

(p) *Collins v. Locke* (1879), 4 App. Cas. 674, P. C. (agreement to prevent competition; see note (e), p. 529, ante).

(q) *Lyddon v. Thomas* (1901), 17 T. L. R. 450 (fifty miles; twenty years: good).

(r) *Hunlocke v. Blacklowe* (1670), 2 Wms. Saund. 156; *Rolfe v. Rolfe* (1846), 15 Sim. 88 (twenty miles; no time limit: good); *Newling v. Dobell* (1868), 38 L. J. (CH.) 111 (five miles to east and two miles to west of High Holborn; three years: good); *Davey v. Shannon* (1879), 4 Ex. D. 81 (five miles; no time limit: question of Statute of Frauds); *Nicoll v. Beere* (1885), 53 L. T. 659 (ten miles; three years: good); *Baker v. Hedgecock* (1888), 39 Ch. D. 520 (one mile; two years: covenant bad as restraining from all business); *Beetham v. Fraser* (1904), 21 T. L. R. 8 ("not to enter into any business arrangement in competition with or that would in any way interfere with" business of covenantee: bad as too wide and too vague).

(s) *Colmer v. Clark* (1734), 7 Mod. Rep. 230 (within bills of mortality; no time limit: good).

(t) *Baxter v. Lewis* (1886), 30 Sol. Jo. 705, 754 (five miles; no time limit: good).

(a) *Wickens v. Evans* (1829), 3 Y. & J. 318 (agreement to avoid competition: good); *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1851), 17 Q. B. 652 (railway combination: good); *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887), 36 Ch. D. 465, C. A. (agreement as to employment of servants by members held bad); *Urmston v. Whitelegg* (1891), 55 J. P. 453, C. A. (agreement as to price of goods; no limit of space: bad); compare *Gunmakers' Society (Master etc.) v. Fell* (1742), Willes, 384 (bye-law bad); and see, generally, p. 599, post.

(b) *Martin v. Brunson* (1895), 98 L. T. Jo. 237 (one mile; ten years: good); *Dottridge Brothers, Ltd. v. Crook* (1907), 23 T. L. R. 644 (ten miles; no time limit: good).

(c) *Howard v. Danner* (1901), 17 T. L. R. 548 (service of rival restaurant; less than one year: good; question of consideration only)

Part VI.—Goodwill.

SECT. 1.

Nature of Goodwill.

Definition.

SECT. 1.—*Nature of Goodwill.*

1126. The goodwill (*d*) of a business is the whole advantage of the reputation and connexion formed with customers together with the circumstances, whether of habit or otherwise, which tend to make such connexion permanent (*e*).

(*d*) As to the rights of partners in respect of the goodwill of the partnership business generally, see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.*; as to compensation for goodwill on compulsory purchase, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 36; as to goodwill in relation to stamp duties, see title SALE OF LAND, Vol. XXV., p. 447; as to an executor's duty to preserve his testator's business, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 294; as to goodwill in relation to rating, see title RATES AND RATING, Vol. XXIV., pp. 27, 41; as to the sale of goodwill in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 119, 160, 161, 224; as to goodwill in relation to the duties on land values, see title REVENUE, Vol. XXIV., pp. 550 *et seq.*; as to goodwill in relation to trade marks and names, see title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 718, 719, *post*; as to goodwill as property liable to be taken in execution, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 79.

(*e*) *Trego v. Hunt*, [1896] A. C. 7, 16, 17, 23, 27, where Lords HERSHELL, MACNAGHTEN and DAVEY criticised as too narrow the definition by Lord ELDON of goodwill as "nothing more than the probability that the old customers will resort to the old place"; *Crutwell v. Lye* (1810), 17 Ves. 335, 346; and see the similar narrow definitions in *Chessum v. Dewes* (1828), 5 Russ. 29, *per* LEACH, M.R., at p. 30; *Austen v. Boys* (1858), 2 De G. & J. 626, *per* Lord CHELMSFORD, L.C., at p. 635; *Re Kitchen*, *Ex parte Punnett* (1880), 16 Ch. D. 226, C. A., *per* JESSEL, M.R., at p. 233; *Steuart v. Gladstone* (1879), 10 Ch. D. 626, 657, C. A. and see note (*n*), p. 592, *post*. The wider view is to be found in the following cases:—*Kennedy v. Lee* (1817), 3 Mer. 441 (where Lord ELDON, L.C., at p. 452, attributed the goodwill of a trade to the fact of sole ownership); *England v. Downs* (1842), 6 Beav. 269, 276 (in relation to a licensed house); *Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147, *per* POLLOCK, C.B., at p. 157; *Wedderburn v. Wedderburn* (No. 4) (1856), 22 Beav. 84, *per* ROMILLY, M.R., at p. 104; *Churton v. Douglas* (1859), John. 174, *per* WOOD, V.-C., at pp. 188, 189; *Ginesi v. Cooper & Co.* (1880), 14 Ch. D. 596, *per* JESSEL, M.R., at p. 600; *West London Syndicate, Ltd. v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A., *per* RIGBY, L.J., at p. 523; *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, [1901] A. C. 217, *per* Lord MACNAGHTEN, at p. 223 ("What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start"); *ibid.*, *per* Lord DAVEY, at p. 227 ("The term goodwill is nothing more than a summary of the rights accruing to the [purchasers] from their purchase of the business and property employed in it"); *ibid.*, *per* Lord LINDLEY, at p. 235 ("I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things"); *Hill v. Fearis*, [1905] 1 Ch. 466, *per* WARRINGTON, J., at p. 471; and see *Corbin v. Stewart* (1911), 28 T. L. R. 99. Goodwill is included in the words "trade interest" in betterment clauses, as, for instance, in the London County Council (Tower Bridge Southern Approach) Act, 1895 (58 & 59 Vict. c. cxxx.), s. 36 (*Re London County Council and City of London Brewery Co.*, [1898] 1 Q. B. 387, 393);

SECT. 1.
Nature of
Goodwill.

Personal and
local goodwill.

1127. A distinction has been drawn between personal goodwill, which is merely the advantage of the recommendation of the owner of a business and of the use of his name, and local goodwill, which is attached to premises (*f*), and must be taken into account in calculating the value of such premises (*g*). There may be a goodwill attached to a business which depends upon personal relations between the man who carries it on and his clients or customers, such as the business of a stockbroker (*h*) or a solicitor (*i*), or a surgeon or doctor (*k*), or a dentist (*l*); and even though a successor

but not in the words "goods, wares and merchandise" (*Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, [1901] A. C. 217, per Lord LINDLEY, at p. 235). It has been held to be included in the words "gas works and plant" on a purchase by a municipal corporation under a statute (*Hamilton Gas Co., Ltd. v. Hamilton Corporation* (1910), 26 T. L. R. 377, P. C.). It includes the licence in the case of a public-house (*Rutter v. Daniel* (1882), 30 W. R. 724, 801, C. A.), and in partnership cases may include a partner's share of the capital (*Cox v. Willoughby* (1880), 13 Ch. D. 863). "Goodwill" has been also applied to the interest which a person has who is entitled to a lease on condition that he erects buildings on the land (*Baxter v. Conolly* (1820), 1 Jac. & W. 576); compare title PARTNERSHIP, Vol. XXII., p. 104, note (*i*).

(*f*) *Re Thomas, Ex parte Thomas* (1841), 2 Mont. D. & De G. 294, 296 (purely personal goodwill does not pass to the assignee of a bankrupt); *Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147, per POLLOCK, C.B., at p. 157; *Llewellyn v. Rutherford* (1875), L. R. 10 C. P. 456, per BRETT, J., at p. 469; *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.; *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, *supra*, per Lord BRAMPTON, at p. 231. The earlier tendency was to recognise only the existence of local goodwill; see the cases referred to in note (*e*), p. 590, *ante*, note (*a*), p. 593, *post*.

(*g*) *Edwards v. Edwards* (1837), 1 Jur. 654 (goodwill must be included in calculating the value of the reversion of a public-house); *Cartwright v. Sculcoates Union*, [1900] A. C. 150; and see title RATES AND RATING, Vol. XXIV., p. 41.

(*h*) *Hill v. Fearis*, [1905] 1 Ch. 466, doubting *Wilson v. Williams* (1892), 29 L. R. Ir. 176, if and in so far as it decided that there could be no goodwill in such a case; see note (*m*), p. 592, *post*.

(*i*) *Chappel v. Griffith* (1885), 53 L. T. 459 (where it was assumed that there could be goodwill of such a business); *Burchell v. Wilde*, [1900] 1 Ch. 551, C. A., per LINDLEY, M.R., at p. 562 (a similar assumption). On the other hand it was thought by Lord CHELMSFORD, L.C., in *Austen v. Boys* (1858), 2 De G. & J. 626, at p. 635, that there could be no goodwill of the practice of a solicitor; and the term "goodwill" in that case was held to mean merely a partner's interest in the business till the end of the term of the partnership; and in *Arundell v. Bell* (1883), 52 L. J. (CH.) 537, C. A., JESSEL, M.R., at p. 538, took a similar view. But on this point BAGGALLAY, L.J., *ibid.*, at p. 539, and LINDLEY, L.J., *ibid.*, at p. 540, were doubtful; and in *Spicer v. James* (1830) (unreported, but referred to in Collyer's Law of Partnership, p. 104), a bill by creditors of a deceased attorney for an account of the profits of a person who had conducted the business with the consent of the widow was dismissed on the ground that the goodwill of an attorney's business was of a personal character and could not form assets in an administration suit; see *Smale v. Graves* (1850), 3 De G. & Sm. 706; *Corbin v. Stewart* (1911), 28 T. L. R. 99.

(*k*) *Farr v. Pearce* (1818), 3 Madd. 74; and compare *May v. Thomson* (1882), 20 Ch. D. 705, C. A., per JESSEL, M.R., at p. 718; *Corbin v. Stewart*, *supra*. As to the prohibition of the sale of the practice of a fellow of the Royal College of Physicians, see title MEDICINE AND PHARMACY, Vol. XX., p. 310.

(*l*) *Smale v. Graves*, *supra*.

SECT. 1.
Nature of
Goodwill.

Existence of
restrictive
covenants.

How far
separate
entry.

may not use the old name, it may be an advantage of appreciable value merely to be a successor (*m*), though in some cases such goodwill may be so worthless as to be unsaleable (*n*).

1128. An important element in estimating the value of goodwill is, of course, the existence or non-existence of covenants restraining the vendor of, or partners or employees in, the business from competing with it (*o*), and the benefit of such covenants passes as incident to the goodwill (*p*).

1129. Goodwill is not a thing which can be separated and dealt with apart from the business out of which it arises (*q*); but it may be dealt with as an entity separate from the particular premises in which such business has been carried on (*r*). Where, however, it is attached to premises and enhances their value, it is inseparable from them; the price of it, therefore, belongs to a mortgagee of the premises (*s*), and if the premises are freehold the price does not form part of the personal estate of the owner (*t*).

(*m*) *Hill v. Fearis*, [1905] 1 Ch. 466, doubting *Wilson v. Williams* (1892), 29 L. R. Ir. 176. But in general it is no fraud on the public to trade under the name of a person who is no longer connected with the business (*Lewis v. Langdon* (1835), 7 Sim 421, 424), though it has been thought to be otherwise in the case of a solicitor; see *Arundell v. Bell*, (1883), 52 L. J. (CH.) 537, C. A.; *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554, 565; and title SOLICITORS, Vol. XXVI.

(*n*) *Wilson v. Williams*, *supra*, as explained in *Hill v. Fearis*, *supra*; and *quere* whether *Wilson v. Williams*, *supra*, is not overruled by *Trego v. Hunt*, [1896] A. C. 7; see also *Steuart v. Gladstone* (1879), 10 Ch. D. 626, C. A.; and note (*e*), p. 590, *ante*; *A.-G. v. Boden*, [1912] 1 K. B. 539, 560. Whether goodwill exists or not is, apparently, a pure question of fact (*ibid.*, *per* HAMILTON, J., at p. 559).

(*o*) *Kennedy v. Lee* (1817), 3 Mer. 442, *per* Lord ELDON, L.C., at p. 452; *Inland Revenue Commissioners v. Angus* (1889), 23 Q. B. D. 579, C. A., *per* LINDLEY, L.J., at p. 596; *Townsend v. Jarman*, [1900] 2 Ch. 698, 703; and see *A.-G. v. Boden*, *supra*, at p. 560.

(*p*) *Jacoby v. Whitmore* (1883), 49 L. T. 335, C. A.; *Showell v. Winkup* (1889), 60 L. T. 389; *Townsend v. Jarman*, *supra*, at p. 703; *Automobile Carriage Builders, Ltd. v. Sayer* (1909), 101 L. T. 419. But such covenants will not be implied; see p. 595, *post*. As to restrictive covenants generally, see pp. 548 *et seq.*, *ante*; and title PARTNERSHIP, Vol. XXII., p. 105.

(*q*) *Smale v. Graves* (1850), 3 De G. & Sm. 706; *Robertson v. Quiddington* (1860), 28 Beav. 529; and see *Smith v. Everett* (1859), 27 Beav. 446; *Wedderburn v. Wedderburn* (No. 4) (1856), 22 Beav. 84, *per* ROMILLY, M.R., at p. 104; *Hall v. Barrows* (1863), 4 De G. J. & Sm. 150; *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, [1901] A. C. 217, *per* Lord MACNAGHTEN, at p. 224.

(*r*) *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A. (even though by the terms of a lease it must necessarily be sold with the premises); *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, *supra*, *per* Lord BRAMPTON, at pp. 230, 231; *Morris v. Moss* (1855), 25 L. J. (CH.) 194 (where it was held that a widow might sell for her own benefit the goodwill of a business which was carried on on premises belonging to her husband's estate).

(*s*) *Chissum v. Dewes* (1828), 5 Russ. 29; *King v. Midland Rail. Co.* (1868), 17 W. R. 113; *Pile v. Pile, Ex parte Lambton* (1876), 3 Ch. D. 36, C. A.; *Re Kitchin, Ex parte Punnett* (1880), 16 Ch. D. 226, C. A., *per*

(*t*) For note (*t*) see p. 593, *post*.

1130. Goodwill, whether local or personal, has always the attribute of local situation in a degree more or less defined (a).

SECT. 1.
Nature of
Goodwill.

1131. Goodwill is property within the meaning of the Stamp Act, 1891 (b), but not "land" within the meaning of that Act, for it is not merely an enhancement of the value of premises to which it is attached (c).

Local.
Stamp Act,
1891.

SECT. 2.—Transfer of Goodwill.

1132. The sale of a business implies the sale of its goodwill, though goodwill be not expressly mentioned (d); but an agreement

When
transfer
implied.

JESSEL, M.R., at p. 233; *Rutter v. Daniel* (1882), 30 W. R. 724, 801, C. A.; *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A., per COTTON, L.J., at p. 479; it is otherwise where the goodwill arises from personal reputation and skill (*ibid.*); and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 155, note (e); MORTGAGE, Vol. XXI., pp. 120, 189, note (d).

(t) *Booth v. Curtis* (1869), 20 L. T. 152. An executor must account for the goodwill of a trade (*Gibblett v. Read* (1744), 9 Mod. Rep. 459, per Lord HARDWICKE, L.C., at p. 460; *Worral v. Hand* (1791), 1 Peake, 105 [74]).

(a) *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, [1901] A. C. 217, per Lord MACNAGHTEN, at p. 224, per Lord JAMES OF HEREFORD, at p. 228, per Lord ROBERTSON, at p. 234, and per Lord LINDLEY, at pp. 235, 236. But Lord BRAMPTON (*ibid.*, at p. 230) apparently restricted the statement in the text to cases where the goodwill is attached to certain premises, and Lord JAMES OF HEREFORD (*ibid.*, at p. 228), suggested that there might be cases in which a goodwill had no local situation. In ascertaining the locality of goodwill, if the trade is carried on in certain premises, the goodwill is not severable from such premises; see *ibid.*, per Lord BRAMPTON, at p. 231; and compare *Ricket v. Metropolitan Rail. Co. (Directors etc.)* (1867), L. R. 2 H. L. 175, 204; but see *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, *supra*, per Lord ROBERTSON, at p. 233; and for a case in which goodwill was held to exist in England though the factory was abroad, see *Brooke (Benjamin) & Co. v. Inland Revenue Commissioners*, [1896] 2 Q. B. 356.

(b) 54 & 55 Vict. c. 39, s. 59 (1); *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, *supra*, per Lord MACNAGHTEN, at p. 223, and per Lord LINDLEY, at pp. 234, 235; *Brooke (Benjamin) & Co. v. Inland Revenue Commissioners*, *supra*; *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A.; for cases under earlier Stamp Acts, see *Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147; *Inland Revenue Commissioners v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579, C. A., per Lord ESHER, M.R., at p. 590; and see titles REVENUE, Vol. XXIV., p. 732; SALE OF LAND, Vol. XXV., p. 447.

(c) *West London Syndicate v. Inland Revenue Commissioners*, *supra*. But where a sum awarded as the price of land on compulsory purchase includes a sum as compensation for loss of business, such sum forms part of the consideration and is liable to duty accordingly (*Inland Revenue Commissioners v. Glasgow and South Western Rail. Co.* (1887), 12 App. Cas. 315; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 36); as to estate duty on the goodwill of a partnership business accruing by virtue of the articles to the survivor, see *A.-G. v. Boden*, [1912] 1 K. B. 539; and title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 191, 195.

(d) *Shipwright v. Clements* (1871), 19 W. R. 599. It passes with the stock-in-trade or the premises, according to the circumstances of each case (*England v. Downs* (1842), 6 Beav. 269). As to goodwill in partnership cases generally, see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.* As to

SECT. 2.
Transfer of
Goodwill.

by a partner to retire from a firm is not necessarily equivalent to an agreement to sell the goodwill (*e*).

A transfer of goodwill can be effected without writing, except in so far as writing may be required by the Statute of Frauds (*f*).

Rights of
transferee.

1133. Such transfer confers on the transferee the exclusive right to carry on the business transferred, the exclusive right to represent himself as carrying on such business (*g*), and, as against the transferor, the exclusive right to use the name under which the business has been carried on (*h*); but such name must not be so used as to expose the transferor to a risk of personal liability owing to his being held out as the owner of or a partner in the business (*i*).

whether a transfer of a solicitor's business and goodwill carries the right to clients' deeds and papers, see title SOLICITORS, Vol. XXVI.

(*e*) *Gray v. Smith* (1889), 43 Ch. D. 208, C. A., *per* COTTON, L.J., at p. 221, distinguishing *Levy v. Walker* (1879), 10 Ch. D. 436, C. A.; but see *Churton v. Douglas* (1859), John. 174, 186 (when a partner assigns his share in a business it is clearly intended that the goodwill shall pass); and see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.*

(*f*) 29 Car. 2, c. 3; *Inland Revenue Commissioners v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579, C. A., *per* Lord ESHER, M.R., at p. 593; the proposition was admitted in argument (*ibid.*, at p. 587), but it was held that an agreement to sell the goodwill of a business was not an equitable transfer within the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 70. But an agreement by a partner to assign a share of partnership assets which include an interest in land is within the Statute of Frauds (29 Car. 2, c. 3) (*Gray v. Smith, supra*). For precedents of assignment of goodwill in various trades, see *Encyclopædia of Forms and Precedents*, Vol. VI., pp. 168 *et seq.* As to the application of the Statute of Frauds (29 Car. 2, c. 3) generally, see titles CONTRACT, Vol. VII., pp. 361 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 127, 128; SALE OF LAND, Vol. XXV., pp. 292 *et seq.*

(*g*) *Walker v. Mottram* (1881), 19 Ch. D. 355, 363, C. A.

(*h*) *Banks v. Gibson* (1865), 34 Beav. 566, *per* ROMILLY, M.R., at p. 569; *Levy v. Walker, supra*, at p. 448; *Thynne v. Shove* (1890), 45 Ch. D. 577; *Re David and Matthews*, [1899] 1 Ch. 378, 384; *Burchell v. Wilde*, [1900] 1 Ch. 551, C. A., *per* BYRNE, J., at p. 558; *Pomeroy (Mrs.), Ltd. v. Scalé* (1906), 22 T. L. R. 795; 23 T. L. R. 170. But an agreement to retire from a firm, with no express assignment of the goodwill, does not give the remaining partner the right to use the name of the retiring partner (*Gray v. Smith, supra*); otherwise, where the goodwill is divided between partners (*Burchell v. Wilde, supra*); see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.*; and, for trade names and marks generally, see title TRADE MARKS, TRADE NAMES, AND DESIGNS, pp. 718, 719, *post*.

(*i*) *Chappell v. Griffith* (1885), 53 L. T. 459; *Chatteris v. Isaacson* (1887), 57 L. T. 177; *Thynne v. Shove, supra*; *Jennings v. Jennings*, [1898] 1 Ch. 378, 388; *Townsend v. Jarman*, [1900] 2 Ch. 698, 705; *Burchell v. Wilde, supra*; as to the right to use a partnership name, see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.* Whether the name is a real or fancy name is material in deciding whether such a risk is caused (*Chatteris v. Isaacson, supra*; *Gray v. Smith, supra*; *Thynne v. Shove, supra*, at p. 582; and see *Churton v. Douglas, supra*, at p. 190). Where the vendor has carried on the business in a name not his own and sold the goodwill with the exclusive right to use that name, he may not afterwards trade under that name in competition with the purchaser (*Pomeroy (Mrs.), Ltd. v. Scalé* (1906), 23 T. L. R. 170); and there may be cases in which the name is so identified with the business that the vendor may not use it even in the absence of express words granting the rights in it to the purchaser (*ibid.*).

SECT. 2.
Transfer of
Goodwill.

Position of
vendor.

1134. In the absence of an express restrictive covenant no covenant to that effect will be implied, and the vendor of the goodwill of a business may set up a competing business (*k*), unless he is estopped by conduct amounting to fraud which has encouraged others to involve themselves, or to pay him money in the confidence that he will not trade again either at all or within a limited area (*l*). He may advertise himself as having been a partner in or the founder of or a manager or employee in the old business (*m*); but he may not represent himself to be a successor to, or as carrying on a continuation of, the old business (*n*), or use the trade marks of the old business (*o*). Similarly, a person who has sold the goodwill (*p*) may not solicit privately any person who was a customer of the

(*k*) *Trego v. Hunt*, [1896] A. C. 7; *Shackle v. Baker* (1808), 14 Ves. 468, 469; *Cruttwell v. Lye* (1810), 17 Ves. 335, 346; *Bozon v. Farlow* (1816), 1 Mer. 459, 474; *Harrison v. Gardner* (1817), 2 Madd. 198, 219; *Kennedy v. Lee* (1817), 3 Mer. 441, 455; *Cook v. Collingridge* (1825), 27 Beav. 456 (and see *Collyer on Partnership*, p. 174); *Re Thomas, Ex parte Thomas* (1841), 2 Mont. D. & De G. 294; *Morris v. Moss* (1855), 25 L. J. (CH.) 194; *Davies v. Hodgson* (1858), 25 Beav. 177; *Churton v. Douglas* (1859), John. 174, 187; *Mellersh v. Keen* (1859), 27 Beav. 236; *Mellersh v. Keen* (No. 2) (1860), 28 Beav. 453; *Smith v. Everett* (1859), 27 Beav. 446, 452; *Hall v. Barrows* (1863), 4 De G. J. & Sm. 150, 159; *Johnson v. Helleley* (1864), 2 De G. J. & Sm. 446, C. A. (form of advertisement settled by court on sale of a partnership business emphasised the right of the partners to carry on a similar business); *Hudson v. Osborne* (1869), 39 L. J. (CH.) 79, 82; *Reynolds v. Bullock* (1878), 47 L. J. (CH.) 774; *Stewart v. Gladstone* (1879), 10 Ch. D. 626, C. A., per BRAMWELL, L.J., at p. 662; *Leggott v. Barrett* (1880), 15 Ch. D. 306, C. A.; *Mogford v. Courtenay* (1881), 45 L. T. 303; *Taylor v. Neate* (1888), 39 Ch. D. 538, 542; *Page v. Ratcliffe* (1897), 76 L. T. 63, C. A.; *Jennings v. Jennings*, [1898] 1 Ch. 378, 382; *Re David and Matthews*, [1899] 1 Ch. 378; *Curl Brothers, Ltd. v. Webster*, [1904] 1 Ch. 685. But where partners have agreed to dissolve and sell the goodwill, one partner may not carry on the partnership business on his own account pending the sale to the prejudice of the partnership property (*Turner v. Major* (1862), 3 Giff. 442). As to the rights of partners to the goodwill generally, see title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.*

(*l*) *Shackle v. Baker, supra*; *Cruttwell v. Lye, supra*, per Lord ELDON, L.C., at p. 341; *Harrison v. Gardner, supra*.

(*m*) *Trego v. Hunt, supra*; *Hudson v. Osborne, supra*, at p. 82; *Hookham v. Pottage* (1872), 8 Ch. App. 91. Unless, of course, he has agreed to the contrary, as in *Wolmershausen v. O'Connor* (1877), 36 L. T. 921. For precedents of clauses protecting the goodwill from competition, see *Encyclopædia of Forms and Precedents*, Vol. VI., pp. 152, 155.

(*n*) *Trego v. Hunt, supra*, at p. 21; *Shackle v. Baker, supra*; *Cruttwell v. Lye, supra*, at p. 342; *Harrison v. Gardner* (1817), 2 Madd. 198; *Rodgers v. Nowill* (1853), 3 De G. M. & G. 614, C. A.; *Churton v. Douglas, supra*, at p. 193; *Hudson v. Osborne, supra*; *Leggott v. Barrett, supra*, at p. 315; *Mogford v. Courtenay, supra*; *Vernon v. Hallam* (1886), 34 Ch. D. 748, 752; *Curl Brothers, Ltd. v. Webster, supra*. This prohibition applies to a bankrupt whose business has been sold by his trustee (*Hudson v. Osborne, supra*; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 161).

(*o*) *Hudson v. Osborne, supra*; and see title TRADE MARKS, TRADE NAMES, AND DESIGNS, p. 718, *post*.

(*p*) Or a partner where by the terms of his agreement the goodwill belongs to the other partner; see note (*q*), p. 596, *post*; and title PARTNERSHIP, Vol. XXII., pp. 83, 104 *et seq.*

SECT. 2.
Transfer of
Goodwill.

Goodwill
apart from
premises.

business prior to the sale (*q*), though he may advertise publicly and deal with such persons as come to him unsolicited (*r*), or, apparently, with such persons as, having been solicited, at first resist such solicitation but subsequently come to him without further solicitation through dissatisfaction with the old firm (*s*).

1135. An agreement to sell goodwill unconnected with any premises is probably too uncertain to be enforced by specific performance (*t*), but specific performance will be decreed of an

(*q*) *Trego v. Hunt*, [1896] A. C. 7, overruling *Pearson v. Pearson* (1884), 27 Ch. D. 145, C. A., *Vernon v. Hallam* (1886), 34 Ch. D. 748, and *Collier v. Chadwick* (1886) (unreported, but referred to in *Vernon v. Hallam*, *supra*, at pp. 751, 752), and approving *Labouchere v. Dawson* (1872), L. R. 13 Eq. 322, and *Ginesi v. Cooper & Co.* (1880), 14 Ch. D. 596 (except in so far as the injunction in that case prevented the defendant from issuing public advertisements or dealing with old customers at all); see also *Leggott v. Barrett* (1880), 15 Ch. D. 306, C. A.; *Walker v. Mottram* (1881), 19 Ch. D. 355, C. A., disapproving *Ginesi v. Cooper & Co.*, *supra*, in so far as it prohibited dealing with old customers; *Mogford v. Courtenay* (1881), 45 L. T. 303; *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A., *per RIGBY, L.J.*, at p. 523; *Jennings v. Jennings*, [1898] 1 Ch. 378, 382; *Gillingham v. Beddow*, [1900] 2 Ch. 242. But an express provision authorising the vendor to set up a similar business may be such as to allow him to solicit old customers, and to this extent *Pearson v. Pearson*, *supra*, is not overruled by *Trego v. Hunt*, *supra*; see *Jennings v. Jennings*, *supra*, at p. 385; *Re David and Matthews*, [1899] 1 Ch. 378; *Gillingham v. Beddow*, *supra*, at p. 244. The obligation not to solicit customers is personal, and not an incident to the transfer of property (*Walker v. Mottram*, *supra*, at p. 364; *Jennings v. Jennings*, *supra*, at p. 283); and the prohibition does not apply to a bankrupt whose business has been sold by his trustee (*Walker v. Mottram*, *supra*); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 160, 161. Though if the trustee of the bankrupt has actively helped to deprive the purchaser of the benefit of his contract by assisting the bankrupt to start again in trade, it may be a question whether the purchaser is, as against the trustee, bound to carry out his contract; see *Crutwell v. Lye* (1810), 17 Ves. 335, *per Lord ELDON, L.C.*, at p. 347. A partner expelled from a partnership is, apparently, in the same position as a bankrupt or other involuntary vendor (*Dawson v. Beeson* (1882), 22 Ch. D. 504, C. A.); and see title PARTNERSHIP, Vol. XXII., p. 84. As to the distinction between a voluntary and an involuntary vendor, see *Jennings v. Jennings*, *supra*, at pp. 389, 390.

(*r*) *Trego v. Hunt*, *supra*, *per Lord HERSCHELL*, at pp. 12, 13, and *per Lord MACNAGHTEN*, at p. 23; *Labouchere v. Dawson*, *supra*; *Leggott v. Barrett*, *supra*.

(*s*) *Leggott v. Barrett*, *supra*, *per COTTON, L.J.*, at p. 316; but, apparently, damages may be given for such first solicitation, though there will be no injunction against the subsequent dealing; and, apparently, he may not solicit such persons who have come unsolicited if they remain customers of the old firm (*Curl Brothers, Ltd. v. Webster*, [1904] 1 Ch. 685; *Leggott v. Barrett*, *supra*).

(*t*) *Bozon v. Farlow* (1816), 1 Mer. 459 (specific performance of an agreement to purchase an attorney's business refused; and *quære* whether such an agreement is not against public policy; but as to this doubt, see p. 565, *ante*); *Baxter v. Conolly* (1820), 1 Jac. & W. 576, *per Lord ELDON, L.C.*, at p. 580; *Costlake v. Till* (1826), 1 Russ. 376; *May v. Thompson* (1882), 20 Ch. D. 705, C. A. (where JESSEL, M.R., during the argument, at p. 715, doubted whether an agreement to sell a medical practice could be specifically enforced, though specific performance was refused on the ground that there was no concluded agreement); *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554 (where it was doubted whether specific performance could be decreed of an agreement by one solicitor to permit another to use

agreement to sell a goodwill mainly or entirely annexed to premises which are sold therewith (*u*).

SECT. 2.
Transfer of
Goodwill.

Part VII.—Trade Unions.

SECT. 1.—*Definition and Legal Status of a Trade Union.*

SUB-SECT. 1.—*Definition of a Trade Union.*

1136. A trade union is any combination, whether temporary or permanent, the principal objects of which are the objects mentioned in the Trade Union Act Amendment Act, 1876 (*a*), s. 16, now called “statutory objects” (*b*), namely, the regulation (*c*) of the relations between workmen and masters, or between workmen and

Statutory
objects.

his name; but the ground for the doubt was the supposed rule of public policy against such an agreement, as to which see note (*k*), pp. 565, 592, note (*m*), *ante*. But in *Cooper v. Hood* (1858), 26 Beav. 293, ROMILLY, M.R., at p. 299, was of opinion that a contract for sale of “goodwill etc.” might not be too uncertain for specific performance, though specific performance was refused on the ground of other uncertainties; and see title SPECIFIC PERFORMANCE, pp. 21 *et seq.*, *ante*. For forms of agreement for sale of goodwill of medical and solicitors’ practices, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 156—163.

(*u*) *Dakin v. Cope* (1827), 2 Russ. 170; *Darbey v. Whitaker* (1857), 4 Drew, 134, 139; and see *Inland Revenue Commissioners v. Angus, Same v. Lavis* (1889), 23 Q. B. D. 579, C. A. *per* Lord ESHER, M.R., at p. 593. For form of agreement for sale of goodwill of licensed victualler’s business, see Encyclopædia of Forms and Precedents, Vol. VI., p. 163; Vol. XII., p. 265; for form of agreement for sale of goodwill annexed to business premises, see Vol. XII., p. 258.

(*a*) 39 & 40 Vict. c. 22.

(*b*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), ss. 1 (2), 2 (1). This Act is, by *ibid.*, s. 8, to be construed as one with the Trade Union Acts, 1871 (34 & 35 Vict. c. 31), and 1876 (39 & 40 Vict. c. 22). The definition in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16, was as follows: “The term ‘trade union’ means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act” (the Trade Union Act, 1871 (34 & 35 Vict. c. 31)) “had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.” The Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (1), extended this definition (which had been construed as strictly limiting the powers of a trade union; see p. 606, *post*) by providing that the objects mentioned in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16 must be the “principal” objects, and that other objects were permissible, subject to provisions as to the furtherance of specified political objects (Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 1 (1); see pp. 598, 608, *post*). A trade union is not a charity; see title CHARITIES, Vol. IV., p. 119.

(*c*) As to the meaning of “regulate,” see *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., *per* CHANNELL, J., at p. 908, and *per* FLETCHER MOULTON, L.J., at p. 919. The words “regulate the relations etc.” cover the provision of sickness and insurance benefits and the like (*Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., *per* FARWELL, L.J., at p. 191), a view which is now confirmed by the definition of “statutory objects” in the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 1 (2).

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workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business (*d*), and also the provision of benefits to members (*e*), whether such combination would or would not, but for the Trade Union Act, 1871 (*f*), have been deemed to have been an unlawful combination by reason of one or more of its purposes being in restraint of trade (*g*).

Any combination, however, which is for the time being registered as a trade union (*h*) is deemed to be a trade union within the definition so long as it continues to be so registered (*i*).

The fact that a combination has under its constitution objects or powers other than statutory objects as defined above does not prevent the combination being a trade union for the purposes of the Trade Union Acts (*j*), so long as it is a trade union within the above definition (*k*).

(*d*) As, for instance, an agreement between manufacturers with regard to the purchase and exchange of their manufactures, and the employment of travellers, with fines for breach of rules (*Edinburgh and District Aerated Waters Manufacturers Defence Association v. Jenkinson & Co.* (1903), 5 F. (Ct. of Sess.) 1159); between dock companies and tea warehouse keepers as to the rates to be charged, and the employment of, or purchase of tea from, dock companies and warehouse keepers not in the agreement (*Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A.; compare *Merrifield, Ziegler & Co. v. Liverpool Cotton Association, Ltd.* (1911) 105 L. T. 97). For cases where an association of masters was held not to be a trade union, see *Aberdeen Master Masons' Incorporation, Ltd. v. Smith*, [1908] S. C. 669; *British Association of Glass Bottle Manufacturers, Ltd. v. Nettlefold* (1911), 27 T. L. R. 527. Associations of musicians, music-hall artistes, and the like have been registered and have claimed the benefit of the Trade Union Acts as though they came within the definition (see, for instance, *Richards v. Bartram* (1908), 25 T. L. R. 181; *Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, C. A.); and the point whether they are trade unions does not appear to have been taken in any case; but it is to be noted that the words are "workmen," "trade or business"; as to the meaning of "trade" and "business," and the distinction between trade or business and a profession, see note (*a*), p. 509, *ante*; for the definition of "workman," see the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5 (3); and p. 662, *post*. But the point in the case of any union actually registered appears to be now met by the proviso to the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (1). For a precedent of the rules of an association of employers not registered under Trade Union Acts, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 522.

(*e*) See note (*c*), p. 597, *ante*.

(*f*) 34 & 35 Vict. c. 31.

(*g*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16, amending the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 23, by which trade unions which would not have been unlawful at common law were excluded; see *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, *per* Lord ROBSON, at p. 440. As the definition in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), is not repealed by the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30); and the two Acts are to be construed together (*ibid.*, s. 8), it is conceived that the words "whether such combination, etc.," which are contained only in the earlier Act, remain a part of the definition.

(*h*) As to registration, see pp. 621 *et seq.*, *post*.

(*i*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (1).

(*j*) 1871 (34 & 35 Vict. c. 31); 1876 (39 & 40 Vict. c. 22); 1906 (6 Edw. 7, c. 47); 1913 (2 & 3 Geo. 5, c. 30).

(*k*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 1 (1). This is subject

On the other hand, the Trade Union Acts (*l*) do not apply to an agreement between partners as to their own business, or to an agreement between an employer and those employed by him as to such employment, or to an agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft (*m*).

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1137. In deciding whether any association comes within the definition of a trade union its objects and rules must be read as a whole (*n*). Rules by which a society whose objects are mainly those of a provident and friendly society provides that its members shall lose unemployment benefit if they leave their employment without the society's consent, that they shall give notice to the society of vacancies, that they shall not acquaint non-members of such vacancies, and the like, constitute that society a trade union within the definition (*o*). A society which is in fact a friendly society is none the less so because it calls itself a trade union and is rightly registered as such (*p*). A society whose principal object is the acquisition and working of a patent is not, however, a trade union merely because it has power to enter into an arrangement for the regulation of output or prices; and it may be rightly registered as a company (*q*).

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to the provisions as to the furtherance of certain specified political objects, as to which, see pp. 608, 609, *post*.

(*l*) See note (*j*), p. 598, *ante*.

(*m*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 23. As to agreements between partners, see p. 549, *ante*; and title PARTNERSHIP, Vol. XXII., pp. 3 *et seq.*; as to agreements between employers and employed, agreements on sale of a business, and agreements for instruction, see pp. 549 *et seq.*, *ante*.

(*n*) *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, 611, 614, C. A. In *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887), 36 Ch. D. 465, C. A., it was thought by CHITTY, J., at p. 468, that a society of employers with a rule restricting the employment by a member of a servant who had left the employment of another member was, with reference to that rule, a trade union; but the point was not discussed in the Court of Appeal. A company incorporated under the Companies Acts (see title COMPANIES, Vol. V., pp. 25 *et seq.*) cannot be a trade union by reason of acts which if and when done would be *ultra vires* its memorandum (*Aberdeen Master Masons' Incorporation, Ltd. v. Smith*, [1908] S. C. 669; and see *British Association of Glass Bottle Manufacturers, Ltd. v. Nettlefold* (1911), 27 T. L. R. 527).

(*o*) *Swaine v. Wilson* (1889), 24 Q. B. D. 252, 259 C. A.; compare *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., where a friendly society one of whose objects was to regulate the relations between employers and workmen, and which provided strike pay, was considered to be rightly registered as a trade union, though the point was not material to the case. For a specimen of the rules of a trade protection society, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 441, 449.

(*p*) *Gozney v. Bristol Trade and Provident Society*, *supra*, per CHANNELL, J., at p. 905, per FLETCHER MOULTON, L.J., at p. 919.

(*q*) *British Association of Glass Bottle Manufacturers, Ltd. v. Nettlefold*, *supra*, distinguishing *Edinburgh and District Aerated Waters Manufacturers' Defence Association v. Jenkinson & Co.* (1903), 5 F. (Ct. of Sess.) 1159. But the certificate of registration as a company is not conclusive that the society is not a trade union (*British Association of Glass Bottle Manufacturers, Ltd. v. Nettlefold*, *supra*); and see note (*g*), p. 668, *post*.

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Union.Trade union
at common
law.Test of
illegality.SUB-SECT. 2.—*Legal Status of a Trade Union.*(i.) *In General.*

1138. Trade unions are not the creation of statute^(r). They existed, and still exist, at common law, and at common law may be either unlawful or lawful, according as their objects and rules do or do not violate the general principles as to restraint of trade which have already been discussed (s).

(ii.) *Distinction between Legal and Illegal Combinations.*

1139. An agreement is in general void by which persons bind themselves to carry on their trade or business in accordance with resolutions of the majority of the parties^(t). Such an agreement

(r) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., per COZENS-HARDY, M.R., at p. 174; S. C. [1910] A. C. 87, per Lord SHAW OF DUNFERMLINE, at p. 107; and see the Report of the Royal Commission on Trade Disputes, 1906 [Cd. 2825].

(s) *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., per COZENS-HARDY, M.R., at p. 915; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, per Lord MACNAGHTEN, at p. 429, per Lord SHAW OF DUNFERMLINE, at pp. 432, 433, and per Lord ROBSON, at p. 439, though Lord LOREBURN, L.C. (*ibid.*, at p. 428), and Lord ATKINSON (*ibid.*, at p. 431) treated the distinction between legality and illegality at common law as immaterial; see note (t), p. 612, *post*. As to restraint of trade generally, see pp. 548 *et seq.*, *ante*.

(t) *Hilton v. Eckersley* (1856), 6 E. & B. 47, Ex. Ch. (bond between masters, each being bound to fix wages and other terms of employment in accordance with the decision of the majority: held illegal); *Hornby v. Close* (1867), L. R. 2 Q. B. 153 (a society one of the main objects of which was the support of its members when on strike held to be a society with an illegal purpose, such a purpose not being analogous to the sick and benefit objects of a friendly society; but see p. 602, *post*); *Farrer v. Close* (1869), L. R. 4 Q. B. 602 (rules allowing maintenance of men on strike held to constitute the society illegal; but as to strikes, see pp. 601 *et seq.*, *post*); *R. v. Stainer* (1870), L. R. 1 C. C. R. 230 (unregistered society; objects, the attainment and maintenance of a fair remuneration for labour, the regulation of the supply of hands and hours of work, and the rendering of assistance in cases of sickness etc.; penalties for working overtime, for seeking to damage the society's interests, for applying for work where no vacancy, for taking a person into a shop to learn where no vacant loom exists; occasional contributions to strike funds: held, some of the rules in illegal restraint of trade, but not on that account criminal; see p. 638, *post*); *Rigby v. Connol* (1880), 14 Ch. D. 482 (rules forbidding members on penalty of fine or expulsion to bind their sons apprentices to employers who employ members of another union, and providing the number of apprentices to be employed in a trade, and generally regulating the trade: held illegal); *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (1887), 36 Ch. D. 465, C. A. (rule of a society of employers forbidding a member to employ a servant, who has left the employment of another member, for two years from the date of his so leaving, unless with the consent of such other member: held an unreasonable restraint); *Old v. Robson* (1890), 59 L. J. (M. C.) 41 (society registered as a trade union; member claimed sickness allowance under the summary jurisdiction provided by the Friendly Societies Act, 1887 (50 & 51 Vict. c. 56), now repealed and replaced by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25) (see title FRIENDLY SOCIETIES, Vol. XV., p. 138): held, no jurisdiction to make the order, part of the rules (as, for instance, a provision that a member could be expelled for violating trade rules laid down by a district committee) being in illegal restraint of trade

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is not made legal by the fact that it is a counter move against a like agreement by others (*u*), though so long as the parties continue to act upon it its illegality cannot be pleaded by a third party affected (*w*).

There is, however, no illegality in a combination for the purpose of mutual protection, sick and accident benefits, and the like (*x*), or in a combination which contemplates strikes (*a*).

1140. A strike is a simultaneous cessation of work on the part of workmen (*b*). It does not necessarily involve any breach

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and inseparable from the rest); *Urmston v. Whitelegg Brothers* (1890), 63 L. T. 455 (agreement by association of traders not to sell mineral waters below a specified price for ten years, unrestricted as to area: held an unreasonable restraint); *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, *per* Lord WATSON, at p. 42, and *per* Lord BRAMWELL, at p. 46 (though, the agreement in this case being voluntary, for no fixed period, and providing for no penalty, Lord MORRIS (*ibid.*, at p. 50), doubted whether it was in restraint of trade at all); *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A. (a tea clearing-house association: members bound by rules not to charge less than certain rates, or to deal with non-members: held illegal); *Quinn v. Leatham*, [1901] A. C. 495, *per* Lord LINDLEY, at p. 538 ("A combination not to work is one thing and is lawful; a combination to prevent others from working by annoying them if they do is a very different thing, and is *primâ facie* unlawful"); *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A. (employers had agreed to rules of union containing, *inter alia*, a rule that boys entering the trade were not to work more than three months without being legally bound apprentice, and in no case were to be more than sixteen years old, except masons' sons and stepsons: *quære* whether the rule was legally enforceable (*ibid.*, *per* COLLINS, M.R., at p. 737, and *per* STIRLING, L.J., at p. 741)); *Sayer v. Amalgamated Society of Carpenters and Joiners* (1902), 19 T. L. R. 122 (rules authorising the fining of members violating trade rules of the district, and requiring members to submit all questions of wages to the union: held illegal); *Aspden v. Steam Engine Makers Society* (1904), *Times*, 14th December; *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A. (by the rules "a fair equitable division of trade" was compulsory in each shop, and the dual system of piecework and day wage was not to be allowed to exist; there were restrictions on working outdoors, on the hours of work and overtime, and powers of fine and expulsion for working for a shop on strike or lock-out, and other matters: held, the whole society illegal); *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421 (rules authorising fining or expulsion of members who refuse to comply with decisions of the committee or wilfully violate the recognised trade rules of the district, or work under conditions which the union considers unfair: held in unlawful restraint of trade; but see *ibid.*, *per* Lord LOREBURN, L.C., at p. 428, and *per* Lord ATKINSON, at p. 431); *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 26 T. L. R. 518; and compare *Edinburgh and District Aerated Water Manufacturers Defence Association v. Jenkinson & Co.* (1903), 5 F. (Ct. of Sess.) 1159.

(*u*) *Hilton v. Eckersley* (1856), 6 E. & B. 47, 66, Ex. Ch.

(*w*) *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra*, *per* Lord WATSON, at p. 42.

(*x*) Compare *Swaine v. Wilson* (1889), 24 Q. B. D. 252, C. A.; *Finch v. Oake*, [1896] 1 Ch. 409, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*, at p. 435.

(*a*) As to the general principles applicable to strikes, see the text, *infra*.

(*b*) *Farrer v. Close* (1869), L. R. 4 Q. B. 602, *per* HANNEN, J., at p. 612. But the word is of an artificial character and does not represent any legal

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of either the civil or the criminal law; for it is not illegal to persuade men lawfully to determine their contracts with their employer, or not to work for an employer, and consequently there is nothing contrary to the rules against restraint of trade in objects and provisions which contemplate the maintenance of strikers or the direction of a strike(c). Provisions in the rules

definition or description (*Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384, per Lord JAMES OF HEREFORD, at p. 405). "A strike is an agreement between persons who are working for a particular employer not to continue working for him" (*Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A., per KAY, L.J., at p. 829; and see *King v. Parker* (1876), 34 L. T. 887, per KELLY, C.B., at p. 889; and title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 178, 200). For definitions of strikes and lock-outs in colonial and foreign legislation reference may be made to the Memorandum on Strikes and Lock Outs, 1912 [Cd. 6081].

(c) *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A., per VAUGHAN WILLIAMS, L.J., at pp. 517, 519, per KENNEDY, L.J., at p. 525; S. C., [1912] A. C. 421, per Lord SHAW OF DUNFERMLINE, at p. 435; *Farrer v. Close* (1869), L. R. 4 Q. B. 602, per HANNEN, J., at pp. 612, 613, and per HAYES, J., at p. 617 (whose views, though they did not prevail (see this note, *infra*), may be taken to represent the present law); *R. v. Bauld* (1876), 13 Cox, C. C. 282, per HUDDLESTON, B., at p. 284; *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; *Allen v. Flood*, [1898] A. C. 1, per Lord HERSCHELL, at p. 138; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per FARWELL, J., at p. 431; *Denaby and Cadeby Main Collieries Co., Ltd. v. Yorkshire Miners' Association*, *supra*, at pp. 393, 406; *ibid.*, per Lord DAVEY, at p. 400; *Jose v. Metallic Roofing Co. of Canada, Ltd.*, [1908] A. C. 514, P. C. (held a misdirection to tell a jury, in effect, that it is an actionable wrong to call out men by resolution of a union, without regard to motive or conspiracy); *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.; *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, 916, 922, 925, C. A.; *ibid.*, per FLETCHER MOULTON, L.J., at p. 923; *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 26 T. L. R. 518, per COLERIDGE, J., at p. 519; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A. (objects of union included "to improve the condition and protect the interests of its members; to obtain and maintain reasonable hours of duty and fair rates of wages; to promote . . . the settlement of disputes . . . by arbitration or, failing arbitration, by other lawful means; to provide temporary assistance to members when out of employment through causes over which they have no control or through unjust treatment," together with the provision of various sickness, accident etc. benefits; by the rules the committee might sanction "trade movements," and any person striking without sanction forfeited strike pay; and the committee might issue notice papers, and if a certain number were signed might hand them to the employers and were then bound to use all lawful means to assist the men in the strike, which was to be directed by the secretary: held, there was no taint of illegality in the objects, nor in the rules, which contained no provision for calling out members in the event of a strike and no penalty except loss of strike pay on any member who chose to continue to work. A provision for expulsion of any member found guilty of attempting to injure the society was held not to be equivalent to the provision of such a penalty); compare Erle, *The Law Relating to Trades Unions*, p. 23 ("Each person may choose whether he will labour or not and on what terms. Many may exercise this power of choice jointly, and may make a simultaneous declaration of that choice and lawfully act thereon for the immediate purpose of obtaining the required terms. But they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless

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enabling a committee to compel members to strike or to penalise them for not striking, are, however, in illegal restraint of trade (*d*);

upon terms allowed by the combination"); and see *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A., *per* KENNEDY, L.J., at p. 527, where a suggested qualification is that "such a mutual obligation must not extend beyond the limits of what under the circumstances is a reasonable restraint." But in *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, C. A.; affirmed, [1905] A. C. 256, a union with similar objects and rules to those discussed in *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., was apparently admitted without argument to be illegal at common law; see *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, C. A., *per* STIRLING, L.J., at p. 335, though it was described by VAUGHAN WILLIAMS, L.J. (*ibid.*, at p. 328), as "an association one of whose objects is to discourage and prevent unnecessary strikes by insisting upon certain salutary conditions being fulfilled before a strike is sanctioned." Some of the expressions in S. C., [1905] A. C. 256, seem to overlook the possibility that a trade union may be legal at common law, but the point was not before the House (compare *ibid.*, *per* Lord JAMES OF HEREFORD, at p. 275, and *per* Lord LINDLEY, at p. 279). A similar assumption of illegality was made in *Mullett v. United French Polishers' London Society* (1904), 20 T. L. R. 595 (objects included the offering of all legitimate resistance to encroachments upon the work and wages of members and their legal protection when subject to unjust treatment on the part of employers and the establishment of funds for the support of members when unemployed or in dispute, with power to the executive to take such steps as they deemed conducive to the welfare of the society); in *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583 (where the objects were "to raise funds for the advancement, regulation, and protection of the trade, for the relief of members out of employment from some unjust cause or dispute existing between the employers and the members . . . and to regulate the relations between them"); and in *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A. (in the report no rule is referred to which seems tainted with illegality, except perhaps a rule providing for a labour representation fund (as to the illegality of which prior to the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), see *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87; *Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 28 T. L. R. 518, C. A., and note (*d*), p. 606, *post*); but the question was not raised, and it was conceded that apart from the Trade Union Act, 1871 (34 & 35 Vict. c. 31), no action could have been maintained, that is to say, that the society was illegal). For the view that a strike is illegal at common law, see *Hornby v. Close* (1867), L. R. 2 Q. B. 153; *Farrer v. Close* (1869), L. R. 4 Q. B. 602, *per* COCKBURN, C.J. (HANNEN, J., and HAYES, J., dissenting and the court being equally divided, with the result that the decision appealed from, holding that the society was illegal, was upheld); *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A., *per* LINDLEY, L.J., at p. 822, *per* KAY, L.J., at p. 828, and *per* A. L. SMITH, L.J., at p. 833; *Sayer v. Amalgamated Society of Carpenters and Joiners* (1902), 19 T. L. R. 122, *per* BRUCE, J., at p. 123; and see, generally, p. 638, *post*.

(*d*) *Osborne v. Amalgamated Society of Railway Servants*, *supra*, at pp. 551, 552, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*, at p. 518; S. C., [1912] A. C. 421, 430, 434, 439, Lord LOREBURN, L.C., and Lord ATKINSON expressing no opinion on this point; see note (*t*), p. 612, *post*); *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 26 T. L. R. 518; *Farrer v. Close*, *supra*, *per* HANNEN, J., at pp. 612, 613 (see note (*c*), p. 602, *ante*); *M'Kernan v. United Operative Masons' Association* (1874), 1 R. (Ct. of Sess.) 453 (provision for circulation of list of members who worked in opposition to the society during strikes: held to show illegal purpose); *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A.; *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., *per* BUCKLEY, L.J., at p. 925. *Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association* (1912), 28 T. L. R. 372.

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Maintenance
of strikes.

Legality
question of
construction.

and a combination to strike actuated by malicious intention to spite or injure another without just cause is illegal (*e*). Similarly, a strike may be illegal if it involves criminal or wrongful acts (*f*).

1141. If a strike has taken place in breach of contract between the strikers and their employers, but the contracts so broken have expired or been determined, it is not illegal to maintain the strikers, after such expiration or determination, in a refusal to enter into new contracts (*g*); but it is illegal with knowledge of such breaches to maintain the strikers during the term of the contracts (*h*).

(iii.) *Construction of the Agreement.*

1142. The question on which side of the line between legality and illegality a society is placed by its rules is a question depending upon their construction in each case (*i*). Whether the rules constitute an unreasonable restraint of trade is a matter for the court; and evidence with regard to the mode in which they have in practice been applied is not relevant (*k*), unless the rules are a mere cloak to shield an illegal object (*l*).

(*e*) *Quinn v. Leatham*, [1901] A. C. 495; *R. v. Hewitt* (1851), 5 Cox, C. C. 162, per Lord CAMPBELL, C.J. (in this case the strike was held criminal; see p. 641, *post*); and compare *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, per Lord SHAW OF DUNFERMLINE, at p. 436; *Curran v. Treleavan*, [1891] 2 Q. B. 545, 553 (meaning of "intimidation" in the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7 (1); see note (*i*), p. 645, *post*).

(*f*) *Farrer v. Close* (1869), L. R. 4 Q. B. 602, per HANNEN, J., at p. 612 (see note (*c*), p. 602, *ante*); *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, 822, 828, C. A.; *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, 916, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 519, 522, C. A.; S. C., [1912] A. C. 421, 435, 436.

(*g*) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384 (for a correction of the headnote in the report of this case, see *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, 335, C. A.). To support the strikers in such circumstances is merely subscribing to a strike fund, as any member of the public might subscribe, without incurring liability (*Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, *supra*, per Lord JAMES OF HEREFORD, at p. 406); compare *Gozney v. Bristol Trade and Provident Society*, *supra*, per BUCKLEY, L.J., at p. 925. Where, however, by a rule, strike pay was payable to members who struck with the sanction of the union, such payment was held not to be authorised where a strike begun without such sanction was subsequently sanctioned (*Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 331, C. A.; affirmed, [1905] A. C. 256).

(*h*) *Smithies v. National Association of Operative Plasterers*, *supra*.

(*i*) *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*.

(*k*) *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 521, 522, C. A.; *Leng (Sir W. C.) & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, C. A. In *Farrer v. Close*, *supra*, two members of the court looked not only to the rules but to the conduct and operations of the society, a procedure disapproved in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A., per FARWELL, L.J., at

A rule, though in restraint of trade, may be lawful if reasonable with reference to the real and legitimate objects of the society (*m*). As in the case of agreements of service and the like (*n*), illegality must not be presumed but must be established upon some plain provision in the agreement (*o*).

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1143. If the main objects of a combination be legal, the fact that some of its rules are in illegal restraint of trade will not vitiate the whole agreement (*p*); but it is otherwise if the illegal parts go to the main object of the combination (*q*), or the legal and illegal parts are so mixed up as to be inseparable (*r*).

Severability.

The trade protection and benefit rules are inseparably connected if, for instance, a member breaking a trade protection rule may be

p. 525; and compare *Farrer v. Close* (1869), L. R. 4 Q. B. 602, *per* HAYES, J., [at p. 618. The principle that such evidence is irrelevant does not appear to have been strictly followed in *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 26 T. L. R. 518; and in *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., COZENS-HARDY, M.R., at p. 553, mentioned the point, but expressed no opinion upon it. As to the principle applied in the case of restraint of trade generally, see p. 554, *ante*. In this connexion, however, it may be noted that by the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (2), (3), the actual conduct of a union is to be regarded in certain cases in deciding whether its objects are statutory; see p. 612, *post*).

(*l*) *Farrer v. Close*, *supra*, *per* HANNEN, J., at p. 610, and *per* HAYES, J., at p. 618.

(*m*) *Swaine v. Wilson* (1889), 24 Q. B. D. 252, 261, C. A.; *Collins v. Locke* (1879), 4 App. Cas. 674, P. C.; and see *Tallis v. Tallis* (1852), 1 E. & B. 391.

(*n*) See p. 572, *ante*.

(*o*) *Osborne v. Amalgamated Society of Railway Servants*, *supra*, *per* COZENS-HARDY, M.R., at p. 553, and *per* FLETCHER MOULTON, L.J., at p. 565; *Swaine v. Wilson* (1889), 24 Q. B. D. 252, C. A.

(*p*) *Hornby v. Close* (1867), L. R. 2 Q. B. 153, 158; *Farrer v. Close*, *supra*; *Collins v. Locke*, *supra*; *Swaine v. Wilson*, *supra* (an unregistered society was a benefit and friendly society; but certain of its rules required the society's assent to a member leaving his employment in case of dispute as a condition precedent to his obtaining unemployment benefit, and provided that a member knowing of a vacancy or impending vacancy should inform the society thereof with a view to other members securing opportunities of employment: held, that such rules, being made for the purpose of economising the society's funds and not exceeding what was reasonably necessary, were not in fact in illegal restraint of trade; but that even if they were, they did not vitiate the other rules); *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, 916, 919, 920, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A. (affirmed, [1912] A. C. 421), *per* VAUGHAN WILLIAMS, L.J., at p. 516, and *per* FARWELL, L.J., at p. 524; *Mudd v. General Union of Operative Carpenters and Joiners*, *supra*, *per* COLERIDGE, J., at p. 519; *Osborne v. Amalgamated Society of Railway Servants*, *supra*, *per* COZENS-HARDY, M.R., at p. 553.

(*q*) *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*; *Mudd v. General Union of Operative Carpenters and Joiners*, *supra*; and compare *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583.

(*r*) *Old v. Robson* (1890), 59 L. J. (M. C.) 41; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, 430; compare the cases in note (*p*), *supra*. As to severing in relation to restraint of trade in general, see pp. 572, 573, *ante*.

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Former law.

expelled and lose all benefits(s), or if funds standing to the credit of benefit purposes may be applied to trade protection purposes (t).

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1144. Before the 7th March, 1913 (u), the definition of a trade union (a) was deemed to be a limiting and restrictive definition, and the objects of a union registered under the Trade Union Acts, 1871—1906 (b), were strictly confined to the objects indicated in that definition and in the Trade Union Act, 1871 (c), with any provisions merely ancillary to those objects (d).

(s) *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 518, 519, 523, C. A.; S. C., [1912] A. C. 421, 430, 436, 441; *Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association* (1912), 28 T. L. R. 372.

(t) *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*, per FARWELL, L.J., at p. 523; S. C., [1912] A. C. 421, 430, 436, 441. Benefit rules may perhaps be enforceable in spite of the presence of trade protection rules if there is a complete separation of the purposes of the society as regards the fund applicable to friendly society purposes, and the fund applicable to trade union purposes (*Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 508, C. A., per VAUGHAN WILLIAMS, L.J., at p. 518; S. C., [1912] A. C. 421, per LORD SHAW OF DUNFERMLINE, at p. 486); and see *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., per FLETCHER MOULTON, L.J., at p. 920, 921 (where the society had two distinct funds; but the question was only dealt with *obiter* as neither object was held to be illegal; and, apparently, if the objects are really separate, it does not matter which is the "main" or "primary" object).

(u) The date of the passing of the Trade Unions Act, 1913 (2 & 3 Geo. 5, c. 30).

(a) As defined prior to the 7th March, 1913 (see note (u), *supra*). The definition was altered by the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30); see note (b), p. 597, *ante*.

(b) 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47.

(c) 34 & 35 Vict. c. 31, s. 4; see p. 615, *post*.

(d) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, 93, affirming S. C., [1909] 1 Ch. 163, 175, 183, C. A., which overruled *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361; compare *Re Amos, Carrier v. Price*, [1891] 3 Ch. 159, 164 (a registered trade union is "a body which exists for certain purposes contemplated by the Act, but for no others"); *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, 262; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, C. A., per FARWELL, L.J., at p. 558; affirmed, [1913] A. C. 107; *Oram v. Hutt*, [1913] 1 Ch. 259, 266. Apparently the doctrine stated in the text did not apply to an unregistered trade union; compare *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., per COZENS-HARDY, M. R., at p. 176, and per FARWELL, L.J., at p. 190; S. C., [1910] A. C. 87, per LORD MACNAGHTEN, at p. 94; but see *Amalgamated Society of Railway Servants v. Osborne*, *supra*, per LORD HALSBURY, at p. 93; *Wilson v. Scottish Typographical Association*, [1912] S. C. 534. The principles which determined whether an act or an object was *ultra vires* were held to be as applicable to trade unions as to companies (*Amalgamated Society of Railway Servants v. Osborne*, *supra*, at pp. 92, 94, 104, applying *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, and *Wenlock (Baroness) v. River Dee Co.* (1885), 10 App. Cas. 354; as to powers of companies, see, generally, *TITLES COMPANIES*, Vol. V., pp. 285, 725; *RAILWAYS AND CANALS*, Vol. XXIII., pp. 628, 629); and the powers of trade unions, being statutory, were held to be construed strictly, so that what was not expressly or by reasonable implication authorised was prohibited (*Amalgamated Society of Railway Servants v. Osborne*, *supra*; compare *Hammersmith, etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171; *Laing v. Reed* (1869),

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5 Ch. App. 4; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519; *A.-G. v. Manchester Corporation*, [1906] 1 Ch. 643; and the cases referred to in title COMPANIES, Vol. V., pp. 285, 725). A power might be not only consistent with, but reasonably conducive to, the objects of the union and yet not so necessary as to be implied when not expressly given (*Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, 96); and it was not enough to show that a power was incidental, ancillary, or conducive to the purposes of the union; it must be granted by fair implication from the powers expressly granted (*ibid.*, at pp. 97, 103, where the use of the word "incidental" in *A.-G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, was explained). Consequently, what was not within the ambit of the Trade Union Acts was held to be prohibited to a union (*Amalgamated Society of Railway Servants v. Osborne*, *supra*, at pp. 93, 94), whether it was inserted as an original rule, or subsequently by amendment (*ibid.*, at p. 97; but see *ibid.*, *per* Lord ATKINSON, at p. 100, where it was suggested that, if the rule had existed before the plaintiff became a member, he might possibly have been bound by it; and apparently, the original objects of a union might be added to by amendment, but the point has not been expressly decided; see *ibid.*; S. C., [1909] 1 Ch. 163, C. A., *per* COZENS-HARDY, M.R., at p. 177, and *per* FLETCHER MOULTON, L.J., at p. 183); and it was held to be *ultra vires* for a registered union to collect and apply its funds for the purpose of securing representation in Parliament (*Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, overruling *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361); or on municipal or other local government bodies (*Wilson v. Amalgamated Society of Engineers*, [1911] 2 Ch. 324, where, by agreement, an exception was made in the case of boards of guardians). A levy was held to be none the less compulsory by reason of the fact that the members were notified that, if they objected to pay, they must send a protest in writing to their branch secretary, and that the levy would be charged only on non-protesting members (*ibid.*). But the fact that the rules of a trade union included a rule which under the decision in the above cases was *ultra vires* was held not to prevent the union from being a trade union within the meaning of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (*Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 28 T. L. R. 518, C. A.); nor did the presence of such an *ultra vires* rule prevent a union from being sued in its registered name, so long as its certificate of registration was not withdrawn or cancelled (*Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366). As to the application of funds in the assistance of litigation by members, see p. 629, *post*. In *Amalgamated Society of Railway Servants v. Osborne*, *supra*, at p. 98, Lord JAMES OF HEREFORD based his judgment, not on the ground that the object was *ultra vires* (as to which he dissented), but on the ground that by a rule of the union all candidates were to sign and accept the conditions of a particular political party and obey its "whip"; and Lord SHAW OF DUNFERMLINE expressed doubt (*ibid.*, at p. 106) as to whether the object was *ultra vires*, but based his judgment on the principle that an agreement by which a man binds himself to vote as a member of Parliament in accordance with the direction of another person or body is against public policy; compare S. C., [1909] 1 Ch. 163, C. A., *per* FLETCHER MOULTON, L.J., at p. 186, and *per* FARWELL, L.J., at p. 194, who suggested that on the same principle it would be illegal for a landlord to bind his tenant, or an employer to compel his workmen, on pain of dismissal, to subscribe to party funds. On this question the rest of the court refrained from expressing an opinion. As to public policy generally, see note (h), p. 525, *ante*; and title CONTRACT, Vol. VII., pp. 394 *et seq.* *Quære*, whether a union might use its funds in support of a newspaper advocating its interests; from *Linaker v. Pilcher* (1901), 70 L. J. (K. B.) 396, 400, it would seem that it might so long as the paper was not carried on for purposes of profit or as a trade adventure (as to the question of liability of the trustees for a libel in such paper, see p. 665, *post*); but see *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., *per* FARWELL, L.J., at p. 192;

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By the Trade Union Act, 1913 (*e*), the fact that a combination has under its constitution objects or powers other than statutory objects (*f*) does not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871—1906 (*g*), so long as the combination is a trade union within the statutory definition. Subject to provisions as to the furtherance of political objects (*h*), any such trade union has power to apply its funds for any lawful objects or purposes for the time being authorised under its constitution (*i*).

Political
objects.

1145. There are, however, certain political objects in the furtherance of which a union may only apply its funds subject to certain prescribed conditions. These objects are the expenditure of money—

(1) on the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election to Parliament or to any public office before, during or after the election in connexion with his candidature or election (*k*);

(2) on the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate (*l*);

(3) on the maintenance of any person who is a member of Parliament or who holds a public office (*m*);

(4) in connexion with the registration of electors or the selection of a candidate for Parliament or any public office (*n*);

Vacher & Sons, Ltd. v. London Society of Compositors, [1912] 3 K. B. 547, C. A., *per* FARWELL, L.J., at p. 559: "It is no part of the functions of a trade union to print and publish a newspaper"; but see note (*i*). *infra*.

(*e*) 2 & 3 Geo. 5, c. 30, s. 2 (1); see pp. 597, 598, *ante*. The Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30) is by *ibid.*, s. 8, to be construed as one with the Trade Union Acts, 1871 (34 & 35 Vict. c. 31), and 1876 (39 & 40 Vict. c. 22).

(*f*) Namely, the objects mentioned in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16; and also the provision of benefits to members (Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30) s. 1 (2)); and see pp. 597, 598, *ante*.

(*g*) 34 & 35 Vict. c. 38; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47.

(*h*) See the text, *infra*.

(*i*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 1 (1). This appears clearly to authorise the running of or subscribing to a newspaper if power to do so is taken by the rules; thus disposing of the doubt referred to in note (*d*), p. 607, *ante*. But the object must be lawful; and it is conceived that the decision in *Oram v. Hutt*, [1913] 1 Ch. 259 (a union may not pay the costs of an action by one of its officers in circumstances constituting maintenance) remains unaffected; see p. 630, *post*.

(*k*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (3). Public office is defined as the office of member of any county, county borough, district or parish council or board of guardians, or of any public body who have power to raise money, either directly or indirectly, by means of a rate (*ibid.*). As to election expenses generally, see title ELECTIONS, Vol. XII., pp. 335, 336, 363, 364, 373, 380.

(*l*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (3).

(*m*) *Ibid.*; as to the meaning of public office, see note (*k*), *supra*.

(*n*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (3). As to the registration of electors, see title ELECTIONS, Vol. XII., pp. 241 *et seq.*

(5) on the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects as defined by statute (o).

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1146. The funds of a trade union (*p*) may not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the above-mentioned political objects (without prejudice to the furtherance of any other political objects), unless the furtherance of those objects has been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken for the purpose in accordance with the statutory provisions by a majority of the members voting, and unless also, where such a resolution is in force, certain rules are in force, which rules must be approved by the Registrar of Friendly Societies (hereinafter called the Registrar), whether the union is registered or not (*q*).

Necessity for
ballot.

Such a resolution takes effect as if it were a rule of the union, and may be rescinded in the same manner and subject to the same provisions as such a rule (*r*).

Resolution.

Such rules must provide (1) that any payments in furtherance of such objects are to be made out of a separate fund (referred to as the political fund of the union), and for the exemption of any member from any obligation to contribute to such a fund if he duly gives notice that he objects to contribute; (2) that a member who is exempt shall not be excluded from any benefits or placed in any respect, either directly or indirectly, under any disability or at any disadvantage as compared with other members of the union, except in relation to the control or management of the political fund, by reason of his being so exempt, and that contribution to the political fund shall not be made a condition for admission to the union (*s*).

Rules.

(o) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (3). Expenditure on meetings etc. in furtherance of statutory objects is permitted without qualification under *ibid.*, s. 1 (1). As to "statutory objects," see pp. 597, 598, *ante*.

(p) Including a union which is in whole or in part an association or combination of other unions (Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (5)). The prohibition applies clearly to both registered and unregistered unions.

(q) *Ibid.*, s. 3 (1). The Registrar of Friendly Societies means, in relation to a registered trade union whose registered office, or an unregistered trade union whose principal office, is situated in England or Wales, the Chief Registrar of Friendly Societies, and in relation to a registered trade union whose registered office, or an unregistered trade union whose principal office, is situated in Scotland or Ireland, the Assistant Registrar of Friendly Societies for Scotland or Ireland respectively (*ibid.*, s. 7). As to the Chief Registrar of Friendly Societies, see, generally, title FRIENDLY SOCIETIES, Vol. XV., pp. 129 *et seq.*

(r) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (4). As to the rules generally, see pp. 627 *et seq.*, *post*.

(s) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (1) (a), (b).

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Powers of
a Trade
UnionAggrieved
member.

1147. Any allegation by a member (*t*) that he is aggrieved by a breach of any rule so made is dealt with on complaint to the Registrar (*u*), who, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that a breach has been committed, make such order as he thinks just in the circumstances. Such order is binding and conclusive without appeal, and is not removable into any court of law or restrainable by injunction, and on being recorded in the county court may be enforced as if it had been an order of the county court (*w*).

Taking of
ballot.

1148. The ballot must be taken in accordance with rules of the union, to be approved for the purpose, whether the union is registered or not, by the Registrar (*u*). The Registrar must not approve any such rules unless he is satisfied that every member has an equal right and, if reasonably possible, a fair opportunity of voting, and that the secrecy of the ballot is properly secured (*b*).

Objection to
contribute.

1149. A member of a union may at any time give notice in a prescribed form (*c*), or in a form to the like effect, that he objects to contribute to the political fund, and on the adoption of a resolution of the union approving the furtherance of political objects as an object of the union, notice must be given to the members acquainting them that each member has a right to be exempt from contributing, and that a form of exemption notice can be obtained by or on behalf of a member either by application at or by post from the head office or any branch office of the union, or the office of the Registrar (*d*).

Exemption.

1150. On giving the proper notice of objection a member is exempt, so long as his notice is not withdrawn, from contributing to the political fund as from the 1st January next after the notice is given, or, in the case of a notice given within one month

(*t*) It is to be noted that no provision is made for the case of a person who desires to be a member but is rejected because he will not undertake to contribute to the political fund.

(*u*) See p. 609, *ante*.

(*w*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (2). In Scotland, for "county court." read "sheriff court," and for "injunction" read "interdict" (*ibid.*)

(*a*) See p. 609, *ante*.

(*b*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 4 (1).

(*c*) The form prescribed in *ibid.*, Schedule, is as follows:—

"[Name of Trade Union.]

"Political Fund (Exemption Notice).

"I hereby give notice that I object to contribute to the political fund of the Union, and am in consequence exempt, in manner provided by the Trade Union Act, 1913, from contributing to that fund.

A. B.

[Address.]

day of 19 ."

(*d*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 5 (1). Any such notice must be given in accordance with rules approved for the purpose by the Registrar, having regard in each case to the existing practice and to the character of the union (*ibid.*). Apparently, therefore, it is not necessary that a written notice be sent to each member. As to the meaning of "the Registrar," see p. 609, *ante*.

after the notice given to members on the adoption of a resolution approving the furtherance of political objects (*e*), as from the date on which the member's notice is given (*f*).

SECT. 2.
Powers of
a Trade
Union.

Separate
levies.

1151. Effect may be given to the exemption from contribution either by a separate levy of contributions to the political fund from the members who are not exempt, in which case the rules must provide that no moneys of the union other than the amount raised by such separate levy shall be carried to that fund, or by relieving any members who are exempt from the payment of the whole or any part of any periodical contributions required from the members of the union towards the expenses of the union, in which case the rules must provide that the relief shall be given as far as possible to all exempt members on the occasion of the same periodical payment and for enabling each member to know, as respects any such periodical contribution, what portion, if any, of the sum payable by him is a contribution to the political fund of the union (*g*).

1152. All the provisions as to the application of funds for political purposes apply to a union which is in whole or in part an association or combination of other unions as if the individual members of the component unions were the members of that union and not the unions; but nothing in the Act (*h*) prevents any such component union from collecting from any of its members who are not exempt from contribution to the political fund (*i*), on behalf of the association or combination, any contributions to the political fund of the association or combination (*h*).

Association of
unions.

1153. If the Registrar (*j*) is satisfied, and certifies, that rules for the purpose of a ballot, or rules made for other purposes under the Trade Union Act, 1913 (*k*), which require his approval, have been approved by a majority of members of a union, whether registered or not, voting for the purpose, or by a majority of delegates of such a union voting at a meeting called for the purpose, those rules shall have effect as rules of the union, notwithstanding that the provisions of the rules as to the alteration of rules, or the making of new rules, have not been complied with (*l*).

Rules as to
ballot.

1154. Any unregistered trade union may, if it thinks fit, at any time, without registering, apply to the Registrar (*j*) for a certificate that it is a trade union within the meaning of the Trade Union Act, 1913 (*m*). The Registrar, if satisfied, having regard to

Unregistered
trade union.

(*e*) As to this notice, see p. 610, *ante*.

(*f*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 5 (2).

(*g*) *Ibid.*, s. 6.

(*h*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3 (5).

(*i*) As to exemption, see p. 610, *ante*.

(*j*) See p. 609, *ante*.

(*k*) 2 & 3 Geo. 5, c. 30.

(*l*) *Ibid.*, s. 4 (2). As to the rules generally, see pp. 627 *et seq.*, *post*.

(*m*) 2 & 3 Geo. 5, c. 30, s. 2 (3); and see note (*b*), p. 597, *ante*.

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the constitution of the union, and the mode in which the union is being carried on, that the principal objects of the union are statutory objects (*n*), and that the union is actually carried on for those objects, must grant such a certificate, but he may, on an application made by any person to him for the purpose, withdraw any such certificate if satisfied, after giving the union an opportunity of being heard, that the certificate is no longer justified (*o*).

Such certificate is conclusive for all purposes so long as it is in force (*p*).

Appeal.

1155. Any person aggrieved by any refusal of the Registrar to give such a certificate, or by the withdrawal of such a certificate as aforesaid, may appeal to the High Court within the time and in the manner and on the conditions directed by rules of court (*q*).

SECT. 3.—*Trade Union Agreements.*

SUB-SECT. 1.—*When Trade Union Legal at Common Law.*

Mode of
enforcement.

1156. When a trade union is a legal association at common law (*r*) its agreements may, apart from and irrespective of the Trade Union Acts (*s*), be enforced (*t*) as in the case of any ordinary club, the

(*n*) See pp. 597, 598, *ante*.

(*o*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (3).

(*p*) *Ibid.*, s. 2 (5).

(*q*) *Ibid.*, s. 2 (4); compare title FRIENDLY SOCIETIES, Vol. XV., p. 134.

(*r*) See p. 600, *ante*.

(*s*) 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47.

(*t*) *Rigby v. Connol* (1880), 14 Ch. D. 482, 491; *Swaine v. Wilson* (1889), 24 Q. B. D. 252, C. A.; *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A.; *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., *per* CHANNELL, J., at p. 906, and *per* COZENS-HARDY, M.R., at p. 916; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, 515, C. A.; S. C., [1912] A. C. 421, 429; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A.; and see *Baker v. Ingall*, [1912] 3 K. B. 106, 112, 117, C. A. It is to be noted, however, that in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, Lord LOREBURN, L.C., at pp. 428, 429, apparently regarded the question whether the union was legal or illegal at common law as irrelevant, and decided that an action against a union to recover benefits was not maintainable on the broad ground that "the action is against a trade union directly to enforce or recover damages for breach of an agreement to provide benefits for members." Lord ATKINSON (*ibid.*, at p. 430) also expressed no opinion upon the legality or illegality of the union, and decided that the action was not maintainable on the sole ground that the union was sued in a common law action (as distinguished from a representative action in equity) in its registered name and by its trustees, and that by reason of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, did not apply. Lord ROBSON (*Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, at p. 438) also doubted whether an action against the union in its registered name and its trustees was properly framed; but the other members of the court (Lords MACNAGHTEN, SHAW OF DUNFERMLINE, and MERSEY) decided the case on the ground that the union was by virtue of its rules illegal at common law. The judgments of Lord LOREBURN, L.C., and Lord ATKINSON (see *supra*) were treated as binding in *Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association* (1912), 28 T. L. R. 372, though not necessary

jurisdiction being founded on a right of property vested in the member seeking relief (*u*).

SUB-SECT. 2.—*When Trade Union Illegal at Common Law.*

(i.) *Agreements in General Legal.*

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Union
Agree-
ments.

1157. An association even though illegal at common law as being in restraint of trade is by statute, in the case of a trade union, cleared from the taint of illegality either criminal or civil (*w*). If, however, it is illegal at common law on that ground, and is therefore compelled to rely upon the Trade Union Acts (*x*) to establish its legality, certain of its agreements are unenforceable by any party thereto (*y*). Restraint of trade.

1158. The purposes of a trade union, whether registered or not (*z*), are not by reason merely that they are in restraint of trade unlawful so as to render any member liable to criminal prosecution for conspiracy or otherwise (*a*), or so as to render void or voidable any Effect of agreements.

for the decision of that case; but their precise effect upon the hitherto accepted principle that the distinction between legality and illegality at common law is essential is not clear, and in view of the judgments of the majority of the House it is conceived that the principle cannot be said to have been overruled. Probably all that was meant was that a trade union legal at common law can only be sued in a representative action and not in its registered name. As to procedure, see pp. 664 *et seq.*, *post*.

(*u*) *Rigby v. Connol* (1880), 14 Ch. D. 482, *per* JESSEL, M.R., at p. 487; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., *per* COZENS-HARDY, M.R., at pp. 553, 554. The right of voting is a property right (*ibid.*, *per* COZENS-HARDY, M.R., at p. 554, and *per* BUCKLEY, L.J., at p. 567), and "property" is not limited to a beneficial interest in land or chattels (*ibid.*, *per* FLETCHER MOULTON, L.J., at p. 562, where it was suggested that a member of an association formed for charitable purposes has as much right to see to the proper administration of the funds as if he had a beneficial interest in them). The members of a trade union have an undoubted interest in property, even in the narrow sense of the word (*ibid.*); compare *Pender v. Lushington* (1877), 6 Ch. D. 70 (a vote may be property); *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Finch v. Oake*, [1896] 1 Ch. 409, C. A. (where, apparently, it was, by implication, held that a member of a voluntary trade protection society entitled to legal assistance and to participate in a possible benevolent fund had a property sufficient to support a claim for an injunction against expulsion; but the injunction was refused on other grounds; see pp. 619, 620, *post*). As to the rights and liabilities of members of clubs, see title CLUBS, Vol. IV., pp. 405 *et seq.*

(*w*) See note (*a*), *infra*, note (*b*), p. 614, *post*. As to the definition of a trade union, see pp. 597, 598, *ante*.

(*x*) 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47.

(*y*) See pp. 615 *et seq.*, *post*. But as to a doubt thrown on the relevance of the distinction between legality and illegality, see note (*t*), p. 612, *ante*.

(*z*) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 437; *Osborne v. Amalgamated Society of Railway Servants*, *supra*, *per* FARWELL, L.J., at p. 190 (the first four sections of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 1—4, give protection to all trade unions, whether registered or unregistered).

(*a*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 2. Consequently a trade union which is divided into a number of district lodges which constitute branches of the association but act separately from each other, having separate officers and appointing delegates to meet and confer with

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agreement or trust (b). A payment made under any such agreement is made for valid consideration and cannot be recovered back, and is neither *ultra vires* nor a breach of trust (c).

delegates of other associations, is not a criminal association within the meaning of the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), and the Seditious Meetings Act, 1817 (57 Geo. 3, c. 19) (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 466), for though these statutes cannot be said to be obsolete, the manner in which Parliament has dealt with trade unions is quite inconsistent with their criminality (*Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371; *Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366). As to the question whether such combinations were criminal at common law, see note (t), p. 600, *ante* p. 639, *post*; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 263, note (o).

(b) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 3. The principal objects of this enactment were to protect trade unions from defalcations by their officers and to enable them to hold, and sue in respect of, property (*Rigby v. Connol* (1880), 14 Ch. D. 482, *per* JESSEL, M.R., at p. 489; *Wolfe v. Matthews* (1882), 21 Ch. D. 194, *per* FRY, J., at p. 196; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 428). The agreements here rendered legal include the contract of membership and rights arising out of it; see *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., *per* FLETCHER MOULTON, L.J., at p. 559; and see also *ibid.*, *per* BUCKLEY, L.J., at p. 567: "He [the plaintiff] enjoyed a vote as a member, a right to subscribe to certain funds, a right to benefits from those funds, an interest in common with his fellow members in the property of the society, a like right in all the advantages of membership, and, in case the society should be dissolved and the common purposes thus come to an end, a right to his distributive share of the assets. These rights were all, by virtue of s. 3 [of the Trade Union Act, 1871 (34 & 35 Vict. c. 31)], lawful, although some, but not all, were by virtue of s. 4 unenforceable. The right to have benefits from the funds was unenforceable; others seem to me to be clearly enforceable. There is nothing in s. 4 to forbid a court to entertain legal proceedings to enforce the member's right to his vote or his right to his distributive share in winding up. It is quite plain that he had rights in respect of property. All the property of the society belonged to him and his co-members, and none the less because s. 4 renders unenforceable certain rights in respect of that property"; compare *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256; S.C., [1903] 1 K. B. 308, 324, C. A.; *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87; *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741, *per* BLACKBURN, J., at p. 746; and, in the light of the statement of BUCKLEY, L.J. (quoted *supra*), see *Strick v. Swansea Tin-plate Co.* (1887), 36 Ch. D. 558 (where, on the winding up of an (apparently) unregistered masters' association, a summons was taken out by the trustees for the determination of the question who was entitled to share in the distribution; seven members had been expelled under a rule authorising expulsion for breach of any rule; the rule they had broken was admittedly in restraint of trade and included among the agreements declared unenforceable; an order was made directing an inquiry as to who were entitled to participate; the Chief Clerk's certificate disallowed the claim of the seven members, who objected that to disallow their claims was to enforce directly the rule under which they had been expelled: held by NORTH, J., (i.) that the objection came too late, the court having already directed the inquiry and thereby entertained the proceeding; (ii.) that the proceeding having thus been entertained and the unenforceable agreements being by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, expressly declared not to be unlawful, the court was able to give effect to the rule for breach of which the seven members had been expelled and to treat them as no longer members).

(c) *Osborne v. Amalgamated Society of Railway Servants*, *supra*, *per* FLETCHER MOULTON, L.J., at p. 558.

(ii.) *Unenforceable Agreements.*

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ments.When no
action lies.

1159. Though agreements are thus made lawful, nothing in the statutory provisions enables any court to entertain any proceedings instituted with the object of directly (*d*) enforcing or recovering damages for the breach of any of the following agreements (*e*) made by a trade union whether registered or unregistered (*f*) and whether the action is brought by a member or by some person claiming in his place (*g*):—

(1) Any agreement between members of a union as such concerning the conditions on which any members for the time being shall or shall not sell their goods, transact business (*h*), employ or be employed (*i*);

(*d*) As to the meaning of this word, see note (*l*), p. 620, *post*.

(*e*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.

(*f*) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., *per* FARWELL, L.J., at p. 190 (see note (*z*), p. 613, *ante*); *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., *per* COZENS-HARDY, M.R., at p. 916, and *per* FLETCHER MOULTON, L.J., at p. 919; see also *ibid.*, *per* CHANNELL, J., at p. 905. The contrary view had been expressed in *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583, *per* A. T. LAWRENCE, J., at p. 591. In *Wolfe v. Matthews* (1882), 21 Ch. D. 194, and *Strick v. Swansea Tin-plate Co.* (1887), 36 Ch. D. 558, the union was not registered. If the union is legal at common law the prohibition against the enforcement of agreements does not apply, unless the judgments of Lord LOREBURN, L.C., and Lord ATKINSON in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, 428, 430 (as to which see note (*t*), p. 612, *ante*), are to be taken to have altered the law. It seems, therefore, that any trade union, registered or unregistered, which, like the Amalgamated Society of Railway Servants, has no rules in restraint of trade (see note (*c*), p. 602, *ante*) may be sued by any member for payment of any benefits provided for by the rules; but *quære* whether it could be sued, if registered, in its registered name; see note (*t*), p. 612, *ante*.

(*g*) *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*, at p. 437; S. C. (1909), as reported 25 T. L. R. 520, *per* PHILLIMORE, J., at p. 521; see note (*g*), p. 626, *post*. The prohibition against entertaining actions applies to an action by a nominee under the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10, as to which see note (*g*), p. 626, *post* (*Crocker v. Knight*, [1892] 1 Q. B. 702, C. A.); and guardians of the poor who have, under the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 32, incurred expense in the relief of a pauper lunatic cannot recover the amount from a trade union from which such pauper is entitled to an allowance; nor is a trade union a benefit or friendly society within that provision (*Winder v. Kingston-upon-Hull Corporation for the Poor (Governors etc.)* (1888), 20 Q. B. D. 412).

(*h*) *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A. (tea clearing-house association; members bound by rules not to charge less than certain rates or to deal with non-members: held a trade union with illegal objects at common law; and a member expelled for alleged breach of rules could not sue for an injunction to restrain the society from acting upon the resolution to expel him); as to this case, see note (*h*), p. 618, *post*; compare *Strick v. Swansea Tin-plate Co.*, *supra* (see note (*b*), p. 614 *ante*).

(*i*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (1); *Mullett v. United French Polishers' London Society* (1904), 20 T. L. R. 595 (action to restrain a union from levying a fine for an alleged breach of a rule is not maintainable, being an attempt to enforce directly one of the specified agreements; but it is not stated which class of agreements was referred to; presumably it was an agreement concerning the conditions on which

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(2) Any agreement for the payment by any person of any subscription or penalty to a union (*k*);

(3) Any agreement for the application of the funds of a union to provide benefits to members (*l*), that is, sick and strike pay and the like; the word "benefits" does not include a special undertaking to a member to pay the costs of legal proceedings prosecuted by the union in his name, and on his behalf (*m*), nor, apparently, does it

the members should be employed, or an agreement for the payment of a penalty, or both), following *Rigby v. Connol* (1880), 14 Ch. D. 482, and *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A., and distinguishing *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, C. A. (for these cases, see note (*h*), p. 618, *post*). By agreements concerning the conditions on which a member shall or shall not be employed are meant agreements as to conditions of employment when a man is actually employed, in regard to such things as hours and wages, and bonds and arrangements between the employer and employee; not as to whether a member shall or shall not be employed (*Baker v. Ingall*, [1911] 2 K. B. 132, 139; reversed, [1912] 3 K. B. 106, C. A., but, apparently, without affecting the above *dictum*).

(*k*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (2). An action to recover the amount of a fine deducted from a benefit payment is an action to enforce, or to recover damages for breach of, an agreement for the application of funds to provide benefits (*Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, 918, C. A. (see note (*l*), *infra*); *Mullett v. United French Polishers' London Society* (1904), 20 T. L. R. 595). *Quære*, whether an agreement by a member to repay in certain events money which he has received as a benefit can be described as an agreement for the payment of a penalty. In *Baker v. Ingall*, *supra*, at pp. 139, 140, it was held that it could not, and that what is not a penalty at common law cannot be a penalty under the Act, and also, apparently, that a penalty under the Act does not comprise all things that could be called penalties at common law, but it is confined to matters such as fines or exclusion from benefits. But the Court of Appeal, [1912] 3 K. B. 106, reversed the decision, holding that such agreement was part of an agreement for the application of funds to provide benefits; see note (*o*), p. 617, *post*.

(*l*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (3) (*a*); *Sayer v. Amalgamated Society of Carpenters and Joiners* (1902), 19 T. L. R. 122; *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A.; *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583; *Gozney v. Bristol Trade and Provident Society*, *supra* (where, the society being legal, it was held that the court had jurisdiction on a claim for payment of a sum deducted from sick benefit by way of a fine; but had the society been illegal there would have been no jurisdiction); *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A. (see note (*h*), p. 618, *post*); *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A.; S. C., [1912] A. C. 421; *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 26 T. L. R. 518 (tool benefit, that is, indemnification for loss of tools); *Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association* (1912), 28 T. L. R. 372; compare *M'Kernan v. United Operative Masons' Association* (1874), 1 R. (Ct. of Sess.) 453 (accident benefit); *Shanks v. United Operative Masons' Association* (1874), 1 R. (Ct. of Sess.) 823). *Quære* whether an action by new trustees to recover funds from old trustees is maintainable; see *Cope v. Crossingham*, *supra*, per COZENS-HARDY, M.R., at p. 159; and p. 619, *post*.

(*m*) *Lees v. Lancashire and Cheshire Miners' Federation* (1906), *Times*, 20th June (held, that the member was entitled to an indemnity and an order that the costs be paid by the union to the successful defendant in the action; the action had been brought in the interests of the whole union); and compare *General Union of Operative Carpenters and Joiners v. O'Donnell* (1877), 11 I. L. T. (Journal) 282. As to the liability of a union on a guarantee to a solicitor to pay his costs in conducting litigation

include the payments on distribution of the fund in a winding-up (*n*); an agreement to repay in certain events a benefit received is an agreement for the application of the funds to provide benefits (*o*);

(4) Any agreement for the application of the funds of a union to furnish contributions to any employer or workman not a member of the union in consideration of his acting in conformity with the rules or resolutions of the union (*p*);

(5) Any agreement for the application of the funds of a union to discharge any fine imposed upon any person by sentence of a court of justice (*q*);

(6) Any agreement made between one union and another (*r*);

(7) Any bond to secure the performance of any of the agreements so declared to be unenforceable (*s*).

1160. The agreements so declared unenforceable remain nevertheless lawful (*t*). There appears to be nothing to prevent a court from declaring the meaning of any agreement or rule, even though it cannot grant consequential relief (*a*), and the court will entertain proceedings to determine whether in given circumstances the rules authorise the payment of strike pay (*b*), or to establish the right

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 court in
 respect of
 such agree-
 ments.

on behalf of members, see *Mackendrick v. National Union of Dock Labourers in Great Britain and Ireland* (1910), 48 Sc. L. R. 17 (union held liable, on the construction of the rules, in respect of such guarantee given by a branch).

(*n*) See *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., per BUCKLEY, L.J., at p. 567 (quoted in note (*b*), p. 614, *ante*). For a case where the court has made an order in respect of distribution of funds in a winding-up, see *Strick v. Swansea Tin-plate Co.* (1887), 36 Ch. D. 558, referred to in note (*b*), p. 614, *ante*, note (*n*), p. 621, *post*.

(*o*) *Baker v. Ingall*, [1912] 3 K. B. 106, C. A., reversing S. C., [1911] 2 K. B. 132 (where a member received a lump sum under an agreement to repay the same in the event of his returning to work: held, that the agreement by which he received the sum and the agreement by which he was to repay it were in effect one agreement for the application of the funds to provide benefits). Apparently, therefore, if a member is entitled under the rules to, and receives, a loan, he cannot be sued for repayment or interest; see *Baker v. Ingall*, [1912] 3 K. B. 106, C. A., per BUCKLEY, L.J., at p. 118. In *Wilkie v. King*, [1911] S. C. 1310, the court followed *Baker v. Ingall*, *supra*, before it was reversed.

(*p*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (3) (*b*); see *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per FLETCHER MOULTON, L.J., at p. 558.

(*q*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (3) (*c*).

(*r*) *Ibid.*, s. 4 (4).

(*s*) *Ibid.*, s. 4 (5).

(*t*) *Ibid.*, s. 4; compare *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per FLETCHER MOULTON, L.J., at p. 558; *M'Kernan v. United Operative Masons' Association* (1874), 1 R. (Ct. of Sess.) 453; and see note (*b*), p. 614, *ante*.

(*a*) See *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per FLETCHER MOULTON, L.J., at p. 560; *Denaby and Cadeby Main Collieries Co., Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384; *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., per FLETCHER MOULTON, L.J., at p. 918; and compare *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741.

(*b*) *Re Durham Miners' Association*, *Watson v. Cann* (1900), 17 T. L. R. 39, C. A. (where the question of jurisdiction does not appear to have been raised); *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256;

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of persons interested to inspect the books by an accountant (c), or to ascertain the proportions in which the funds should be distributed on a dissolution (d).

1161. The agreements so declared unenforceable do not cover all the agreements which a trade union may, under the Trade Union Act, 1871 (e), legally make (e), and consequently any agreement which does not come within the terms of the prohibition is not only lawful, but may be enforced (f).

(iii.) *Meaning of Direct Enforcement.*

Injunction.

1162. The court cannot make an order entitling a member to participate (g) in the funds of a union, or for the administration of such funds (h). An action for an injunction to restrain members from applying the funds of the union in a manner incon-

S. C., [1903] 1 K. B. 308, 330, C. A. (the payment of strike pay to members who in breach of a rule have struck without the sanction of the union and without giving proper notices terminating their employment is not a mere matter of internal administration with which the courts cannot interfere).

(c) *Norey v. Keep*, [1909] 1 Ch. 561.

(d) *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184. This may, however, not involve any inquiry into any unenforceable agreement; see p. 616, *ante*.

(e) 34 & 35 Vict. c. 31; *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, *per* Lord MACNAGHTEN, at p. 266; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506, C. A.; [1912] A. C. 421; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., *per* COZENS-HARDY, M.R., at p. 554, and *per* BUCKLEY, L.J., at p. 567 (quoted in note (b), p. 614, *ante*). For an instance of an enforceable agreement, see *Lees v. Lancashire and Cheshire Miners' Federation* (1906), *Times*, 20th June, referred to in note (m), p. 616, *ante*.

(f) For instances of such enforceable agreements and rights, see *Osborne v. Amalgamated Society of Railway Servants*, *supra*, *per* BUCKLEY, L.J., at p. 567.

(g) Except perhaps in a winding-up; see note (d), *supra*.

(h) *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741, *per* BLACKBURN, J., at p. 747 ("We cannot administer the funds in dispute; but I can see no reason why the parties should not be able to obtain relief and adjudication upon their rival claims in equity"); *Rigby v. Connol* (1880), 14 Ch. D. 482, as explained in *Osborne v. Amalgamated Society of Railway Servants*, *supra*, at p. 554; *Duke v. Littleboy* (1880), 49 L. J. (CH.) 802, following *Rigby v. Connol*, *supra*; *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A., following *Rigby v. Connol*, *supra*; and compare *Aitken v. Associated Carpenters and Joiners of Scotland* (1885), 12 R. (Ct. of Sess.) 1206; but *quære* whether *Rigby v. Connol*, *supra*, was rightly decided; see *Yorkshire Miners' Association v. Howden*, *supra*, *per* Lord HALSBURY, L.C., who, while distinguishing between *Rigby v. Connol*, *supra*, and *Wolfe v. Matthews* (1882), 21 Ch. D. 194, said, at p. 261: "I am bound, however, to say if that decision [*Rigby v. Connol*, *supra*] ever came up for review, I think it would have to be considered whether it does not strike the word 'direct' out of the statute"; *Yorkshire Miners' Association v. Howden*, *supra*, *per* Lord MACNAGHTEN, at p. 265. In *Osborne v. Amalgamated Society of Railway Servants*, *supra*, though the actual decision in *Rigby v. Connol*, *supra*, was not questioned, because the plaintiff there expressly claimed to be entitled to participate in the funds, certain expressions in the judgment (suggesting that the intervention of the court is excluded in any question arising upon the agreement constituted by the rules and

sistent with the rules is, however, maintainable (i), as is an action for

that the mere declaration of right to membership would amount to decreeing the specific performance of the whole contract of membership) were criticised and disapproved; see *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., per COZENS-HARDY, M.R., at p. 554, per FLETCHER MOULTON, L.J., at pp. 561, 563, and per BUCKLEY, L.J., at p. 568. Apparently *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605, C. A., may be subject to different considerations, the agreement there being not for the provision of benefits, but an agreement under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (1) (see p. 615, *ante*); and this case was distinguished in *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, per Lord LINDLEY, at p. 283, and in *Osborne v. Amalgamated Society of Railway Servants*, *supra*, but not questioned; see *ibid.*, per FLETCHER MOULTON, L.J., at p. 564. Possibly, too, both *Rigby v. Connol* (1880), 14 Ch. D. 482, and *Chamberlain's Wharf, Ltd. v. Smith*, *supra*, may be supported on the ground that to restore the plaintiff to membership would have involved an inquiry into the validity of the action of the society under a rule which came within the unenforceable agreements (see *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per BUCKLEY, L.J., at p. 569), whereas in *Osborne v. Amalgamated Society of Railway Servants*, *supra*, the plaintiff was not expelled for breach of any rule covered by the provisions of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4. In *Duke v. Littleboy* (1880), 49 L. J. (CH.) 802, where the officers of a union sued the officers of a branch (i) to restrain them from dividing the branch funds in contravention of the rules, and (ii.) for payment over of the funds, DENMAN, J., refused both remedies. The refusal of (ii.) was, apparently, right; see *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A.; and note (l), p. 616, *ante*; the refusal of (i.) was on a ground similar to that of *Rigby v. Connol*, *supra*, disapproved as above; and though in *Yorkshire Miners' Association v. Howden*, *supra*, Lord LINDLEY suggested, at p. 283, that the decision in *Duke v. Littleboy*, *supra*, was due to the fact that the object of the action was wider than the object in *Yorkshire Miners' Association v. Howden*, *supra*, it must probably be taken that on this point *Duke v. Littleboy*, *supra*, is overruled. In *Aitken v. Associated Carpenters and Joiners of Scotland* (1885), 12 R. (Ct. of Sess.) 1206, the court assumed that no rights flowing from membership were enforceable at all and refused a declaration that the expulsion was illegal on the ground that its effect would be *nil*, but this view seems clearly wrong; see note (l), p. 620, *post*; and compare *Cope v. Crossingham*, *supra* (a claim by a union for the payment of funds in the hands of trustees of a branch is an attempt to enforce directly an agreement for the application of funds to provide benefits; otherwise, where the claim is to restrain the misapplication of the funds; see note (i), *infra*; but *quare* whether the society in this case was illegal at common law; see note (c), p. 602, *ante*). *Cope v. Crossingham*, *supra*, appears to overrule a *dictum* in *Madden v. Rhodes*, [1906] 1 K. B. 534, per Lord ALVERSTONE, C.J., at p. 537, to the effect that the trustees of a union may recover by civil proceedings moneys, securities, books etc. withheld by trustees of a branch. As to the recovery of such by criminal proceedings, see p. 636, *post*.

(i) *Wolfe v. Matthews* (1882), 21 Ch. D. 194, distinguishing *Rigby v. Connol*, *supra*; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 428; *Alfin v. Hewlett* (1902), 18 T. L. R. 664; *Yorkshire Miners' Association v. Howden*, *supra*; compare *ibid.*, per Lord HALSBURY, L.C., at p. 261; *Denaby and Cadeby Main Collieries Co., Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384; *Cope v. Crossingham*, *supra*; *M'Laren v. Miller* (or *Amalgamated Society of Railway Servants for Scotland v. Motherwell Branch of the Society*) (1880), 7 R. (Ct. of Sess.) 867. Ordinarily the trustees are the proper persons to sue to protect the funds from misapplication, but if they refuse to do so an individual member may sue (*Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 328, 330, 336, C. A.; affirmed, *sub nom. Yorkshire*

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an injunction restraining the union from expelling a member (*k*). In neither of these cases is an agreement to provide benefits directly enforced, for such proceedings need not have either the object or the effect of involving the administration of the funds or their application to provide benefits (*l*).

Miners' Association v. Howden, [1905] A. C. 256. Such member need not have first applied to the trustees when it is clear that such application would have been useless (*Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 331, 341). As a matter of form it may be advisable that the member be expressed to sue on behalf of himself and the other members (*ibid.*, at p. 331); but, apparently, this is not necessary (*ibid.*, at p. 336). In such an action the trustees should be made defendants (*ibid.*, at pp. 308, 309, 323, 340); and see Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9; and p. 665, *post*. The injunction should take the form of prohibiting directly and in terms the diversion of the funds to the particular purpose which is held to be unauthorised (*Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, 266 (form of order restraining the defendants from misapplying the funds and dealing with them contrary to the rules, disapproved)); for a similar variation of the form of an injunction, see *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, 826, 832, C. A. As to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*k*) *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A.; *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371; *Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366.

(*l*) See the cases in note (*i*), p. 619, *ante*, note (*k*), *supra*. As to the meaning of the words "directly enforce" in *Rigby v. Connol* (1880), 14 Ch. D. 482, JESSEL, M.R., considered that to declare an expelled member entitled to share in the benefits and to restrain the union from excluding him therefrom were equivalent to directly enforcing an agreement for the application of the funds to provide benefits. As the plaintiff claimed to participate, the actual decision has not been overruled; but the reasoning of the decision has been criticised and disapproved; see *Wolfe v. Matthews* (1882), 21 Ch. D. 194, where FRY, J., distinguished *Rigby v. Connol*, *supra*, and illustrated the word "direct" at p. 196: "An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. Either that is no enforcement of the agreement at all or it is an indirect enforcement. To take a simple case, if there is a contract by A. to pay £100 to B., that contract is directly enforced by a judgment of the court directing A. to pay B. And the contract is only indirectly enforced or not at all by a judgment restraining A. from paying the money to someone else. It is only by a stretch of language that such an order can be said to enforce A.'s contract; the utmost that can be said is that it is then more likely that A. will pay B." This view was adopted in *Yorkshire Miners' Association v. Howden*, *supra*, per Lord HALSBURY, L.C., at p. 261, and per Lord LINDLEY, at p. 280 (compare S. C., [1903] 1 K. B. 308, per VAUGHAN WILLIAMS, L.J., at p. 328), although Lord MACNAGHTEN, at p. 264, suggested that the word "directly" merely pointed the antithesis between "proceedings to enforce agreements directly and proceedings to recover damages for breach of contract"; for a similar suggestion, see *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A., per BUCKLEY, L.J., at p. 159; *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per COZENS-HARDY, M.R., at p. 554 ("The statement of claim asks . . . an injunction to restrain the society from acting upon and enforcing the resolution [to expel the plaintiff]. It does not claim the payment of any sum of money out of the funds of the union. If the plaintiff obtains the relief he seeks, he will be entitled, not as a matter of legally enforceable right, but as a matter of reasonable expectation, to certain benefits for which he has subscribed"); and *ibid.*, at p. 555 ("FRY, J., in *Wolfe v. Matthews*, *supra*, drew a distinction between 'directly

(iv.) *Time for Taking Objection to Jurisdiction.*

1163. It appears that the objection to the jurisdiction may be taken on appeal, even though not taken in the court below (*m*). Where, however, an order has been made, although wrongly, by a court entertaining legal proceedings for the enforcement of any of the agreements so declared unenforceable, the objection that the proceedings cannot be entertained comes too late, if taken at a later stage during the working out of the order (*n*), and rules which are only illegal because they are in restraint of trade will be taken into consideration and enforced (*o*). Where a member sues officers of a union for a benefit payment and obtains a judgment against which no appeal is brought, and subsequently sues other officers for further instalments of the same benefit, the matter is not *res judicata*, if the society is illegal at common law and the action is not maintainable, and the defence in the second action is good (*p*).

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1164. Any seven or more members of a trade union subscribing

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members.

enforcing' and 'indirectly enforcing.' . . . This view was distinctly adopted by the Court of Appeal and by the House of Lords in *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256; and see *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., per FLETCHER MOULTON, L.J., at p. 559, and per BUCKLEY, L.J., at pp. 567, 568. It is to be noted that in *Osborne v. Amalgamated Society of Railway Servants*, *supra*, the whole of this discussion went on the assumption that the society was illegal at common law, an assumption which was held to be unfounded. Where a society is legal, no question of the prohibitions in the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, arises, unless the judgments of Lord LOREBURN, L.C., and Lord ATKINSON in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, at pp. 428, 430, are to be taken to have altered the law, as to which see note (*t*), p. 612, *ante*.

(*m*) See *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583, where, however, it was unnecessary to decide the point; and compare *London, Edinburgh and Glasgow Assurance Co. v. Partington* (1903), 19 T. L. R. 389; *General Union Society of Operative Carpenters and Joiners v. O'Donnell* (1877), 11 I. L. T. (Journal) 282. The objection can of course be taken in a defence, and also presumably in a clear case on an application to stay under R. S. C., Ord. 25, r. 4.

(*n*) *Strick v. Swansea Tin-plate Co.* (1887), 36 Ch. D. 558, 561, 562 (see note (*b*), p. 614, *ante*), quoted in *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per FARWELL, J., at p. 428, as deciding that on a winding-up the funds are distributed among the members in accordance with the rules of the society; but *quære* whether it decides more than that such is the result if the objection has not been taken in time. It would appear that on a winding-up the court may enforce the rules as to the rights of members to participate, on the ground that such rules do not come within the agreements declared unenforceable (see note (*d*), p. 618, *ante*), but that if a member has been expelled under a rule declared unenforceable, and his restoration to membership involves an inquiry into the validity of and the enforcement of that rule, the objection to the jurisdiction of the court, if taken in time, will be good; see note (*h*), p. 618, *ante*.

(*o*) *Strick v. Swansea Tin-plate Co.*, *supra*.

(*p*) *Cullen v. Elwin* (1904), 20 T. L. R. 490, C. A. Apparently, the court may take the objection even though the parties agree not to raise the question of illegality (*ibid.*, per ROMER, L.J., at p. 491, and per MATHEW, L.J., at p. 492; compare *Great North-West Central Railway v. Charlebois*, [1899] A. C. 114, P. C.).

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their names to its rules may register the union (*q*). The registration is void if any one of the purposes of the union is unlawful (*r*).

1165. An application to register, and printed copies of the rules with a list of the titles and names of the officers, must be sent to the Registrar (*s*), who, upon being satisfied that the union has complied with the regulations in force respecting registry, must register the union and the rules (*t*). If two applications are made by two sections of the same union each applying for registration in the same name and each claiming to have the authority of the governing body of the union, the Registrar is justified in refusing to register on either application (*u*).

The Registrar may not register any combination as a trade union unless in his opinion, having regard to the constitution of the combination, its principal objects are statutory objects (*w*).

If a union applying for registration has been in operation for more than a year before the date of application, a general statement of receipts, funds, effects and expenditure in the form of the annual general statement hereafter referred to must be sent to the Registrar (*a*).

Certificate.

The Registrar, on registering the union, issues a certificate which, unless proved to have been withdrawn or cancelled, is conclusive evidence that the regulations with respect to registry have been complied with (*b*).

Regulations.

1166. Regulations (*c*) as to registry and as to the seal, if any, to

(*q*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 6. As to forms, see note (*e*), p. 623, *post*.

(*r*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 6. "Unlawful" means unlawful in any other way than as being in restraint of trade; thus, a purpose might be criminal; compare *Swaine v. Wilson* (1889), 24 Q. B. D. 252, 256, C. A. The Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 6, 13 (5) (see note (*b*), *infra*), are to be read with the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 8 (see note (*z*), p. 626, *post*), and the result is that a registered union can be sued in its registered name until its certificate of registration is withdrawn or cancelled, notwithstanding that one of its rules is illegal (*Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366). As to right of action generally, see pp. 664 *et seq.*, *post*.

(*s*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 13 (1), 17. The Registrar lays before Parliament an annual report of the matters transacted by him in pursuance of the Act (*ibid.*, s. 17). For form of application, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 515. As to the Registrar, see p. 609, *ante*.

(*t*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (2).

(*u*) *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741; see note (*g*), p. 623, *post*.

(*w*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (2). As to the meaning of "statutory objects," see pp. 597, 598, *ante*.

(*a*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (4); see p. 631, *post*.

(*b*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (5). As to withdrawal and cancellation of registration, see pp. 625, 626, *post*; see also *Parr v. Lancashire and Cheshire Miners' Federation*, *supra*; and note (*r*), *supra*.

(*c*) The regulations in force are the Regulations (1876 and 1890) Governing Registered Trade Unions (Stat. R. & O. Rev., Vol. XIII., Trade

be used for the purposes of registry (*d*), the forms to be used for registry (*e*), the inspection of documents kept by the Registrar, and the fees, if any, to be paid (*f*), and generally for carrying the Acts into effect, are made by a Secretary of State (*g*). No such regulation can, however, make the Registrar's certificate conclusive evidence of the validity of an alteration of the rules (*h*).

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1167. Any person aggrieved by any refusal of the Registrar to register a combination as a trade union may appeal to the High Court within the time and in the manner and on the conditions directed by rules of court (*i*). Appeal.

SUB-SECT. 2.—*General Effect of Registration.*

1168. A registered trade union is not a corporation nor an individual nor a partnership (*k*); but it becomes by registration a legal entity distinct from an unregistered trade union (*l*). Its Legal entity.

Unions, p. 1), dated the 1st November, 1876, as amended 29th April, 1890; see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 506 *et seq.*

(*d*) There is no regulation as to the seal.

(*e*) For the form of application, and other forms, see Regulations (1876 and 1890) Governing Registered Trade Unions; *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 515.

(*f*) Not exceeding £1 for registering a union, 10s. for registering alterations in rules, and 2s. 6d. for inspection of documents (Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (6), and Sched. II.). The fees are the maximum fees set out above except that for inspection on the same day of one or more documents relating to the same union the fee is 1s., and certain additional fees; see Regulations (1876 and 1890) Governing Registered Trade Unions, r. 24. The Registrar may dispense with the fee for inspection of documents in cases where he may consider it to the public interest to do so (*ibid.*).

(*g*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (6). The regulations are made by the Home Secretary. In *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741, the following regulations of the Home Secretary (8th December, 1871) were considered to be *intra vires*: "(1) The Registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not registered . . . [for the words of the Act, see p. 624, *post*]; (2) Upon an application for the registration of a trade union which is already in operation, the Registrar, if he has reason to believe that the applicants have not been duly authorised by such trade union to make the same, may, for the purpose of ascertaining the fact, require from the applicants such evidence as may seem to be necessary." But no power is given by the Act to administer an oath or compel the production of any evidence; and, apparently, the duties of the Registrar are ministerial and not judicial; see the report of the Registrar, set out in *R. v. Registrar of Friendly Societies*, *supra*, at p. 743. The existing regulations, Regulations (1876 and 1890) Governing Registered Trade Unions, rr. 2, 3, are identical with the above.

(*h*) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, 176, C. A.

(*i*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (4). No such rules have as yet been made.

(*k*) *Re Amos, Carrier v. Price*, [1891] 3 Ch. 159, 164; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 427, 439, 440; *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, 280; compare *Mackendrick v. National Union of Dock Labourers in Great Britain and Ireland* (1910), 48 Sc. L. R. 17; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, *per* Lord MACNAGHTEN, at p. 429.

(*l*) *Taff Vale Railway v. Amalgamated Society of Railway Servants*,

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registered name is to be used and applied in all legal proceedings, unless there is any provision inconsistent with such use (*m*).

1169. Whether a trade union is registered or not is irrelevant to the question whether its agreements are enforceable, as is the fact that it describes itself as a trade union or as formed to regulate the relations between employers and workmen (*n*).

SUB-SECT. 3.—*Name.*

Resemblance
of name.

1170. No trade union may be registered under a name identical with that by which any other existing union has been registered, or so nearly resembling such name as to be likely to deceive the members or the public (*o*).

Change of
name.

A union may change its name with the approval in writing of the Registrar and the consent of not less than two-thirds of the total number of members. No change of name affects any right or obligation of the union or of any member, and any pending legal proceedings may be continued by or against the trustees of the union or any other officer who may sue or be sued on behalf of the union, notwithstanding the change (*p*).

Notice in writing of every change of name signed by seven members and countersigned by the secretary, together with a statutory declaration by the secretary that the statutory provisions in respect of changes of name have been complied with, must be sent to the Central Office of the Registry of Friendly Societies and there registered. Till registration the change does not take effect (*q*).

[1901] A. C. 426, 442. It is described in *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., per COZENS-HARDY, M.R., at p. 174, as "a species of quasi-corporation"; see *ibid.*, per FARWELL, L.J., at p. 191; S. C., [1910] A. C. 87, per Lord ATKINSON, at p. 102; and compare *Wilson v. Scottish Typographical Association*, [1912] S. C. 534.

(*m*) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per Lord BRAMPTON, at p. 442. For an instance of an inconsistent provision, see Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9, as to which see p. 665, *post*; and see also Trade Disputes Act, 1906) 6 Edw. 7, c. 47), s. 4; and p. 665, *post*.

(*n*) *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A. (society registered as a trade union, but nothing illegal in its rules: held, that the court had jurisdiction on a claim to recover a sum deducted from such pay by way of fine); and see notes (*o*), (*p*), p. 599, *ante*.

(*o*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13 (3); Regulations (1876 and 1890) Governing Registered Trade Unions, r. 2. As to the similar provision in the case of companies, see title COMPANIES, Vol. V., pp. 84, 85; compare *R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741; and see note (*g*), p. 623, *ante*.

(*p*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 11; Regulations (1876 and 1890) Governing Registered Trade Unions, r. 16; Forms N., O. (see note (*e*), p. 623, *ante*). The fee for certificate of registry of a change of name is 10s. (Regulations (1876 and 1890) Governing Registered Trade Unions, r. 24). As to the Registrar, see p. 609, *ante*.

(*q*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 13. As to the penalty for failure to send the above notice and declaration, see *ibid.*, s. 15; and p. 635, *post*. As to the regulations and forms, see note (*e*), p. 622, note (*e*), p. 623, *ante*. As to the Central Office of the Registry of Friendly Societies, see title FRIENDLY SOCIETIES, Vol. XV., pp. 129, 130.

SUB-SECT. 4.—*Office.*

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Trade
Unions.Registered
office..

1171. Every registered trade union must have a registered office; and if any union under the Trade Union Acts, 1871—1913 (*r*), is in operation for seven days without such an office the union and every officer is liable to a penalty not exceeding £5 for every day during which the union is so in operation. Notice of the situation of such office and of every change therein must be given to the registrar and recorded by him, and till such notice is given the union has not complied (*s*) with the Trade Union Acts, 1871—1913 (*r*).

A trade union carrying or intending to carry on business in more than one country (*t*) must be registered in the country in which its registered office is situate; but copies of the rules, and of all amendments thereto, must, when registered, be sent to the Registrar of Friendly Societies of each of the other countries to be recorded by him. Till such rules are recorded in any country the union is not entitled to any of the privileges of the Trade Union Acts, 1871—1913 (*r*), in that country, and amendments do not take effect in any country till recorded there (*u*).

Carrying on
business in
different
countries.SUB-SECT. 5.—*Cancellation of Registration.*

1172. No certificate of registration may be withdrawn or cancelled otherwise than by the Registrar (*w*), and by him only at the request of the union, to be evidenced as he may from time to time direct; or on proof to his satisfaction that a certificate has been obtained by fraud or mistake, or that the registration has become void by

When
registration
cancelled.†

(*r*) 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47; 2 & 3 Geo. 5, c. 30.

(*s*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 15; Regulation 15; Form M. It may be noted that it is not stated, as in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 15, who is to prosecute; therefore, it seems, any person may; see note (*k*), p. 635, *post*. Apparently, this provision does not in itself confine the union to the jurisdiction of the courts within whose jurisdiction the office is situated (*Mackendrick v. National Union of Dock Labourers in Great Britain and Ireland* (1910), 48 Sc. L. R. 17). No fee is payable on registry of notice of a change of office (Regulations (1876 and 1890) Governing Registered Trade Unions, r. 24).

(*t*) "Country" here means England, Scotland, or Ireland (Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 6).

(*u*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 6; Regulations (1876 and 1890) Governing Registered Trade Unions, rr. 11, 15B. As to the penalty for failure to send these documents, see Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 15; and p. 635, *post*. Apparently, a union registered in one country but having branches in another country, where also a copy of its rules has been recorded, is subject to the jurisdiction of both countries (*Mackendrick v. National Union of Dock Labourers in Great Britain and Ireland, supra*); and, apparently, a union may be registered in each country (*ibid.*). The removal of the registered office from one country to another does not render it necessary to re-register the union in the country in which its new registered office is situate (Regulations (1876 and 1890) Governing Registered Trade Unions, r. 15A). No fee is payable for recording rules or documents already registered in another country (*ibid.*, r. 24).

(*w*) As to the Registrar, see p. 609, *ante*.

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reason of one of the purposes of the union being unlawful (*x*), or that the union has wilfully and after notice from a registrar violated any of the provisions of the Trade Union Acts, 1871—1913 (*y*), or has ceased to exist (*z*); or if the constitution of the union has been altered in such a manner that in the opinion of the Registrar its principal objects are no longer “statutory objects” (*a*), or if, in his opinion, the principal objects for which the union is actually carried on are not “statutory objects” (*b*).

Notices.

Before a certificate can be withdrawn or cancelled the Registrar must, except when the withdrawal or cancellation is at the request of the union, give to the union not less than two months' notice in writing specifying briefly the ground of the proposed withdrawal or cancellation. If, however, the registration is shown to have become void by reason of one of the purposes of the union being unlawful (*c*), such notice is unnecessary, and it is the duty of the Registrar to cancel the certificate forthwith (*d*).

Appeals.

Any person aggrieved by the withdrawal of a certificate of registration on the ground that the constitution of the union has been so altered that the principal objects are no longer statutory objects, or that the principal objects for which the union is actually carried on are not “statutory objects,” may appeal to the High Court within the time and in the manner and on the conditions directed by rules of court (*e*).

Effect of
cancellation.

A trade union whose certificate has been withdrawn or cancelled ceases forthwith to enjoy as such the privileges of a registered union, but without prejudice to any liability actually incurred by it; such liability may be enforced against it as if the withdrawal or cancellation had not taken place (*f*).

SUB-SECT. 6.—*Membership.*

What
constitutes
membership.

1173. A person becomes a member (*g*) on acceptance of his

(*x*) That is, otherwise than as in restraint of trade; see note (*r*), p. 622, *ante*.

(*y*) See note (*r*), p. 625, *ante*.

(*z*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 8; Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 6; Regulations (1876 and 1890) Governing Registered Trade Unions, rr. 12—14. No fee is payable for registry of cancellation or withdrawal of a certificate (*ibid.*, r. 24). Till the withdrawal or cancellation of its certificate a registered union can be sued in its registered name notwithstanding that one of its objects is illegal (*Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366). As to the right of action generally, see pp. 664 *et seq.*, *post*.

(*a*) See pp. 597 *et seq.*, *ante*. As to the Registrar, see p. 609, *ante*.

(*b*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (2); and see pp. 597 *et seq.*, *ante*.

(*c*) See note (*x*), *supra*.

(*d*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 8; Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 6.

(*e*) Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 2 (4); in Scotland the appeal is to the Court of Session (*ibid.*). No such rules have as yet been made.

(*f*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 8.

(*g*) In the case of unregistered unions the right to be a member is subject to the ordinary rules as to the capacity to make contracts; see title

entrance fee and contributions and the receipt by him of a card of membership; he cannot thereafter be expelled in the absence of a rule giving power to expel, and if such power exists he cannot be expelled without having an opportunity of obtaining a hearing (*h*).

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1174. An infant above the age of sixteen may be a member of a trade union, unless its rules contain a provision to the contrary; and may, subject to the rules of the union, execute all instruments and give all acquittances necessary under the rules and enjoy all the rights of a member, except that he cannot be a member of the committee of management, a trustee or treasurer (*a*).

Infant
members.

SUB-SECT. 7.—*Rules.*

(i.) *Statutory Requirements.*

1175. The rules of every registered trade union must contain the following provisions (*b*):—

Contents of
rules.

(1) The name of the union (*c*) and its place of meeting for business;

(2) The whole of the objects for which the union is to be established (*d*), the purposes for which its funds shall be applicable, the

CONTRACT, Vol. VII., pp. 340, 341. The statutory provisions seem clearly to apply only to registered unions. As to the special provisions relating to nomination and payments on death, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192; FRIENDLY SOCIETIES, Vol. XV., pp. 152 *et seq.*; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 17; and see *Crocker v. Knight*, [1892] 1 Q. B. 702, C. A.; *Russell v. Amalgamated Society of Carpenters and Joiners* (1909), 25 T. L. R. 520, 521; S. C., [1912] A. C. 421, 437. If the total personal property of any person entitled to make a nomination exceeds £100, any sum paid without probate or letters of administration is, notwithstanding such nomination or payment, liable to probate duty as part of the amount on which such duty is charged. The trustees may before making any such payment require a statutory declaration by the claimant, or by one of the claimants, that the total personal estate of the deceased, including the sum in question, does not, after deduction of debts and funeral expenses, exceed the value of £100 (Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 10 (2)).

(*h*) *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371; *Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366, 373. The principle of these cases is, it is conceived, not confined to registered unions.

(*a*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 9. As to infants, generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 39 *et seq.*

(*b*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14 (1), Sched. I. For a suggested form of rules, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 517. As to the special rules relative to the furtherance of political objects, see pp. 609 *et seq.*, *ante*.

(*c*) As to the name, see p. 624, *ante*.

(*d*) Before the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), the objects which could be specified in the rules included only objects strictly within the scope of the Trade Union Acts (*Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, 96), and the rules were held to constitute an exhaustive code (*Re Durham Miners' Association*, *Watson v. Cann* (1900), 17 T. L. R. 39, C. A.; *Oram v. Hutt*, [1913] 1 Ch. 259, 266). It is conceived that the rules must still be treated as an exhaustive code; but as to the extension of the objects which they may include by the Trade Union Act,

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conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member ;

(3) The manner of making, altering, amending, and rescinding rules (*e*) ;

(4) A provision for the appointment and removal of a general committee of management, of a trustee or trustees (*f*), treasurer, and other officers (*g*) ;

(5) A provision for the investment of the funds, and for an annual or periodical audit of accounts ;

(6) The inspection of the books and names of members of the union by every person having an interest in its funds (*h*) ;

(7) Provisions for the manner of dissolving the union (*i*).

Copy of rules.

1176. A copy of the rules must be delivered to every person on demand on payment of not exceeding 1s. (*k*).

(ii.) *Amendment of Rules.*

Effect of
amendment.

1177. Amendments must be made in strict accordance with the rules (*l*), and amended rules, if *ultra vires*, are not validated by registration (*m*). Rules capable of amendment must be adhered to

1913 (2 & 3 Geo. 5, c. 30), see note (*b*), p. 597, *ante*. As to the Trade Union Acts, see note (*r*), p. 625, *ante*.

(*e*) As to amendment, see the text, *infra*. As to the registration of alterations and the distinction between a partial and a complete alteration, see Regulations (1876 and 1890) Governing Registered Trade Unions, rr. 6—10. The fee for registration of an alteration is 10s. (*ibid.*, r. 24).

(*f*) As to trustees and their powers, see pp. 631, 632, *post*. It is not necessary under the Acts that a trustee should be a member of the union (*Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, *per* Lord DAVEY, at p. 271 ; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, *per* Lord ROBSON, at p. 438 ; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord ATKINSON, at p. 124).

(*g*) As to infants becoming officers, see p. 627, *ante*.

(*h*) The right to inspect the books may in a proper case be exercised by the agency of an accountant, subject to an undertaking by him to divulge the information so obtained only to his clients (*Norey v. Keep*, [1909] 1 Ch. 561 (where, however, PARKER, J., at p. 565, seems to have regarded it as possible that the right to inspect by accountant might validly be negatived by a rule), following *Bevan v. Webb*, [1901] 2 Ch. 59, C. A.).

(*i*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 14. The rules of a union registered before the passing of the Act (30th June, 1876) were not invalidated by the absence of a provision for dissolution (*ibid.*). As to dissolution, see pp. 634, 635, *post*.

(*k*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14 (2).

(*l*) Thus, if an amendment can, at any given time, be made only if recommended by the executive committee as being urgently required, there must be a resolution of the committee to that effect (*Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, 178, C. A. ; compare *Harington v. Sendall*, [1903] 1 Ch. 921). But a rule providing that a rule may not be altered unless notice of the proposed alteration has been given does not mean that the notice must set out the identical alteration ultimately adopted (*Amalgamated Society of Engineers v. Jones* (1913), 29 T. L. R. 484) ; to justify the court in interfering with the internal government of a union an informality is not enough ; there must be something in the nature of an illegality (*ibid.*, *per* BAILLACHE, J., at p. 485).

(*m*) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87,

till amended (n); but if a rule is duly amended in accordance with the rules regulating amendments, such amendment is binding upon a member even though he was insane at the time of the amendment (o).

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(iii.) *Construction of Particular Rules.*

1178. A rule (p) giving power to the executive committee to institute any legal proceedings which it may deem to be in the interests of the members does not authorise the payment of the costs of the separate defence of one of the officers, sued together with the union, in the absence of evidence that the committee deemed such separate defence to be in the interests of the members (q).

Institution
of legal
proceedings.

Rules authorising the union to give legal aid to members in cases

Legal aid.

101; S. C., [1909] 1 Ch. 163, 176, 178, C. A. Cases under other Acts containing similar, but not identical, words, as, for instance, *Dewhurst v. Clarkson* (1854), 3 E. & B. 194 (Friendly Societies Acts); *Rosenberg v. Northumberland Building Society* (1889), 22 Q. B. D. 373, C. A. (Building Societies Acts), are not authorities on the construction of the Trade Union Acts (*Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, 176, C. A.). The rules are not given statutory authority, nor is there any provision whereby the registrar is instructed or enabled to ascertain whether the rules have been properly observed in making any alteration; two contradictory applications to register alterations might be made to the registrar and he would apparently be compelled to register both without deciding which was right; see *ibid.*, per FLETCHER MOULTON, L.J., at p. 181. But as to the case of two contradictory applications for registration of a union, see p. 622, *ante*. As to the duty to send a copy of alterations to the registrar, see p. 631, *post*; but, apparently, valid alterations take effect from the time of their making, independently of whether or not notice has been sent to the registrar; see *Osborne v. Amalgamated Society of Railway Servants*, *supra*, per FLETCHER MOULTON, L.J., at p. 180; compare title FRIENDLY SOCIETIES, Vol. XV., pp. 141, 142.

(n) *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 338, C. A.; compare *Re Durham Miners' Association*, *Watson v. Cann* (1900), 17 T. L. R. 39, C. A. As to the date at which amendment or alteration is deemed to have taken place, see note (m), *supra*.

(o) *Burke v. Amalgamated Society of Dyers*, [1906] 2 K. B. 583 (where a county court judge had awarded sick pay up to the date of the registration of the amendment, and it was held that the plaintiff was not entitled to more); but *quære* whether there was jurisdiction to award any sum at all, it being assumed that the objects of the society were illegal at common law (see pp. 615 *et seq.*, *ante*); as to whether this assumption was correct, see note (c), p. 602, *ante*. Compare the provisions relating to the alteration of rules of building societies and friendly societies; see titles BUILDING SOCIETIES, Vol. III., pp. 332 *et seq.*; FRIENDLY SOCIETIES, Vol. XV., pp. 139 *et seq.*

(p) As to the power of the court to make declarations as to the meaning of rules, see pp. 617, 618, *ante*. In cases where the union is not illegal at common law, its agreements and rules are all enforceable unless the judgments of Lord LOREBURN, L.C., and Lord ATKINSON in *Russell v. Society of Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, 428, 430, are to be taken to have altered the law; see note (t), p. 612, *ante*. Apparently, the cases as to the construction of rules are applicable whether a union be registered or not. As to the validity of a rule of a trade defence association authorising the expulsion of a member for dishonourable conduct, see *Merrifield, Ziegler & Co. v. Liverpool Cotton Association, Ltd.* (1911), 105 L. T. 97. As to the power to expel at common law, see *Luby v. Warwickshire Miners' Association* (1912), 28 T. L. R. 509; *Parr v. Lancashire and Cheshire Miners' Federation of Great Britain*, [1912] 2 Ch. 371; and see note (h), p. 627, *ante*.

(q) *Alfin v. Hewlett* (1902), 18 T. L. R. 664.

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of disputes arising between members of a union and their employers, or of unlawful treatment of members by their employers authorise the giving of legal aid where there is a common interest, but they do not authorise such a proceeding in circumstances which constitute the offence of maintenance; for no rule can justify an act which would be wrongful in an individual (*r*). Thus, it might be justifiable to take steps to recover wages on a member's behalf, but not to instigate him to take proceedings for libel and to conduct such proceedings at the expense of the union (*s*).

Strikes in
breach of
rule.

1179. If members strike in breach of a rule requiring them first to obtain the sanction of the union and to give proper notices to the employer, and subsequently, in accordance with instructions from the union, decide to return to work and to give the proper notices, but on offering to return to work are required to sign a fresh contract which on the advice of the union they refuse to sign, whereupon they, without being allowed by the employer to return to work, serve notices upon the employer, they do not thereby bring themselves within the rule so as to justify the payment to them of strike pay; nor do they come within a rule authorising such payment in the event of their being locked out or otherwise thrown out of employment in consequence of any action legally taken by the union to keep up prices or remedy grievances (*t*).

(*r*) *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906), 22 T. L. R. 274; *Oram v. Hutt*, [1912] 1 Ch. 259. As to maintenance generally, see titles ACTION, Vol. I., pp. 51 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 499, 500.

(*s*) *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks*, *supra* (where a union having first assisted a discharged member to recover damages from his employer, then instigated the member to sue the employer for libel, but no person appearing on the member's behalf the action was struck out with costs: held, that there was no reasonable and probable cause and no common interest, and that the union was liable in damages to the employer; apparently the employer could have recovered his solicitor and client costs, but he had only claimed party and party costs). Since the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (see p. 665, *post*), the trade union would no longer be liable; but, apparently, an official in his private capacity would be liable (see note (*g*), p. 667, *post*); and an injunction could be obtained restraining such an application of the funds (see p. 618, *ante*). In *Oram v. Hutt*, [1913] 1 Ch. 259, the payment of the costs of an action by a union secretary for damages for a slander reflecting upon his conduct as such secretary and possibly affecting the union by bringing it into disrepute, was held *ultra vires* on the ground that such payment constituted maintenance, and also on the ground that there was no rule authorising such payment. In *Howden v. Yorkshire Miners' Association* (1903), as reported in the *Times*, 16th, 17th, 28th January, the appellant was supported by a masters' union, being a member of the union sued, the common interest between him and the masters being the cessation of the strike. An appeal *in formâ pauperis* will be allowed, even though the appellant is supported by his union (*Gordon v. Pyper* (1892), 20 *Rettie* (House of Lords), 23).

(*t*) *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 331, C. A., affirmed, [1905] A. C. 256. The words "thrown out of employment" only apply to men already in employment, not to men who have already struck and are unable to get back into employment. It is to be noted that the court regarded the offer to return to work in this case as being not a *bonâ fide* offer but one made by the men with a view to

If members strike in breach of rules requiring them first to lay their case before the committee or council of the union and obtain its consent or approval, on penalty of forfeiting all claims upon the union, a subsequent resolution of the council to grant them lock-out pay does not operate as an approval of or consent to the strike, and is *ultra vires* (u).

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1180. A rule providing that a delegate meeting should not have power to alter any rule unless notice of the proposed alteration has been given only means that notice of an intention to alter the rule must be given, and the delegate meeting can alter it in the way they then and there decide (a).

Delegate
meetings.

SUB-SECT. 8.—*Accounts.*

1181. A general statement of the receipts, funds, effects and expenditure of every registered trade union must be transmitted to the Registrar before the 1st June in every year (b).

General
statement.

With the above statement there must be sent a copy of all alterations of rules, new rules and changes of officers made during the year preceding the date up to which the statement is made out, and a copy of the rules as they exist at that date (c).

1182. Every trade union which fails to comply with or contravenes the above provisions as to the general statement, and the matter to be sent therewith, and every officer of the union so failing, is liable to a penalty not exceeding £5 for each offence (d).

Penalties.

Every person who wilfully makes, or orders to be made, any false entry in, or omission from, the general statement, or the return of copies of rules or alterations, is liable to a penalty not exceeding £50 for each offence (e).

SUB-SECT. 9.—*Property, and Powers and Duties of Trustees.*

(i.) *Right to Hold Property.*

1183. A registered trade union has a right to hold an unlimited

Acquisition
of property.

putting themselves right under the rules of the union (*Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 333, 343, C. A.). If an employer has accepted a repudiation of their contracts by his employees, he does not treat the contracts as still existing by taking out summonses against them for absenting themselves without leave (*Employers and Workmen Act*, 1875 (38 & 39 Vict. c. 90), s. 4; *Howden v. Yorkshire Miners' Association*, *supra*, at p. 334).

(u) *Re Durham Miners' Association*, *Watson v. Cann* (1900), 17 T. L. R. 39, C. A. (where the decision turned upon the interpretation of the words of the rules, and the expression "all claims" was held to be restricted to claims in respect of cessation of labour).

(a) *Amalgamated Society of Engineers v. Jones* (1913), 29 T. L. R. 484; see note (l), p. 628, *ante*.

(b) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 16. The statement must show fully the assets and liabilities at the date, and the receipts and expenditure during the year preceding the date, to which it is made out; and, separately, the expenditure in respect of the several objects of the union. It must be made out up to such date, in such form and with such particulars as the registrar may from time to time require. Every member of, and depositor in, the union is entitled to a free copy (*ibid.*).

(c) *Ibid.*

(d) *Ibid.*

(e) *Ibid.*

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Land.

amount of personal property (*f*), and such union, and any branch thereof, may purchase (*g*), or take upon lease, in the name of its trustees, any land not exceeding one acre, and may sell, exchange, mortgage or let the same. The purchaser, assignee, mortgagee, or tenant need not inquire into the trustees' authority, and the trustees' receipt is a good discharge (*h*).

The power to acquire land is limited to the acquisition of land required for purposes connected with the administration of the business of the union, such as, for instance, for an office; it does not extend to land acquired as part of the substratum of the union (*i*). A devise of land, therefore, to a trade union for the furtherance of its objects is not within the statutory power, and is void (*j*). Moreover, apart from this, a devise of land to a trade union is void as a perpetuity, or as a gift tending to a perpetuity (*k*).

(ii.) *Vesting of Property in Trustees.*

Union and
branches.

1184. All real and personal estate belonging to a registered trade union is vested in the trustees of the union for the use and benefit of the union and its members, and the real and personal estate of a branch is vested in the trustees of the branch (*l*), or, if the rules of the union so provide, in the trustees of the union (*m*), and is under the control of such trustees, their respective executors or administrators, according to their respective claims and interests (*n*).

In all actions, indictments, or summary proceedings concerning such property it must be stated to be the property of the trustees for the time being in their proper names, as trustees of the union, without further description (*o*).

(iii.) *Death and Change of Trustees.*

Transfer of
trust estate.

1185. On the death or removal of any such trustees the estate vests in the succeeding trustees, subject to the same trusts, without conveyance or assignment, except that stocks and securities in the

(*f*) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 441; *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, C. A., *per* FARWELL, L.J., at p. 191.

(*g*) "Purchase" is here used in its popular meaning "buy for money," not in its technical meaning, "acquire otherwise than by descent or escheat" (*Re Amos, Carrier v. Price*, [1891] 3 Ch. 159).

(*h*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 7. Apparently, an unregistered trade union cannot hold land; see *Re Amos, Carrier v. Price, supra*.

(*i*) *Re Amos, Carrier v. Price, supra*, at p. 166.

(*j*) *Ibid.* A bequest of an annual sum charged on land devised on remainder to a trade union is also void (*ibid.*, at p. 166).

(*k*) *Ibid.*, at p. 164; and see titles CHARITIES, Vol. IV., pp. 119, 120, 133 *et seq.*, 174 *et seq.*; PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(*l*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 8.

(*m*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 3; see, generally, *Taff Vale Railway v. Amalgamated Society of Railway Servants, supra*; *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A.

(*n*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 8.

(*o*) *Ibid.*, s. 8; *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 335, C. A.; as to actions generally, see pp. 664 *et seq.*, *post*.

public funds of Great Britain and Ireland must be transferred into the names of the new trustees (*p*).

When a trustee, or late trustee, in whose name, solely or jointly, any stock belonging to his union or branch, transferable at the Bank of England or Ireland, is standing is absent from Great Britain or Ireland, or becomes bankrupt, or files a petition, or executes any deed of assignment or arrangement, or for composition with his creditors, or becomes lunatic, or is dead or has been removed, or if it is unknown whether he be living or dead, then, on application from the secretary and three members of the union or branch, the Registrar, on satisfactory proof, is empowered to direct the transfer of such stock into the names of any other persons as trustees; and the transfer must be made by the surviving or continuing trustees, or if there are none, or they refuse or are unable to make the transfer, and the Registrar so directs, then by the Accountant-General, or Deputy, or Assistant Accountant-General of the Bank of England (or Ireland), indemnity being given to the Banks against any claim arising therefrom (*q*).

SECT. 4.
Registered
Trade
Unions.
—
Stock in
public funds.

(iv.) *Liability of Trustees.*

1186. A trustee of a registered trade union is liable only for the moneys actually received by him on account of the union, and not for any deficiency which may arise in the funds of the union (*r*).

Liability of
trustees.

(v.) *Rendering of Accounts to and Actions thereon by Trustees.*

1187. Every treasurer or other officer of a registered trade union must render an account to the trustees or members at times provided by the rules, or, upon being required to do so, of all moneys received and paid by him, and of the balance in his hands, and of all bonds or securities of the union; and the trustees must have such accounts audited. After audit the treasurer must, if required, forthwith hand over the balance and all securities and effects, books, papers and property of the union in his custody to the trustees. If he fails to do so, the trustees may sue for the said balance and for all moneys since received on account of the union, and for the said securities and effects, books, papers and property, leaving him to set off any sums which he may have paid on account of the union. In such action the trustees are entitled to solicitor and client costs (*s*).

Treasurer's
accounts.

The ordinary equitable machinery for preserving the trust property and for executing the trusts is available to the members (*t*), subject, perhaps, to the exception that the trustees of

(*p*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 8.

(*q*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 4; Regulations (1876 and 1890) Governing Registered Trade Unions, rr. 17—20. The fee payable on a direction to transfer stock is £1 (*ibid.*, r. 24).

(*r*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 10. As to the liability of trustees generally, see title TRUSTS AND TRUSTEES.

(*s*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 11; as to actions generally, see pp. 664 *et seq.* As to solicitor and client costs, see title SOLICITORS, Vol. XXVI.

(*t*) *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256, *per Lord LINDLEY*, at p. 280; compare *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894; as to actions to prevent misapplication of funds, see p. 618, *ante*.

SECT. 4. the union cannot enforce payment of funds in the hands of the
Registered trustees of a branch (a).
Trade
Unions.

SUB-SECT. 10.—*Exemption from Income Tax.*

Extent of exemption. **1188.** A registered trade union is entitled to exemption from income tax under Schedules A, C, and D in respect of its interest and dividends applicable and applied solely for the purpose of provident benefits (b); but the exemption does not extend to any union by the rules of which the amount assured to any member exceeds £300, or the amount of any annuity granted to any member exceeds £52 a year (c).

Claim for exemption. The exemption is claimed and allowed in the same manner as in the case of income applicable or applied to charitable purposes (d).

SUB-SECT. 11.—*Amalgamation.*

Consent of members. **1189.** Any two or more trade unions may, by the consent of not less than two-thirds of the members of each union, be amalgamated as one union, with or without any dissolution, or division of funds, but without prejudice to any right of a creditor of any union (e).

Registration. Notice in writing of every amalgamation signed by seven members, and countersigned by the secretary, of each union, together with a statutory declaration by each secretary that the statutory provisions in respect of amalgamations have been complied with, must be sent to the Central Office of the Registry of Friendly Societies and there registered. Till registration the amalgamation does not take effect (f).

SUB-SECT. 12.—*Dissolution.*

Provision in rules. **1190.** The dissolution of a registered trade union must be provided for in its rules (g).

(a) *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A.; see note (h), p. 618, *ante*.

(b) The expression "provident benefits" means and includes payments during sickness, incapacity from personal injury, or unemployment, superannuation payments, accident payments, payments for loss of tools by fire or theft, funeral payments and payments as provision for the children of a deceased member, where the payment in respect whereof exemption is claimed is expressly authorised by the registered rules (Trade Union (Provident Funds) Act, 1893 (56 & 57 Vict. c. 2), s. 3).

(c) *Ibid.*, s. 1; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 70. Under the former Act the figures were £200 and £30 respectively; see title INCOME TAX, Vol. XVI., p. 641.

(d) Trade Union (Provident Funds) Act, 1893 (56 & 57 Vict. c. 2), s. 2; Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 60—62, 88, 98, 100; see titles CHARITIES, Vol. IV., pp. 208 *et seq.*; INCOME TAX, Vol. XVI., pp. 614, 628, 629, 642, 665.

(e) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 12; Regulations (1876 and 1890) Governing Registered Trade Unions, r. 22. An injunction will be granted to restrain amalgamation if the necessary consent is not shown (*Wolfe v. Matthews* (1882), as reported 30 W. R. 838).

(f) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 13. As to the penalty for failure to send the above notice and declaration, see *ibid.*, s. 15; and p. 635, *post*. The fee for registry of amalgamation is 10s. (Regulations (1876 and 1890) Governing Registered Trade Unions, r. 24). As to the Central Office, see title FRIENDLY SOCIETIES, Vol. XV., pp. 129, 130.

(g) See p. 628, *ante*.

Notice of every dissolution of a trade union, signed by the secretary and seven members, must be sent within fourteen days of the dissolution to the Central Office of the Registry of Friendly Societies and there registered (*h*).

On the dissolution of a registered trade union, in the absence of rules for the distribution of the funds, there is a resulting trust of the funds in favour of all the existing members; and the funds should be divided among them in proportion to the amounts contributed by each of them, disregarding amounts paid for fines, forfeitures or annuities (*i*).

SECT. 4.
Registered
Trade
Unions.

Distribution
of funds.

SUB-SECT. 13.—*Offences and Penalties.*

1191. A trade union (*k*) failing to give any notice or send any document which it is required to send in the case of a union carrying on, or intending to carry on, business in more than one country (*l*), or in the case of change of name (*m*), or amalgamation (*n*), or dissolution (*o*), and every officer or other person bound by the rules to give or send the same, or, if there be no such officer, every member of the committee of management, unless proved to have been ignorant of, or to have attempted to prevent, the omission, is liable to a penalty of not less than £1 and not more than £5, recoverable at the suit of the Chief or any Assistant Registrar of Friendly Societies, or of any person aggrieved, and to an additional penalty of a like amount for each week during which the omission continues (*p*).

Failure to
give notice.

(*h*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 14; Regulations (1876 and 1890) Governing Registered Trade Unions, r. 21. As to the penalty for failure to send the above notice, see Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 15; and the text, *infra*. The fee for registry of a notice of dissolution is 2s. 6d. (Regulations (1876 and 1890) Governing Registered Trade Unions, r. 24).

(*i*) *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184 (the Crown in this case made no claim to the funds as *bona vacantia*), distinguishing *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A. But where moneys have been contributed for a purpose which is declared illegal, and a resulting trust arises in favour of the contributors, they are not *cestuis que trust* under an instrument within R. S. C., Ord. 55, r. 3, nor is there any question of construction under an instrument within R. S. C., Ord. 54A, r. 1, and the rights of the contributors cannot be determined by originating summons (*Re Amalgamated Society of Railway Servants, Addison v. Pilcher*, [1910] 2 Ch. 547). As to retirement of members, compare *Finch v. Oake*, [1896] 1 Ch. 409, C. A., where in the case of a voluntary trade protection society with no objects or rules in restraint of trade, and no liability on the members beyond the payment of a subscription, it was held that a member who had paid his subscription to date might resign at any time, that such resignation became effective on its communication to the secretary without any acceptance of it by the other members, and that having been so communicated it could not be withdrawn.

(*k*) As to offences and penalties in specific cases, see pp. 625, 631, *ante*. As to who may be an informer when no person is specified, see *Cole v. Coulton* (1860), 2 E. & E. 695; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 292, 293.

(*l*) See p. 625, *ante*.

(*m*) See p. 624, *ante*.

(*n*) See p. 634, *ante*.

(*o*) See the text, *supra*.

(*p*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 15.

SECT. 4.

Registered
Trade
Unions.Copies of
rules.Offences as
to property.

1192. It is a misdemeanour to give, with intent to mislead or defraud, to any member or intending member of a registered trade union a copy of any rules or alterations or amendments of rules other than those in existence for the time being, on the pretence that the same are the existing rules, or that there are no other rules; or, with such intent, to give a copy of any rules to any person on the pretence that they are the rules of a union registered which is not registered (*q*).

1193. It is an offence for any officer, member or other person being or representing himself to be a member or the nominee, executor, administrator or assignee of a member of a registered trade union, or for any person whatsoever, by false representation or imposition, to obtain possession of any moneys, securities, books, papers or other effects of the union, or, having the same in his possession, wilfully to withhold or fraudulently to misapply the same or wilfully to apply any part of the same to purposes other than those expressed in the rules of the union (*r*). On complaint by any person on behalf of the union or by the registrar, the court of summary jurisdiction for the place where the registered office of the union is situate, or where the offence was committed (*s*), may summarily order the delivery up of all such moneys, securities, books, papers, or other effects to the union, or the repayment of the money improperly applied, with, at the discretion of the court, a further sum of not exceeding £20 and costs not exceeding £1. In default of such delivery up or payment, the court may order imprisonment, with or without hard labour, for not exceeding three months (*t*).

Under this provision jurisdiction arises only in cases of fraud or dishonesty (*a*). Recourse to this remedy against a defaulting officer, if such officer is summarily ordered to pay the amount misapplied and is fined or imprisoned, or both fined and imprisoned, precludes a subsequent action for the sum misapplied (*b*).

The union may be sued for such penalties by its registered name (*Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 440, 441).

(*q*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 18.

(*r*) *Ibid.*, s. 12.

(*s*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 5.

(*t*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 12; *R. v. Truscott* (1899), 81 L. T. 188 (on non-compliance with order to pay a sum withheld within twenty-eight days, a magistrate refused to convict, the order having been drawn up as for a civil debt: held, that the order was in accordance with the statute, though it was also competent for the magistrate to order imprisonment in default of payment); and compare *Vernon v. Watson*, [1891] 2 Q. B. 288, C. A. (a case on similar words in the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16 (9)). A trade union, even though unregistered, may proceed under the Larceny Act, 1868 (31 & 32 Vict. c. 116), s. 1 (see *R. v. Blackburn* (1868), 11 Cox, C. C. 157; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 635), and under the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), s. 1 (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 659).

(*a*) *Madden v. Rhodes*, [1906] 1 K. B. 534 (in civil cases the remedy lies under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9), following *Barrett v. Markham* (1872), L. R. 7 C. P. 405; but see note (*b*), pp. 618, 619, *ante*,

(*b*) *Knight v. Whitmore* (1885), 53 L. T. 233; approved in *Vernon v.*

The foregoing provisions are without prejudice to the right of the union to proceed by indictment, unless a conviction by such summary procedure has already been obtained (*c*), and they do not oust the jurisdiction of the superior courts so as in any way to prevent an action in the name of the union against its trustees to restrain, or compel an account for, a breach of trust (*d*).

SECT. 4.
Registered
Trade
Unions.

1194. All offences and penalties under the Trade Union Acts, 1871—1913 (*e*), may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts (*f*), and summary orders may be made and enforced on complaint before a court of summary jurisdiction in manner provided by those Acts (*g*). Summary procedure.

The court of summary jurisdiction, when hearing and determining an information or complaint, is constituted (1) in any place within the jurisdiction of a metropolitan police magistrate or other stipendiary magistrate, of such magistrate or his substitute; (2) in the City of London, of the Lord Mayor or any alderman; (3) in any other place, of two or more justices of the peace sitting in petty sessions (*h*).

The description of any offence under any of the Trade Union Acts, 1871—1913 (*i*), in the words of such Act is sufficient in law; and any exception, exemption, proviso, excuse or qualification, whether

Watson, [1891] 2 Q. B. 288, C. A.; see *ibid.*, per Lord HALSBURY, L.C., at p. 290 (the proceedings are partly of a civil and partly of a criminal kind: "if the operation of the statute had been confined to criminal proceedings I should have entertained no doubt that imprisonment for the criminal offence afforded no answer to a civil claim for the debt . . . In the statute in question two different proceedings have been mixed together by the Act of the legislature," namely (i.) a penalty for wilfully withholding or misapplying property or money; and (ii.) an order to deliver up or repay; with, in both cases, imprisonment in default of payment, "which is to be a satisfaction for the criminal offence and also for the non-payment of the civil debt and costs." The imprisonment is execution for, and satisfaction of, the civil debt). Lord ESHER, M.R. (*ibid.*, at p. 291), doubted whether the magistrates had any power, unless they inflicted the penalty, to order the delivery up of the property or repayment of the money. He also thought that the society had an alternative of proceeding under the statutory provision or bringing a civil action. Apparently, also, a distress warrant cannot issue to enforce the order. But in *United Builders' Labourers Union v. Stevenson* (1906), *Times*, 7th February, FARWELL, J., ordered payment of the amount of the defalcations of an official of a registered union after he had been convicted and imprisoned under the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24); and compare *Agnew v. Addison* (1892), 20 *Rettie* (Justiciary), 19 (unregistered union). It seems that if a society, registered or unregistered, proceeds otherwise than under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 12, the reasoning of *Vernon v. Watson*, [1891] 2 Q. B. 288, C. A., does not apply.

(*c*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 12.

(*d*) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per Lord LINDLEY, at p. 444.

(*e*) 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22; 6 Edw. 7, c. 47; 2 & 3 Geo. 5, c. 30.

(*f*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*g*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 19; see title MAGISTRATES, Vol. XIX., pp. 531 *et seq.*

(*h*) *Ibid.*, s. 19 (1) (*a*); see title MAGISTRATES, Vol. XIX., pp. 559 *et seq.*

(*i*) See note (*e*); *supra*.

SECT. 4.
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Trade
Unions.

accompanying the description of the offence in the Act or not, may be proved by the defendant, but need not be specified or negatived in the information, and if it is so specified or negatived, no proof in relation to the matters so specified or negatived is required on the part of the informant or prosecutor (*k*).

If a party is aggrieved by any order or conviction by a court of summary jurisdiction under the Trade Union Acts, 1871—1913 (*l*), appeal lies to quarter sessions (*m*).

Disqualifica-
tion of
justice.

A person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business in, or in connexion with, which any offence under the Trade Union Acts, 1871—1913 (*n*), is charged to have been committed, may not act as, or as a member of, a court of summary jurisdiction or appeal (*o*).

SECT. 5.—*Criminal Offences Arising out of the Operations of Trade Unions.*

SUB-SECT. 1.—*Conspiracy.*

Early law.

1195. A long series of Acts culminating in the year 1800 (*p*), made it a criminal offence (*q*) for workmen to agree together for the purpose of obtaining in combination higher wages or shorter hours of work, or preventing any person from employing whomsoever he thought proper, or controlling or in any way affecting any person carrying on any manufacture, trade, or business in the conduct or management thereof; or for any workman by persuasion or intimidation or any other means wilfully and maliciously to endeavour to prevent any person from taking employment, or to induce any person to leave his employment. The consequence was that the courts were not called upon to decide whether such a combination constituted a conspiracy at common law (*r*), and statements to the effect that it does constitute a criminal offence may be explained either by reference to the statutes in force at the time (*s*), or on the

(*k*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 19 (2), (3).

(*l*) See note (*e*), p. 637, *ante*.

(*m*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 20. As to appeals to quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*n*) See note (*e*), p. 637, *ante*.

(*o*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 22. But it was held (though it was not necessary to the decision) no evidence of bias that three of the magistrates were shareholders in shipping companies which were insured in an association which was a member of a federation of which the informant was an official (*R. v. McKenzie*, [1892] 2 Q. B. 519; and see title MAGISTRATES, Vol. XIX., p. 552).

(*p*) See stat. (1800), 39 & 40 Geo. 3, c. 106.

(*q*) As to the offences of wilful and malicious breach of contract in certain cases, see Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ss. 4, 5; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 564; as to torts arising out of the operations of trade unions, see pp. 648 *et seq.*, *post*.

(*r*) See, generally, Stephen, History of the Criminal Law, Vol. III., pp. 202 *et seq.*; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 260 *et seq.*

(*s*) See *R. v. Maubey* (1796), 6 Term Rep. 619, *per* GROSE, J., at p. 636, as explained in *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., *per* FLETCHER MOULTON, L.J., at p. 923.

ground that they referred to offences against the State, or of a public nature (t).

1196. The above-mentioned Acts were, however, repealed in 1824 (u) and 1825 (w), and though in cases since those dates there have been decisions and *dicta* to the contrary (x), it is now clear that a combination in restraint of trade is not a criminal offence at common law (y), unless it is a combination in pursuit of a malicious purpose to ruin or injure a person, as opposed to a combination for the purpose of a legitimate trade object (z).

By statute an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute (a), is not indictable as a conspiracy if such act committed by one person would not be punishable as a crime (b).

SECT. 5.
Criminal
Offences
Arising out
of the
Operations
of Trade
Unions.

Combina-
tion not
necessarily
conspiracy.

(t) See 1 Hawk. P. C. 446: "There can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law as where divers persons confederate together by indirect means to impoverish a third person," as explained in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., per FRY, L.J., at pp. 630, 631, discussing *R. v. Sterling* (1664), 1 Lev. 126 (the ground of the decision being, as explained in *R. v. Daniell* (1704), 6 Mod. Rep. 99, that the offence was levelled at the Government), and criticising *R. v. Eccles* (1783), 1 Leach, 274 (indictment for conspiracy by indirect means to prevent a person from exercising the trade of a tailor: held, that the indictment need not state the means used), and *Cousins v. Smith* (1807), 13 Ves. 542 (a combination of grocers to "corner" all imported fruit held to be an unlawful conspiracy). For a similar case of an offence of a public nature, compare *Vertue v. Clive* (Lord) (1769), 4 Burr. 2472, 2476 (combination of officers in service of East India Company to resign because of a reduction in salary held criminal). See also *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra*, per BOWEN, L.J., at p. 618.

(u) Stat. (1824) 5 Geo. 4, c. 95.

(w) Stat. (1825) 6 Geo. 4, c. 129.

(x) See *R. v. Ferguson and Edge* (1819), 2 Stark. 489; *R. v. Bykerdyke* (1832), 1 Mood. & R. 179; *R. v. Duffield* (1851), 5 Cox, C. C. 404; *Hilton v. Eckersley* (1855), 6 E. & B. 47, per CROMPTON, J., at pp. 51 *et seq.*; *Hornby v. Close* (1867), L. R. 2 Q. B. 153 (*quære* whether it was a criminal offence); and the cases set out in note (b), p. 640, *post*. As to conspiracy generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 260 *et seq.*

(y) *R. v. Stainer* (1870), L. R. 1 C. C. R. 230 (rules in restraint of trade are not on that account criminal (compare the Trade Unions Funds Protection Act, 1869 (32 & 33 Vict. c. 61), s. 1, repealed by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 24); and a secretary of an unregistered society was held properly convicted of embezzlement; see *R. v. Stainer*, *supra*, per KEATING, J., at p. 235); *Swaine v. Wilson* (1889), 24 Q. B. D. 252, 260, C. A.; *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, per Lord HANNEN, at p. 58, and per Lord BRAMWELL, at p. 46, disapproving *Hilton v. Eckersley*, *supra*, per CROMPTON, J., at pp. 51 *et seq.*, and *Walsby v. Anley* (1861), 3 E. & E. 516, per CROMPTON, J., at p. 523; see note (b), p. 640, *post*.

(z) *Allen v. Flood*, [1898] A. C. 1, per Lord SHAND, at p. 169; *Quinn v. Leatham*, [1901] A. C. 495; *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, 264, P. C.; and see p. 640, *post*; see also the summing up of ERLE, J., in *R. v. Rowlands* (1851), 17 Q. B. 671, at p. 686, note (b). As to conspiracy generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 260 *et seq.*; as to trade combinations, *ibid.*, p. 563.

(a) As to the meaning of these words, see p. 662, *post*. The words "between employers and workmen" were originally inserted after the

(b) For note (b), see p. 640, *post*.

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Offences
Arising out
of the
Operations
of Trade
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words "trade dispute," but were repealed by the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5(3), and the definition of a trade dispute in that Act was applied to the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). As to the effect of this in extending the area of protection, see note (a), p. 662, *post*.

(b) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord ATKINSON, at p. 122: "It [s. 3] thus struck, in the particular instance mentioned, at the principle of the criminal law of conspiracy to the effect that it is the 'agreement or combination' which is the essence of the crime and that therefore a combination or agreement to do, or procure to be done, something not in its own nature criminal if done by one person, might still be a crime." The provision does not exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament, or affect the law relating to riot, unlawful assembly, breach of the peace, sedition, or any offence against the State or the Sovereign; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 563. As to the effect of the provision on the legality of strikes, see *Gibson v. Lawson*, [1891] 2 Q. B. 545, 557 *et seq.* In *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., COZENS-HARDY, M.R., said, during the argument, at p. 914, that the provision legalised strikes in the broadest terms, whilst FLETCHER MOULTON, L.J., said, at p. 923, that were a strike illegal at common law (which it is not) then it would have been legalised by the above Act, for "the only ground upon which an agreement simultaneously to decline to work on proposed conditions could be held to be unlawful would be that it was one of the instances where a combination by two or more persons to do an act permissible to a single individual can be held to be unlawful"; and see pp. 601, 602, *ante*. In *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A., and *Quinn v. Leatham*, [1901] A. C. 495, 541, it was held that the provision did not legalise a combination to call out the workmen of A., with whom there was no dispute, in order to prevent A. from dealing with B., with whom there was a dispute; *quære* whether this is now the law in view of the extension of the definition of a trade dispute in the Trade Disputes Act, 1906 (6 Edw. 7, c. 47); see note (a), p. 662, *post*. The object of this provision may be seen from the Report of the Royal Commission of 1874 (quoted in the Report of the Royal Commission on Trade Disputes, 1906 [Cd. 2825]), which, at p. 12, stated the law as to criminal conspiracy as follows:—"Conspiracy may be divided into three classes. First where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is lawful, but the means to be resorted to are criminal, as where the conspiracy is to support a cause believed to be just by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime, the conspiracy is to do something criminal, and here again the case is consequently free from difficulty. The third and last case is where, with a malicious design to do an injury, the purpose is to affect a wrong, though not such a wrong as when perpetrated by a single individual would amount to an offence under the criminal law. Thus an attempt to destroy a man's credit and effect his ruin by spreading reports of his insolvency would be a wrongful act, which would entitle the party whose credit was thus attacked to bring an action as for a civil wrong; but it would not be an indictable offence. If it be asked on what principle a combination of several to effect the like wrongful purpose becomes an offence, the answer is—upon the same principle that any other civil wrong, when it assumes a more aggravated and formidable character, is constituted an offence and becomes transferred from the domain of the civil to that of the criminal law." The provision of the Act, while not affecting the law as to the first and second classes of conspiracy, was designed to protect the members of trade unions from the uncertainty necessarily incidental to the third class.

The cases on the subject of conspiracy and offences by individuals must be read in conjunction with the Acts in operation at their dates, and the history of the law leading up to the Conspiracy and Protection of Property

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Act, 1875 (38 & 39 Vict. c. 86), was as follows:—By stat. (1825) 6 Geo. 4, c. 129, s. 3, which was repealed by the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), s. 7, Schedule, it was a criminal offence by violence to the person or property, or by threats or intimidation or by molesting or obstructing another, to force or endeavour to force any workman to leave his employment, or to prevent or endeavour to prevent any workman from accepting employment, or by such means to force or induce a person to belong to any association, or to punish him for not complying with rules made to obtain an advance or reduce the rate of wages, or to lessen or alter the hours of work, or to regulate the mode of carrying on any trade; or by such means to force or endeavour to force any person to make any alteration in the mode of regulating or carrying on his trade, or to limit the number or description of his workmen etc. By stat. (1825) 6 Geo. 4, c. 129, “threats,” “intimidation,” “molestation,” and “obstruction” were left at large to the jury; and it was held criminal to combine for the purpose of dictating to employers what men they should employ, as involving illegal compulsion (*R. v. Bykerdyke* (1832), 1 Mood. & R. 179); to strike for the like purpose, to circulate bills announcing a picket, to patrol the employer’s premises, and watch and interfere with his men, and to use expressions such as “You had better not go there, you will repent it” (*R. v. Selsby* (1847), 5 Cox, C. C. 495, n.; though in his summing up, ROLFE, B., confined intimidation to threats of personal violence, and, at p. 498, said of persuasion, “It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peacefully trying to persuade others to adopt the same view,” unless the words used convey an impression of intimidation; it was also suggested (*ibid.*, at p. 498) that the object of a picket was to see that members of the union were not going to work while receiving strike pay); to strike, and support a strike, in order to procure the dismissal of a member who refused to pay a fine (*R. v. Hewitt* (1851), 5 Cox, C. C. 162); to combine to persuade men to leave their employment in order to compel an employer to raise wages (that being a combination to “obstruct” an employer), and to combine to molest, intimidate or annoy men who refuse to strike (*R. v. Duffield* (1851), 5 Cox, C. C. 404 (where certain employees and a trade union secretary from London watched and conferred with the employer’s men, distributed a placard stating that his wages were below the average, assisted with money the removal of some of his men to other parts of the country and persuaded others not to enter into his employment and were found guilty of conspiracy but not of threats or intimidation: and ERLE, J., emphasised the right to strike, so long as no efforts were made to induce others to join the strike; and spoke of a “threat” (*ibid.*, at p. 432) as “threatening a man either with personal injury or with the loss of comfort in any way”)); to intoxicate imported labourers and remove them to a distance, in addition to the acts done in *R. v. Duffield*, *supra* (*R. v. Rowlands* (1851), 5 Cox, C. C. 436, 466 (where ERLE, J., at p. 460, laid it down (i.) that workmen might combine to raise wages, and, apparently, others not workmen might combine with them, but that such combination was only lawful while its purpose was to obtain a benefit for the parties combining; (ii.) that whether or not a combination to force a manufacturer to assent to certain wages was lawful, it was clearly unlawful to bring about that purpose by unlawful means, such as, intimidation or threats; (iii.) that an intention to create alarm and so force assent supported a charge of conspiracy to molest; and (4) that an agreement to obstruct an employer by intoxicating his workmen and inducing them to leave his employment was indictable, as was, apparently, an agreement to obstruct by persuading men, not under contract, to leave him; and he extended the meaning of “threat” and “intimidation” to an intimation of intended interference with a man’s freedom of action, including possibly a threat to call men out)); to say to men, “If you work there we shall consider you as blacks and we shall strike against you,” and to follow a man to his home (*Re Perham* (1859), 5 H. & N. 30).

By the Molestation of Workmen Act, 1859 (22 Vict. c. 34), s. 1, also repealed by the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), “molestation” and “obstruction” in stat. (1825) 6 Geo. 4, c. 129, were qualified as

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follows: "No workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work or by reason merely of his endeavouring peaceably, and in a reasonable manner and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages or the altered hours of labour so fixed or agreed upon or to be agreed upon shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said Act . . . provided always that nothing herein contained shall authorize any workman to break or depart from any contract or authorize any attempt to induce any workman to break or depart from any contract." Under the stat. (1825) 6 Geo. 4, c. 129, as thus amended, it was held to be criminal to present, in combination, to an employer a copy of a resolution of men threatening to strike unless certain men were discharged, this being a "threat" and "molestation" (*Walsby v. Anley* (1861), 3 E. & E. 516 (where COCKBURN, C.J., at p. 521, distinguished between a combination of men who put the employer to the alternative of retaining either themselves or the obnoxious persons, which he regarded as legal, and a combination of men who did not fairly give him the alternative but sought to coerce him by threats of doing something to his injury, which he regarded as illegal; and CROMPTON, J., at p. 523, held it a criminal offence to combine to procure the discharge of a fellow workman by a threat of a strike (as to this see note (y), p. 639, ante)); to order a member of a union to come out from a yard where a person objected to was employed, and to abuse such member, threaten to turn him out of the union and send his name round the country (*O'Neill v. Longman* (1863), 4 B. & S. 376), though it was not intimidation of an employer merely to discuss with him the terms of arranging a dispute, without communicating to him a resolution to strike (*O'Neill v. Kruger* (1863), 4 B. & S. 389), or, where such a resolution had been passed, to communicate it to the employer at his request (*Wood v. Bowron* (1866), L. R. 2 Q. B. 21); to threaten to call men out unless a certain person be discharged (*Shelbourne v. Oliver* (1866), 13 L. T. 630); to place pickets to note people coming in and out, which pickets used insulting expressions and gestures and followed persons, this being intimidation, molestation, and obstruction (*R. v. Druitt* (1867), 10 Cox, C. C. 592 (where, though it was said to be no offence to endeavour to persuade, without coercion or intimidation, or to place pickets if they excited no reasonable alarm and did not coerce or annoy, BRAMWELL, B., said, at p. 601, "even if the jury should be of opinion that the picket did nothing more than his duty as a picket and if that duty did not extend to abusive language and gestures . . . still, if that was calculated to have a deterring effect on the minds of ordinary persons by exposing them to have their motions watched and to encounter black looks, that would not be permitted by the law"; but for disapproval of this, see *Gibson v. Lawson*, [1891] 2 Q. B. 545, 557 *et seq.*)); to serve a notice on an employer that his men would be called out unless one of them joined the union (*Skinner v. Kitch* (1867), L. R. 2 Q. B. 393); to issue a placard requesting persons not to enter into the service of a certain employer (*Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; compare *ibid.*, *per* MALINS, V.-C., at p. 558 ("Every man is at liberty to induce others, in the words of the Act of Parliament 'by persuasion or otherwise' to enter into a combination to keep up the price of wages and the like: but directly he enters into a combination which has as its object intimidation or violence or interfering with the perfect freedom of action of another man, it then becomes an offence")). But mere peaceful persuasion without menace or violence, or abuse, shouting or hooting was held protected by the stat. (1859) 22 Vict. c. 24, no matter what the consequence was (*R. v. Shepherd* (1869), 11 Cox, C. C. 325); and in *Wood v. Bowron*, *supra*, where union officials called out men without breach of contract and in reply to a request for the reason forwarded a copy of a resolution not to work for that employer unless he limited the number of his apprentices, it was doubted whether the combination and the resolution were in themselves unlawful, and Cock-

BURN, C.J., said: "The cases ought not to be pressed further than they have gone: and we ought, as long as nothing is done contrary to the law, to leave it open to labour on the one hand and capital on the other to make the best terms they can for themselves. Large numbers of men, who have not the advantage of wealth, very often can protect their own interests only by means of association and co-operation and we ought not to strain the law against men who have only their own labour and their association by which they can act in the assistance of one another"; and see *Wood v. Bowron* (1866), L. R. 2 Q. B. 21, *per* MELLOR, J., at p. 28 ("Lord CAMPBELL, C.J., in *Hilton v. Eckersley* (1855), 6 E. & B. 47, expresses a strong opinion in favour of the right of labour to combine as to wages; and the late CROMPTON, J., in that case, and in the case of *Walsby v. Anley* (1861), 3 E. & E. 516, seems to differ in opinion with Lord CAMPBELL").

By the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), s. 1, which repealed the foregoing Acts, and was itself repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17, it was declared a criminal offence in any person "who shall do any one or more of the following acts, that is to say . . . (2) threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace . . . with a view to coerce such person, —(1) Being a master to dismiss or to cease to employ any workman or being a workman to quit any employment or to return work before it is finished; (2) Being a master not to offer or being a workman not to accept any employment or work; (3) Being a master or workman to belong to or not to belong to any temporary or permanent association or combination; (4) Being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination; (5) Being a master to alter the mode of carrying on his business or the number or description of any persons employed by him. . . . A person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases; that is to say, (1) If he persistently follow such person about from place to place: (2) If he hide any tools, clothes or other property owned or used by such person, or deprive him of, or hinder him in the use thereof: (3) If he watch or beset the house or other place where such person resides or works, or carries on business or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road. . . . Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section and is done with the object of coercing as hereinbefore mentioned." In the same year, by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 3, the purposes of a trade union were declared not unlawful by reason merely that they were in restraint of trade; see p. 613, *ante*. But it was held that these two Acts had not affected the common law as to conspiracy, and where a number of servants of a gas company struck in breach of contract in order to secure the reinstatement of a dismissed employee, but used no threats or violence, they were convicted of having agreed to force their employer to conduct his business as they desired by improper threats and molestation; molestation being anything done with improper intent to the unjustifiable annoyance of and interference with the employer, and such as would be likely to deter a man of ordinary nerve (*R. v. Bunn* (1872), 12 Cox, C. C. 316 (where BRETT, J., also laid it down that the defendants might be criminally liable for having agreed to hinder the employer in his business by simultaneous breaking of contracts of service, the breach of which was criminal under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), s. 4 (now repealed), though the defendants were not convicted on this ground). *R. v. Bunn*, *supra*, was disapproved in *Gibson v. Lawson*, [1891] 2 Q. B. 545, 557; and see Wright, Law of Criminal Conspiracies and Agreements, pp. 50—59. In *R. v. Hibbert* (1875), 13 Cox, C. C. 82, Mr. RUSSELL GURNEX, in his charge to the grand jury under the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32) (quoted in argument in *Lyons (J.) & Sons v. Wilkins*, [1899]

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Intimidation.

This enactment has no effect upon civil remedies (c).

SUB-SECT. 2.—Offences by Individuals.

1197. Every person commits an offence (d) who, with a view to compel (e) any other person (f) to abstain from doing, or to do, any act (g) which such other person has a legal right to do or to abstain

1 Ch. 255, 262, C. A.), declared it to be legal to attend at a place "to ascertain who were the persons working there or peaceably to persuade them or any others who were proposing to work there to join their fellow workmen"; but *CLEASBY, B.*, in his summing up (*R. v. Hibbert* (1875), 13 Cox, C. C. 82, at p. 87), used expressions which suggested that picketing otherwise lawful became unlawful if carried on to such a length and to such an extent as to cause in the employer a dread of loss: "for instance, suppose it was proved that there was a confederacy which rendered it impossible for the employers to continue their business from the want of workpeople, carried out by waylaying and offering money to their workmen and men seeking employment from them, this would be an indictable offence"; and the defendants were convicted on proof that they, while picketing, invited men to quit work, promised money if they did so, and threatened that they would be known as "black sheep" and would be unable to get employment elsewhere if they refused.

(c) *Quinn v. Leatham*, [1901] A. C. 495, per Lord LINDLEY, at p. 542. As to civil remedies, see pp. 648 *et seq.*, *post*.

(d) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7. The penalty is a fine not exceeding £20 or imprisonment for not exceeding three months (*ibid.*). Where in any Act relating to employers or workmen a pecuniary penalty is imposed, and no power is given to reduce such penalty, the court may impose by way of penalty a sum not less than one-fourth of the penalty imposed by the Act (*ibid.*, s. 8), but this, apparently, does not apply to the above-mentioned penalty which is expressed to be "not exceeding £20." The information may be laid by a police officer, and need not necessarily be laid by the person intimidated etc. (*Young v. Peck* (1912), 77 J. P. 49). The defendant is entitled to be tried before a jury (*R. v. Mitchell, Ex parte Livesey*, [1913] 1 K. B. 561). As to the procedure generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 566, note (a). As to the history of the law leading up to this Act, see note (b), p. 640, *ante*. The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), does not apply to offences committed by seamen or apprentices to the sea service (*ibid.*, s. 16), but it does apply to offences committed against seamen by persons who are not seamen (*Kennedy v. Cowie*, [1891] 1 Q. B. 771; compare *R. v. Wall* (1890), 112 C. C. Ct. Cases, 880; *R. v. Phillips* (1891), 113 C. C. Ct. Cas. 622). Offences of a similar character are dealt with by the Merchant Shipping Acts; see title SHIPPING AND NAVIGATION, Vol. XXVI., note (d), p. 14. By "seamen" are meant persons employed or engaged on board ship, as defined in the Merchant Shipping Acts (*R. v. Lynch*, [1898] 1 Q. B. 61, C. C. R. (persons are not exempt from the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), though they follow the sea as a calling if they are not engaged or employed as seamen on board ship at the time of the offence). But, apparently, if they are so engaged or employed, it does not affect their exemption that they were at the moment on shore (*ibid.*, at p. 66); and see title SHIPPING AND NAVIGATION, Vol. XXVI., note (d), p. 14.

(e) Apparently, whether the compulsion was effective or not (*Agnew v. Munro* (1891), 28 Sc. L. R. 335). This "view to compel" is the gist of the offence; see note (g), *infra*; see also *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A.; *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., per LINDLEY, M.R., at p. 267.

(f) Whether an employer or a workman (*Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A., per KAY, L.J., at p. 830).

(g) It is not sufficient in a conviction to use the words "with a view to compel him to abstain from doing acts which he had a legal right to do"

from doing, wrongfully and without legal authority (*h*) uses violence to or intimidates (*i*) such other person, or his wife or children, or

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(*R. v. McKenzie*, [1892] 2 Q. B. 519, where the justices had found that the "acts" were "following his occupation as the agent of the Shipping Federation"). The defect is one of substance and cannot be cured by amendment; the gist of the offence is not the following, but the view to compel a person to abstain etc. (*ibid.*). But, apparently, if the conviction had followed the words of the statute and said "act" instead of "acts," it would be sufficient (*ibid.*, per BRUCE, J., at p. 523; compare *Ex parte Wilkins* (1895), 64 L. J. (M. C.) 221, where CAVE, J., said that the only point in *R. v. McKenzie*, *supra*, was that the conviction did not follow the exact words of the statute; and it was held a sufficient description of a specified act to say "with a view to compel one A. B. to abstain from working as a shoe finisher in the employment of one C. D. a shoe manufacturer, carrying on business in the parish of E."). In *Smith v. Moody*, [1903] 1 K. B. 56, distinguishing and explaining *R. v. McKenzie*, *supra*, it was held that the act was sufficiently specified by the words "to abstain from working for J. B. at F. colliery"; and see *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., per LINDLEY, M.R., at p. 266.

(*h*) The words "wrongfully and without legal authority" should be inserted in the complaint or indictment (*Lyons (J.) & Sons v. Wilkins*, *supra*, per LINDLEY, M.R., at p. 266; *Clarkson v. Stuart* (1894), 32 Sc. L. R. 4 (where their absence was not fatal)). If the evidence is consistent with the legality of the acts, this possible legality must be disproved before the defendant can be convicted (*Lyons (J.) & Sons v. Wilkins*, *supra*), the words being inserted to provide for any unforeseen case in which the evidence of the acts may show some lawful authority (*ibid.*, per CHITTY, L.J., at p. 272). But in *Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (1906), 22 T. L. R. 327, C. A., VAUGHAN WILLIAMS, L.J., at p. 329, expressed the view that the words were introduced for the purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy; and it was held that merely to compel a person to pay union wages or employ union men by trying to get all the men into the union, so that there would be no non-union men to employ, was neither a civil nor a criminal offence; see *ibid.*, per FLETCHER MOULTON, L.J., at p. 330 ("It is inaccurate to say that the masters have a right to employ men on any specific terms. They have only a right to employ such, if any, as are willing to accept those terms, and no wrong is done them by any one who by lawful means lessens the number of those willing to accept them"). It is, apparently, not essential to specify in the complaint the particular sub-section of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7, which has been contravened (*Wilson v. Renton* (1909), 47 Sc. L. R. 209); the sub-sections merely specify different modes of committing one offence (*ibid.*). As to indictments generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329 *et seq.*

(*i*) An indictment charging that a person "used violence to or intimidated" is bad for duplicity (*R. v. Edmondes* (1895), 59 J. P. 776). In *Judge v. Bennett* (1887), 52 J. P. 247, it was held to be intimidation to write to an employer that his shop would be picketed, in language such as to make him afraid, whether the picketing amounted to an unlawful watching or besetting within the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7 (4) (see p. 646, *post*), or not; but see *Gibson v. Lawson*, [1891] 2 Q. B. 545, per MATHEW, J., at p. 550, commenting on *Judge v. Bennett*, *supra*. In *R. v. McKeevet* (1890), *Times*, 16th December, referred to in *Gibson v. Lawson*, *supra*, at pp. 550, 562, it was apparently held that to constitute intimidation there must be a threat of personal violence; and in *Gibson v. Lawson*, *supra*, it was held that it was not intimidation to communicate to a person and his employer an intention to strike and thus put that person in fear of being unable to get work. Apparently, intimidation in the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), is not wider in meaning than in the Criminal Law Amendment Act, 1871 (34 & 35

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injures his property, or persistently follows him about from place to place (*k*), or hides any tools, clothes or other property owned or used by him, or deprives him of or hinders him in the use thereof, or watches or besets the house or other place where he resides, or works, or carries on business, or happens to be, or the approach to such house or place (*l*), or follows him with two or more other persons in a disorderly manner in or through any street or road.

Vict. c. 32), s. 1 (see note (*b*), p. 643, *ante*), where it was limited to such intimidation as would justify a man being bound over, namely, a threat of personal violence (*Gibson v. Lawson*, [1891] 2 Q. B. 545); see *Curran v. Treleaven*, [1891] 2 Q. B. 545, 562, where a threat to an employer that the unions would combine to stop his business, and a speech to his men calling upon them in moderate terms to leave their work, were held not to be intimidation, even though the men left, as the defendant knew, in breach of contract; and compare *R. (Lanktree) v. M'Carthy*, [1903] 2 I. R. 146; *Young v. Peck* (1912), 77 J. P. 49. But a distinction is to be drawn between intimidation and threats as a criminal offence under the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), and the like as forming a ground of civil liability (*Allen v. Flood*, [1898] A. C. 1, *per* Lord HERSCHELL, at p. 128); see note (*n*), p. 653, *post*. The word "intimidation" is not a word of art, but a word of common use (*Gibson v. Lawson*, *supra*, at p. 559; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155, H. L., *per* TINDAL, C.J., at p. 235). Apparently, it is not essential to set out the words of threats alleged in a complaint (*Clarkson v. Stuart* (1894), 32 Sc. L. R. 4), but the specific acts of intimidation must be set out in the conviction (*Metcalfe v. Wiseman* (1888), 52 J. P. 439); compare *R. v. Rowlands* (1851), 5 Cox, C. C. 436, 466; *Re Perham* (1859), 5 H. & N. 30; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 260, note (*b*).

(*k*) The gist of the offence is not the following, but the view to compel a person to abstain etc. (*R. v. McKenzie*, [1892] 2 Q. B. 519); and it is illegal to follow with a view to compelling an employer to take back a dismissed employee (*R. v. Wall* (1907), 21 Cox, C. C. 401; compare *Re Perham*, *supra*; *Mackinlay v. Hart* (1897), 35 Sc. L. R. 32; *Wilson v. Renton* (1909), 47 Sc. L. R. 209). It is an offence to follow silently at a short distance if at the same time a crowd is following with hostile words and gestures (*Smith v. Thomasson* (1890), 16 Cox, C. C. 740); and compare *Young v. Peck*, *supra*.

(*l*) Such watching is illegal if done with a view to compelling an employer to take back a dismissed employee (*R. v. Wall*, *supra*). To beset A.'s house in order to compel B. is within the provision (*Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., *per* LINDLEY, M.R., at p. 268, and *per* CHITTY, L.J., at p. 272; and see *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A.). Watching and besetting is an actionable nuisance at common law, as an interference with the ordinary comfort of existence and the enjoyment of the house (*Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., *per* LINDLEY, M.R., at p. 267, though VAUGHAN WILLIAMS, L.J., at p. 274, dissented from this view; and compare *Wallis v. United French Polishers* (1905), *Times*, 28th November (where an *interim* injunction was granted against pickets on affidavits that their proceedings were a nuisance and annoyance, though there was no allegation of disorder)). The watching or besetting may be for even a short time (*Charnock v. Court*, [1899] 2 Ch. 35; *Walters v. Green*, [1899] 2 Ch. 696), and may be of any place where the workman is casually found, such as, for instance, the landing stage of a port at which men are being imported (*Charnock v. Court*, *supra*), or a railway station (*Walters v. Green*, *supra*); compare *Farmer v. Wilson* (1900), 69 L. J. (Q. B.) 496, where the place beset was a vessel in a river used by employers as a dépôt for the supply of men. Apparently, however, the operations of the defendants in these cases would now be protected by the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2; see note (*o*), p. 647, *post*. The persons in the place beset need not be in the service of any person; and a person has a legal right to remain in a place and there receive board and wages even

1198. One or more persons acting on their own behalf or on behalf of a trade union, or a branch (*m*) of a trade union, or of an individual employer or firm, may, however, in contemplation or furtherance of a trade dispute (*n*), attend at or near a house or place where a person resides or works or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working (*o*).

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though the object of his so doing is to fulfil a contract which he has no right to fulfil because it is in violation of a statute (*Farmer v. Wilson* (1900), 69 L. J. (Q. B.) 496). Apparently, evidence of previous acts of the defendant is admissible against him, his intention being in question (*Topin v. Feron* (1909), 43 I. L. T. 190).

(*m*) See Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5.

(*n*) As to the meaning of these words, see p. 662, *post*.

(*o*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2 (1). By *ibid.*, s. 2 (2), the following words in the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7, are repealed: "Attending at or near the house or place where a person resides or works or carries on business or happens to be or the approach to such house or place, in order merely to obtain or to communicate information shall not be deemed a watching or besetting within the meaning of this section." The alterations, therefore, are (i.) the omission of the words "the approach to such house or place," which may narrow the area of permissible "attendance," but, apparently, makes no practical difference; (ii.) the addition of "peacefully" before "obtaining or communicating information"; (iii.) the addition of "peacefully persuading any person etc."; and (iv.) the addition of the general requirement that the act, if it is to be protected, must be done "in contemplation or furtherance of a trade dispute"; the result of this being, apparently, that if the existence or contemplation of a trade dispute be negatived (see p. 662, *post*), such protection as was given to pickets by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), is withdrawn by the Trade Disputes Act, 1906 (6 Edw. 7, c. 47). *Ibid.*, s. 2 (1), deals with civil as well as with criminal responsibility (*Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord ATKINSON, at p. 123). Under the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), proof of an intention peacefully to persuade was held to be no defence in *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., *per* LINDLEY, M.R., at p. 267, though VAUGHAN WILLIAMS, L.J., at p. 274, thought that the fact that the "communication" invited the men to leave their work as soon as they lawfully might did not thereby cause it to cease to be a communication within the proviso, and that there were no facts to constitute such persuasion a common law nuisance; and in *Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (1906), 22 T. L. R. 327, C. A., the Court of Appeal held (before the passing of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47)) that no wrong, civil or criminal, was committed by stationing pickets who caused no violence, obstruction, or nuisance, did nothing beyond communicating and obtaining information, and invited no breach of contract, but were employed to induce the plaintiffs' workmen to join the union and then to determine their employment by proper notice; see *ibid.*, *per* FLETCHER MOULTON, L.J., at p. 329: "I cannot see that this section [Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7] affects or is intended to affect civil rights or remedies. It legalizes nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes of acts which were previously wrongful, *i.e.*, were at least civil torts, with penal consequences capable of being summarily inflicted"; and at p. 330: "No wrong would have been done to the plaintiffs in the present case if the defendants had succeeded in persuading every printer's assistant in the country to join the union, and they had rendered it impossible for the plaintiffs to get men to work for them on the terms

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1199. The fact that this summary jurisdiction is given to the magistrate does not affect the right of the High Court to grant an interlocutory injunction (*p*), and an injunction will be granted to restrain any of the acts which are crimes by common law or by statute if it tends to the destruction or deterioration of property (*q*).

SECT. 6.—*Torts Arising Out of the Operations of Trade Unions.*

SUB-SECT. 1.—*Torts by Individuals.*

(i.) *When there is no Trade Dispute.*

1200. A person commits an actionable wrong (*r*) if he knowingly and for his own ends induces another person to commit an

they desired. . . . In support of the plaintiffs' claim with regard to picketing, it must be shown that the defendants, or one of them, were guilty of a wrongful act, *i.e.*, that the picketing constituted an interference with the plaintiffs' action wrongful at common law, or as I think it may accurately be phrased, were guilty of a common law nuisance." It is to be noted that in this case the pickets do not appear to have persuaded men to join the union and terminate their service; but the object of the defendants, the union and its secretary, was so to persuade. In *R. v. Bauld* (1876), 13 Cox, C. C. 282 (a conviction under the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), wrongly referred to in the report as the Employers and Workmen Act, 1875), HUDDLESTON, B., at pp. 283, 284, 291, had limited the words "obtaining or communicating information" to obtaining etc. information as to union members who, while receiving strike pay, were also going to work; compare *R. v. Selsby* (1847), 5 Cox, C. C. 495, n., *per* ROLFE, B., at p. 498. The Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2 (1), does not change the nature of the offence under the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7, or make it necessary to allege intimidation expressly in the complaint; it merely provides a defence (*Wilson v. Renton* (1909), 47 Sc. L. R. 209); nor does it confer any right to enter upon private property against the will of the owner (*Larkin v. Belfast Harbour Commissioners*, [1908] 2 I. R. 214). It has been suggested that the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2 (1), does not apply to the "watching" of a private residence (*R. v. Wall* (1907), 21 Cox, C. C. 401, *per* PALLES, C.B., summing up at p. 403 ("They [the defendants] rely on their right under the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2 (1), to attend at the house for the purpose of peaceably persuading other employees to abstain from working. The Trade Disputes Act, 1906, refers to a 'mere attending,' which is more temporary than 'watching.' In any case, it is not suggested that there were any workmen there to be persuaded, as this count refers to watching the house in the suburbs, not the business premises in the city")). Apparently, there must be evidence that information was in fact received or communicated, or that there was an intention to receive or communicate information (*Wilson v. Renton*, *supra*). *Quære* whether peacefully picketing a theatre to persuade the public to abstain from going there is within the provision (*Topin v. Feron* (1909), 43 I. L. T. 190). It is to be noted that the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2 (1), is general in its application and is not confined to the case of members of a trade union (*Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord HALDANE, L.C., at p. 114, and *per* Lord ATKINSON, at p. 123).

(*p*) *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, 826, 827, C. A.

(*q*) *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; see title INJUNCTION, Vol. XVII., p. 205.

(*r*) Acts which are criminal offences are *a fortiori* a ground of civil liability. As to the exemption of trade unions from liability for torts, see pp. 665, 666, *post*. As to torts generally, see title TORT, pp. 461 *et seq.*, *ante*.

actionable wrong to a third person (s) to the damage of such third person (t).

It is an actionable wrong for a third person to interfere with contractual relations recognised by law if there is no sufficient justification for the interference (a); consequently it is an actionable

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(s) *Lumley v. Gye* (1853), 2 E. & B. 217, *per* ERLE, J., at p. 232; *Bowen v. Hall* (1881), 6 Q. B. D. 333, C. A.; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 614, C. A.; S. C., [1892] A. C. 25; *Allen v. Flood*, [1898] A. C. 1, *per* Lord WATSON, at p. 96; *Quinn v. Leathem*, [1901] A. C. 495, *per* Lord MACNAGHTEN, at p. 509; *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A.; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335, 339, C. A.; and compare *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. 147, C. A. The principle stated in the text is not confined to cases of conspiracy (*Quinn v. Leathem*, *supra*, at p. 537; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*, at p. 359); see titles CONTRACT, Vol. VII., p. 345; MASTER AND SERVANT, Vol. XX., pp. 269 *et seq.*; TORT, p. 476, *ante*.

(t) Actual damage is the gist of the action (*Ward, Lock & Co., Ltd. v. Operative Printers' Assistants' Society* (1906), 22 T. L. R. 327, 329, C. A.; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*, at pp. 369, 370), but not necessarily special damage in the narrow sense of the words (*National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*, at p. 370); see *Workman v. London and Lancashire Fire Insurance Co.* (1903), 19 T. L. R. 360; and title TORT, p. 470, *ante*. When a person does a wrongful act calculated as its natural and probable consequence to produce injury, and in fact producing injury, it is no answer that the natural and probable consequence is an act done by a third person in breach of duty or contract (*Bowen v. Hall* (1881), 6 Q. B. D. 333, 337, C. A. (disapproving *Vicars v. Wilcocks* (1806), 8 East, 1; 2 Smith, L. C., 11th ed., p. 521, if and in so far as it implies a decision to the contrary), approved in *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, 250); compare *Lumley v. Gye*, *supra*; and see 1 Smith, L. C., 11th ed., p. 293; 2 Smith, L. C., 11th ed., p. 531; and title TORT, pp. 469, 485, *ante*.

(a) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 37; *Quinn v. Leathem*, *supra*, *per* Lord MACNAGHTEN, at p. 510; approving *Lumley v. Gye*, *supra*, and *Temperton v. Russell*, [1893] 1 Q. B. 715 (apart from *dicta* which suggest that bad motive is the gist of the action); *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, *supra*; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239 (*a fortiori*, "to combine to procure a number of persons to break contracts is manifestly unlawful" (*ibid.*, *per* Lord HALSBURY, L.C., at p. 244)); and compare *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37, 51, C. A., following *Lumley v. Wagner* (1852), 1 De G. M. & G. 604, and, apparently, overruling *Heathcote v. North Staffordshire Rail. Co.* (1850), 2 Mac. & G. 100. In *Bowen v. Hall*, *supra*, the act induced was a breach of contract, and the decision was therefore correct on the principle stated in the text; but the ground of the decision was the presence of an intent to injure the plaintiff, a ground disapproved in *Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 119. In *Temperton v. Russell*, *supra*, it was laid down that it was immaterial whether the act induced was a breach of contract or not; this was similarly disapproved in *Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 119; compare *ibid.*, *per* Lord SHAND, at p. 168, and *per* Lord DAVEY, at p. 171; and see note (e), p. 650, *post*. The contract need not be one setting up the relation of master and servant, but may be a contract of any description (*Lumley v. Gye*, *supra*; *Bowen v. Hall*, *supra*; *Temperton v. Russell*, *supra*; *Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 126; *Quinn v. Leathem*, *supra*; *National Phonograph Co., Ltd.*

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wrong, apart from cases where there is a trade dispute in contemplation or existence (*b*), to induce men to leave their employment in breach of their contracts, if the inducement is made with knowledge of such contracts (*c*), or, with knowledge that such contracts have been broken, to assist in supporting the men who have broken them (*d*).

1201. The ground of the liability is not malice in the sense of spite or ill-will towards, or intent to injure, the employer, but malice in the sense of the motive which may be inferred to exist from the procuring of the commission of an act known by the procurer to be illegal (*e*).

v. Edison-Bell Consolidated Phonograph Co., Ltd., [1908] 1 Ch. 335, C. A., *per* KENNEDY, L.J., at p. 366). The damages for procuring breach of contract are not necessarily calculated on the same basis as that of the damages for the actual breach (*Lumley v. Gye* (1853), 2 E. & B. 217). As to procuring or encouraging breach of contract by a servant or master, see, generally, titles CONTRACT, Vol. VII., p. 345; MASTER AND SERVANT, Vol. XX., pp. 267 *et seq.*; TORT, pp. 476, 484, *ante*. As to justification, see pp. 659, 660, *post*.

(*b*) See p. 654, *post*.

(*c*) *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.; *Conway v. Wade*, [1909] A. C. 506, *per* Lord LOREBURN, L.C., at p. 510; *Dallimore v. Williams and Jesson* (1912), *Times*, 27th April (where, however, a new trial was ordered on the ground of misdirection as to the meaning of "trade dispute"); see S. C. (1912), *Times*, 14th November, C. A. See also *Scrutton, Ltd. v. Lewis* (1913), *Times*, 16th January, C. A., where COLERIDGE, J., had decided that the mere communication to workmen of a fact which caused them to strike did not constitute "persuasion," but in the Court of Appeal, Lord ALVERSTONE, C.J., without deciding the point, doubted whether this was correct.

(*d*) *Smithies v. National Association of Operative Plasterers*, *supra*, distinguishing *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384, because in that case, before the union approved and supported the strikers, the masters had insisted on new terms of employment before taking the men back; see also p. 604, *ante*.

(*e*) *Lumley v. Gye*, *supra*, *per* ERLE, J., at p. 231; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* BOWEN, L.J., at p. 614; compare *Allen v. Flood*, [1898] A. C. 1, where Lord WATSON, p. 95, disapproved the principle expressed, in *Bowen v. Hall* (1881), 6 Q. B. D. 333, C. A., *per* BRETT, L.J., at p. 338, laid down in *Temperton v. Russell*, [1893] 1 Q. B. 715, and followed in *Flood v. Jackson*, [1895] 2 Q. B. 21, 37, C. A., that a person who procures another to commit a lawful act is guilty of an actionable wrong if he was actuated by an intent to injure; a principle which was unnecessary to the actual decision in *Temperton v. Russell*, *supra*, where the defendants had procured persons to break contracts and had conspired to induce persons not to enter into contracts. In a case of conspiracy, however, the intent to injure does constitute a ground of liability; see *Allen v. Flood*, *supra*, *per* Lord WATSON, at p. 108, *per* Lord HERSCHELL, at p. 124, and *per* Lord MACNAGHTEN, at pp. 153, 154 (where a *dictum* in *Cattle v. Stockton Waterworks* (1875), L. R. 10 Q. B. 453, BLACKBURN, J., at p. 458, that malicious intention was the gist of the action in *Lumley v. Gye*, *supra*, was disapproved); *Quinn v. Leatham*, [1901] A. C. 495, *per* Lord MACNAGHTEN, at p. 510; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, *per* Lord MACNAGHTEN, at p. 246, and *per* Lord JAMES OF HEREFORD, at p. 250, approving *Bowen v. Hall*, *supra*, *per* BRETT, L.J., at p. 337; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, *supra*, at p. 360; compare *Bromage v. Prosser* (1825), 4 B. & C. 247, 255; and see, generally, title TORT, pp. 466 *et seq.*, *ante*.

1202. It is not actionable in an individual to ask or persuade a person to do or to refrain from doing an act which such person may lawfully do or refrain from doing, even though a third party is thereby injured in his trade (*f*), for an act in itself legal does not become actionable merely because it interferes with another in his trade (*g*).

If an act is not in itself a civil wrong, a bad motive will not make it so (*h*), and where "malice" is used in this connexion it means an

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(*f*) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 36, 42, 52; *Scottish Co-operative Wholesale Society v. Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc. L. R. 645; compare *Keeble v. Hickeringall* (1707), 11 East, 573, n.; *Boots v. Grundy* (1900), 82 L. T. 769; *Workman v. London and Lancashire Fire Insurance Co.* (1903), 19 T. L. R. 360. But in *Conway v. Wade*, [1909] A. C. 506, Lord LOREBURN, L.C., at p. 510, treated it as still doubtful whether an action would or would not lie for inducing a person not to employ or not to serve another where there was no breach of contract, no violence, and no threat alleged. The basis of the legality of the acts of a trader who injures another by competition has been the subject of a considerable difference of opinion. One view is that there is a right to trade, interference with which is *prima facie* unlawful, but may be justified by a plea of competition (*Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* FRY, L.J., at p. 625; compare *Keeble v. Hickeringall*, *supra*, at p. 576; *Gloucester Grammar School Case* (1410), Y. B. 11 Hen. 4, 47, f. 21). The other view is that the acts by which competition is pursued are all lawful acts, and require no justification (*Allen v. Flood*, [1898] A. C. 1, *per* Lord HERSCHELL, at p. 140; and see note (*h*), *infra*). In *Quinn v. Leathem*, [1901] A. C. 495, however, the court apparently returned to the first principle; see *ibid.*, at pp. 525, 527; and in *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A., *per* STIRLING, L.J., at p. 622, the words of FRY, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., at p. 625, were quoted as good law; see also *A.-G. of Australia v. Adelaide Steamship Co.* (1913), 109 L. T. 258, P. C.; and pp. 655, 656, *post*.

(*g*) *Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 138, criticising (at p. 139) *dicta* in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* BOWEN, L.J., at p. 613, as too wide.

(*h*) *Allen v. Flood*, *supra*, *per* Lord WATSON, at p. 92 ("although the rule may be otherwise with regard to crimes"; and if the act be a civil wrong, it is none the less so because done with a good motive); *ibid.*, *per* Lord MACNAGHTEN, at p. 152 ("Many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern, for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement—suppose a man declines to give a servant a character because he is offended with the servant for leaving—suppose a person of position takes away his custom from a country tradesman in a small village, merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling—no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend of his not to employ the tradesman any more. Neither the one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge?"). Compare *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, C. A., *per* BYRNE, J., at p. 258, and *per* CHITTY, L.J., at p. 270; *Quinn v. Leathem*, *supra*, *per* Lord MACNAGHTEN, at p. 508,

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intent to do an act which is wrongful, not merely an act which is harmful, to the detriment of another (*i*). It is, therefore, not an actionable wrong for an individual merely to induce a person not to serve or not to employ another, where no breach of contract is thereby caused (*k*), unless such inducement be accompanied by violence or threats (*l*), or fraud, misrepresentation, intimidation, obstruction, or molestation, or other illegal means (*m*), whether the means of compulsion used be physical or moral (*n*).

per Lord BRAMPTON, at p. 524, and *per* Lord LINDLEY, at p. 533; *Stevenson v. Newnham* (1853), 13 C. B. 285, 297, Ex. Ch.; *Bradford Corporation v. Pickles*, [1895] A. C. 587 (a case applicable not only to rights of property, but to the exercise by an individual of any right; see *Allen v. Flood*, [1898] A. C. 1, *per* Lord HERSCHELL, at p. 124). *Carrington v. Taylor* (1809), 11 East, 571, was overruled in *Allen v. Flood*, *supra*, *per* Lord WATSON, at p. 103; compare *ibid.*, *per* Lord HERSCHELL, at pp. 135, 136. *Keeble v. Hickeringill* (1707), 11 East, 573, n., does not decide that an evil motive will render unlawful an act otherwise lawful (*Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 135), or if it does, is overruled (*ibid.*, *per* Lord WATSON, at p. 102, and *per* Lord HERSCHELL, at pp. 132, 133); and see, generally, titles MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 680; TORT, pp. 466 *et seq.*, *ante*.

(*i*) *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* BOWEN, L.J., at p. 612, approved in *Allen v. Flood*, *supra*, *per* Lord WATSON, at p. 94. "Malice" in such cases cannot be left at large to the jury (*ibid.*, *per* Lord HERSCHELL, at p. 118, and *per* Lord DAVEY, at p. 171); compare the meaning of "malice" in defamation, as to which see title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 609. As to malice in torts generally, see title TORT, pp. 466 *et seq.*, *ante*.

(*k*) *Allen v. Flood*, *supra*. This case was decided on the hypothesis that the defendant had neither uttered nor carried into effect any threat, and that there was no conspiracy or combination; it does not affect cases where there are conspiracy, threats, loss of business and interference with legal rights (*Quinn v. Leathem*, [1901] A. C. 495, *per* Lord HALSBURY, L.C., at pp. 406, 407). It decided no new law, but merely set aside *dicta* in *Bowen v. Hall* (1881), 6 Q. B. D. 333, C. A., and *Temperton v. Russell*, [1893] 1 Q. B. 715, which were unnecessary to the decision of either case (*Quinn v. Leathem*, *supra*, *per* Lord MACNAGHTEN, at p. 508); see also *ibid.*, *per* Lord SHAND, at p. 514, and *per* Lord LINDLEY, at p. 536, distinguishing *Allen v. Flood*, *supra*, on the ground that in that case the defendant's purpose was to promote his own trade interest as distinguished from a purpose to injure the plaintiff in his trade, which latter purpose was held to be present in *Quinn v. Leathem*, *supra*; and see *Workman v. London and Lancashire Fire Insurance Co.* (1903), 19 T. L. R. 360; *McElrea v. United Society of Drillers* (1905), *Times*, 17th February, C. A.; *Jose v. Metallic Roofing Co. of Canada, Ltd.*, [1908] A. C. 514, P. C.

(*l*) *Allen v. Flood*, *supra*, *per* Lord WATSON, at p. 96; *Conway v. Wade*, [1909] A. C. 506, *per* Lord LOREBURN, L.C., at p. 510. "Threat" includes a threat of violence to property (*Allen v. Flood*, *supra*, *per* Lord HERSCHELL, at p. 128). *Quære* whether a threat of vexatious litigation is unlawful coercion (*ibid.*, *per* Lord WATSON, at p. 105); compare *Garret v. Taylor* (1620), Cro. Jac. 567 (where a trader's customers were deterred from buying by threats of personal injury and of annoyance by litigation); *Tarleton v. McGawley* (1793), Peake, 270 [205] (natives willing to be customers frightened off by cannon); and see *Santen v. Busnach* (1913), 29 T. L. R. 214, C. A.

(*m*) *Lumley v. Gye* (1853), 2 E. & B. 217; *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra*, at p. 614; S. C., [1892] A. C. 25, 37;

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1203. By “illegal means” are meant acts in the nature of civil or criminal wrongs, regardless of motive (*o*), and a threat to cause a strike apparently constitutes such illegal means (*p*), but not a mere warning that there may or will be a strike (*q*).

Whether words used are a threat or a mere warning is a question of fact for the jury (*r*); but mere words of warning must not be left to

Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B. 147, 156, C. A.; *Quinn v. Leatham*, [1901] A. C. 495, 510; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335, 359, 361, 368, 369, C. A. (“illegal means” includes deceit practised upon the person induced; but in this case the inducement was to break a contract, for, A. being bound by agreement with B. not to sell to C. goods obtained from B., C. secured such goods from A. through the intervention of D., who acted under an assumed name as an independent dealer); compare *Couper & Sons v. Macfarlane* (1879), 16 Sc. L. R. 379, 384. Apparently, the misrepresentation must be wilful and intentional (*Allen v. Flood*, [1898] A. C. 1, per Lord HERSCHELL, at p. 142, per Lord MACNAGHTEN, at p. 149, and per Lord DAVEY, at p. 175). It is not illegal means for a trader to cease to employ agents who also act as agents for his rivals (*Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 43, 50 (a case of action in combination; but the proposition applies *a fortiori* to the acts of an individual)); see the note on this point in the Report of the Royal Commission on Trade Disputes, 1906 [Cd. 2825], p. 19.

(*n*) *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 626; *Allen v. Flood*, *supra*, per Lord HERSCHELL, at p. 128. As to intimidation as a criminal offence, see *Connor v. Kent*, *Gibson v. Lawson*, *Curran v. Treleaven*, [1891] 2 Q. B. 545; and p. 645, *ante*.

(*o*) *Allen v. Flood*, *supra*, per Lord WATSON, at p. 96.

(*p*) *Quinn v. Leatham*, [1901] A. C. 495, per Lord LINDLEY, at p. 538; *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A. In *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A., STIRLING, J., at p. 623, thought that to threaten a strike in order to procure the dismissal of a man who had not paid a fine imposed by his union was probably an actionable wrong, even if done by an individual, being of the nature of “molestation or coercion.”

(*q*) *Allen v. Flood*, *supra*, per Lord WATSON, at p. 98, and per Lord HERSCHELL, at p. 129; *Quinn v. Leatham*, *supra*, per Lord LINDLEY, at pp. 537, 538, disapproving the view taken by Lord HERSCHELL in *Allen v. Flood*, *supra*, at p. 117, that it made no difference in law whether the defendant said that the men would be called out, or merely that they would cease to work; *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, L.C., at p. 510; *Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 28 T. L. R. 518, C. A.; *Santen v. Busnach* (1913) 29 T. L. R. 214, C. A.

(*r*) *Conway v. Wade*, *supra*, at pp. 514, 515; S. C., [1908] 2 K. B. 844, C. A. (the evidence was that the plaintiff, a member of a union, who had not paid a fine imposed in 1900, obtained work at R.'s in 1907, and a few days later was promoted; other union members working with him were dissatisfied, and sent a man to tell the defendant, a delegate of the union, that unless the plaintiff were stopped there would be a strike; a similar intimation was given by the men to another trade union official, who also conveyed it to the defendant; defendant thereupon said to R.'s foreman, “You had better stop Conway or there will be trouble with the men,” and the plaintiff was thereupon discharged (apparently without any breach of contract); but the defendant had no authority from the union to do what he did; and it was found by the jury that no trade dispute was in existence or contemplation (see pp. 662 *et seq.*, *post*); that the defendant uttered a threat with a view to, and with the effect of, preventing the plaintiff from obtaining or retaining employment, in order to compel him to pay, and punish him for not paying, the fine; that the defendant did not merely warn the employers that the men would strike, nor was his action in consequence of the men

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the jury unless there is something in the manner or circumstances of their utterance which might constitute them a threat (s).

(ii.) *When there is a Trade Dispute.*

1204. If an act is done by a person in contemplation or furtherance of a trade dispute (t), it is not actionable on the ground only that it induces some other person to break a contract of employment (u), or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or of his labour as he wills (a).

objecting to work with the plaintiff; and that the defendant did more than merely act on behalf of the men. In view of these findings the case was treated in the House of Lords on the basis that the defendant, acting as a mere mischief-maker in order from unworthy motives to injure the plaintiff, and in a matter in which he, the defendant, had no concern, procured the plaintiff's dismissal by a threat that the men would strike, which was untrue; that the complaint as to non-payment of the fine was a mere excuse to cover an intention to injure the plaintiff because he had been promoted, and that the whole story as to the men's objection to work with the plaintiff was a fabrication); compare *Allen v. Flood*, [1898] A. C. 1, per Lord HERSCHELL, at p. 128, and per Lord SHAND, at p. 164; and see *Santen v. Busnach* (1913), 29 T. L. R. 214, C. A.; *Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 28 T. L. R. 518, C. A.

(s) *Santen v. Busnach*, *supra*. As to the functions of the jury generally, see title JURIES, Vol. XVIII., pp. 225 *et seq.*

(t) As to the meaning of these words, see pp. 662 *et seq.*, *post*.

(u) As to what constitutes a contract of employment, see title MASTER AND SERVANT, Vol. XX., pp. 75 *et seq.*, 268. It is to be noted that the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3, does not affect inducements to break contracts other than contracts of employment. As to the liability against which protection is afforded by this provision, see p. 649, *ante*. Nor does the provision protect a man from liability for a libel (*Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, 68, C. A.).

(a) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3. As to the general application of this provision, compare note (o), p. 647, *ante*; as to its general effect, see *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, L.C., at p. 511 ("It is clear that if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract' and so forth. So far there is no change. If the inducement be to break a contract [of employment] without threat or violence then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute.' . . . If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills' there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute.' So there is no longer any question in such cases whether there was 'sufficient justification' or not. The condition contained in these words as to trade disputes is made sufficient"); S. C., [1908] 2 K. B. 844, C. A., per COLLINS, M.R., at p. 849 ("It will be observed that this leaves *Lumley v. Gye* [1853], 2 E. & B. 217, and *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* [1903] 2 K. B. 600, C. A.] untouched except as to trade disputes"); see also *Gaskell v. Lancashire and Cheshire Miners' Federation*, *supra*. The words "or that it is an interference with" to the end of the enactment seem to be designed to protect the doer against the consequences of the doctrine that there is a right to trade, any interference with which, even by an

SUB-SECT. 2.—*Conspiracy.*(i.) *When there is no Trade Dispute.*

1205. It is not possible to state with certainty the position at common law of officials and members of a trade union or other persons who carry out in combination the operations usually associated with the activities of trade unions, as the cases on the subject have left the law in considerable doubt (*b*).

It is clear, in the first place, that acts actionable (*c*), if done by an individual, are *a fortiori* actionable if done by two or more in combination and if causing actual damage (*d*).

There is much authority of great weight in support of the proposition that no action will lie against persons who in combination do acts which apart from the combination would not be either criminal or actionable, unless the combination is itself a criminal conspiracy (*e*). Where, on the other hand, a combination to do certain acts is alleged and proved, the effect of the combination has been held to give rise to a cause of action even though the acts done which constitute the means by which that effect is attained would not have been

individual, requires to be justified on the ground, for instance, of trade competition, a doctrine repudiated in *Allen v. Flood*, [1898] A. C. 1, but asserted in *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; *Quinn v. Leatham*, [1901] A. C. 495, and *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A.; see note (*f*), p. 651, *ante*, and p. 656, *post*. If there was a trade dispute and the act was done in furtherance of it, the fact that the act was done with a bad motive does not take it out of the protection of the statute (*Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, C. A.).

(*b*) As to criminal conspiracy generally, see pp. 638 *et seq.*, *ante*; title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 260 *et seq.* As to the statutory exemption of trade unions from liability, see pp. 665, 666, *post*. The essential elements of criminal conspiracy and conspiracy giving rise to a cause of action are the same, but in the latter case special damage must be proved (*Quinn v. Leatham*, *supra*, per Lord MACNAGHTEN, at p. 510, per Lord BRAMPTON, at p. 528, and per Lord LINDLEY, at p. 542; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, per Lord ATKINSON, at pp. 122, 123; and see *Skinner v. Gunton, Lyon and Leason* (1669), 1 Wms. Saund. 229; *Lumley v. Gye* (1853), 2 E. & B. 217, 230; *Barber v. Lesiter* (1859), 7 C. B. (N. S.) 175; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 616, C. A.; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*, per STIRLING, L.J., at p. 621); see also the Memorandum (by the Right Hon. Arthur Cohen, K.C.) on the Civil Action of Conspiracy, annexed to the Report of the Royal Commission on Trade Disputes, 1906 [Cd. 2825], p. 20.

(*c*) And, *a fortiori*, acts criminal.

(*d*) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 37; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, per Lord HALSBURY, L.C., at p. 244.

(*e*) *Skinner v. Gunton, Lyon and Leason*, *supra*; *Savile v. Roberts* (1698), 1 Ld. Raym. 374, 378, 379; *Mogul Steamship Co. v. McGregor, Gow & Co.* (1888), 21 Q. B. D. 544, per Lord COLERIDGE, C.J., at p. 549; S. C. (1889), 23 Q. B. D. 598, C. A., per BOWEN, L.J., at p. 616; S. C., [1892] A. C. 25; *Kearney v. Lloyd* (1890), 26 L. R. Ir. 268, per PALLES, C.B., at p. 280; *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fishers' Trade Defence Association* (1898), 35 Sc. L. R. 645; *Boots v. Grundy* (1900), 82 L. T. 769; and compare *Salaman v. Warner* (1891), 65 L. T. 132, C. A.; and see the Memorandum referred to in note (*b*), *supra*; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 260 *et seq.*

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actionable if done by an individual (*f*). Even in this case, however, there must be an interference with some legal right (*g*), and such legal right is apparently to be found in the principle that every man has a right to carry on his trade or dispose of his labour in any lawful way in which he thinks fit and that an interference with such right is *prima facie* wrongful and requires justification (*h*).

1206. The result appears to be that though when an individual interferes by legal means with the right of another person to trade his acts may be lawful and require no justification (*i*), when several in combination are responsible for a similar interference, the effect of their combination constitutes their acts unlawful by reason, presumably, of the greater extent of the injury which can be caused by the co-operation of numbers (*k*), and so supplies the violation of a legal right which is essential to the cause of action. Consequently, it is necessary for the defendants to show some justification, and in the inquiry into justification a malicious intention, in the sense of ill-will and intention to injure, becomes a material element (*l*). A distinction, therefore, is to be drawn according as the combination is in pursuit of a legitimate trade object, such as success against a rival trader (*m*), or is in pursuit of an intention to injure, apart from such object (*n*).

(*f*) Compare *Quinn v. Leatham*, [1901] A. C. 495, 510, 511, 530 (approving *dicta* in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 616, 630, 631, C. A.; S. C., [1892] A. C. 25, 38, 45); *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901, C. A., per BUCKLEY, L.J., at p. 925; and see *Allen v. Flood*, [1898] A. C. 1, per Lord WATSON, at p. 108; *Santen v. Busnach* (1913), 29 T. L. R. 214, C. A. Similarly an act not criminal if done by an individual may be criminal if done in combination; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 261, 262, and note (*b*), p. 640, *ante*. It was pointed out in *Quinn v. Leatham*, *supra*, per Lord HALSBURY, L.C., at pp. 506, 507, that *Allen v. Flood*, *supra*, did not affect cases of conspiracy; see note (*k*), p. 652, *ante*.

(*g*) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, 38, 50; *Allen v. Flood*, *supra*; *Quinn v. Leatham*, *supra*, per Lord LINDLEY, at p. 539; and compare *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fishers' Trade Defence Association* (1898), 35 Sc. L. R. 645 (butchers acting in concert induced salesmen not to sell meat to the plaintiffs by threatening that if they did so they, the butchers, would not buy from the salesmen: held, no action lay); *Salaman v. Warner* (1891), 65 L. T. 132, C. A.

(*h*) Compare *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A.; *Quinn v. Leatham*, *supra*, per Lord BRAMPTON, at p. 526 (where it seems to be implied that a combination with intent to injure a man in his trade, as apart from a combination in defence of legitimate trade interests, is a criminal conspiracy at common law); and see p. 639, *ante*; see also Erle, *The Law Relating to Trades Unions*, p. 12.

(*i*) See p. 651, *ante*.

(*k*) Compare *Quinn v. Leatham*, *supra*, per Lord MACNAGHTEN, at p. 511.

(*l*) *Allen v. Flood*, *supra*, per Lord WATSON, at p. 108, per Lord HERSCHELL, at p. 124, and per Lord MACNAGHTEN, at p. 153 (where the rule that a legal act cannot be made illegal by a bad motive was regarded as probably not applicable in a case of conspiracy).

(*m*) As in *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; *Jenkinson v. Nield* (1892), 8 T. L. R. 540; *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fishers' Trade Defence Association*, *supra*; and see *Workman v. London and Lancashire Fire Insurance Co.* (1903), 19 T. L. R. 360.

(*n*) Compare *Allen v. Flood*, *supra*, per Lord SHAND, at p. 169;

If, however, the object is not unlawful, and the acts done would not have been actionable if done by an individual, no action lies (o).

1207. In accordance with the above principle, it has been held an actionable wrong requiring justification (p) for two or more in combination to induce persons not to work for an employer, and to induce persons not to work for a customer of that employer, whether the inducement involve breaches of contract or not, if damage results to that employer (q); or, with the object of preventing a person from obtaining or retaining employment, to cause or threaten to cause a strike of the men employed by the employer of such person, if the defendants have power to cause such strike and thereby in fact deprive such person of his employment (r).

It is a sufficient justification if the acts were done not with intent to injure, but with intent to further a legitimate trade purpose (s).

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Application of
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Quinn v. Leatham, [1901] A. C. 495, per Lord SHAND, at p. 512. It is to be noted that Lord SHAND (*ibid.*, at p. 514) and Lord LINDLEY (*ibid.*, at p. 536) apparently applied the same test to the acts of an individual; but see p. 651, *ante*.

(o) *Huttley v. Simmons*, [1898] 1 Q. B. 181 (an unsatisfactory case as reported (see *Quinn v. Leatham*, *supra*, at p. 540), but approved by Lord BRAMPTON (*ibid.*, at p. 531), on the ground that apparently DARLING, J., held the object to be lawful ("If he had held that, although the object of the conspiracy was unlawful, yet if [*sic*] the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed")); compare *Kearney v. Lloyd* (1896), 26 L. R. Ir. 268.

(p) As to what may be justification, see pp. 659, 660, *post*.

(q) *Quinn v. Leatham*, *supra*.

(r) *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A. (where breach of contract was involved); *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A. (where no breach of contract was involved and it was held that if such acts are done by officials of a union in its service and for its benefit the union is liable; but, as to the liability of trade unions, see p. 665, *post*); compare *Thomas v. Amalgamated Society of Carpenters and Joiners* (1902), *Times*, 28th April. But in *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*, ROMER, L.J., at p. 619, was of opinion that in such a case combination was not essential to the cause of action, the ground of the action being "unjustifiable molestation" and "improper and inexcusable interference with the man's ordinary rights of citizenship." This, however, appears to be contrary to the principle that a bad motive will not make a legal act illegal; see p. 651, *ante*. There is a distinction between a threat to call men out and a mere warning that men will come out; see *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*, per VAUGHAN WILLIAMS, L.J., at p. 617, and per STIRLING, L.J., at p. 623; and see p. 653, *ante*.

(s) Thus, in *Bulcock v. St. Anne's Master Builders' Federation* (1902), 19 T. L. R. 27, the defendants, a masters' federation, finding that the plaintiff, one of their employees, having struck or been locked out, had obtained employment with a member of an allied federation, asked the central federation to which they were allied to induce that member to discharge the plaintiff, and the plaintiff was in consequence, without breach of contract, discharged; but it was held that no action lay, as

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—
“Black lists.”

1208. The same principle has been applied in the case of “black lists” and circulars issued in the course of trade disputes.

It is actionable to publish lists of a person’s customers for the purpose and with the effect of injuring that person in his business by holding him up to unpopularity or by intimidating those who would otherwise have dealt with him (*t*), or to publish lists of the names of men who refuse to strike, with the object of intimidating them or coercing their employer (*a*); and *a fortiori*, such conduct is actionable if the circulars or lists contain statements which are false (*b*).

If, however, such lists or circulars contain no false statement, they may be justified by showing that they were issued in pursuit of a legitimate trade object and without ill-will towards the person injured by them, or if there is no evidence to the contrary (*c*).

the acts done were not done with intent to injure the plaintiff, but only with intent to further the defendants’ own interests; and see *Workman v. London and Lancashire Fire Insurance Co.* (1903), 19 T. L. R. 360; and note (*m*), p. 656, *ante*.

(*t*) See *Quinn v. Leathem*, [1901] A. C. 495, *per* FITZ-GIBBON, L.J., at p. 500; in the House of Lords the “black lists” were not in issue except as overt acts showing conspiracy; but see *ibid.*, *per* Lord LINDLEY, at p. 538 (“Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost”).

(*a*) *Trollope v. London Building Trades Federation* (1896), 12 T. L. R. 373 (distribution of a poster edged with black containing the names of members of the union who refused to strike held actionable, on a finding by a jury that it was not published *bonâ fide* in the interests of the union, but for the purpose of compelling an employer to dismiss men in breach of contract); compare *M’Kernan v. United Operative Masons’ Association of Scotland* (1874), 11 Sc. L. R. 219 (where a rule requiring the circulation among the members of a list of members who had worked in opposition to the society was regarded as in unlawful restraint of trade).

(*b*) *Pink v. Federation of Trades and Labour Unions* (1892), 8 T. L. R. 216, 711 (injunction granted restraining a circular which falsely alleged that the plaintiffs (employers) had boycotted men in their employment because they belonged to a union, and which invited secretaries of co-operative societies not to deal with, and to induce their members not to deal with, the plaintiffs; but the impropriety of the circular was not disputed by the defendants); and see *Dallimore v. Williams and Jesson* (1912), *Times*, 27th April (where, however, a new trial was ordered on account of misdirection as to the meaning of “trade dispute”; see S. C. (1912), 29 T. L. R. 267, C. A.); *Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, C. A.; S. C., [1913] A. C. 107.

(*c*) *Peto v. Apperley* (1891), 35 Sol. Jo. 792 (distribution of a notice by a trade union secretary merely inviting carpenters and joiners to keep away from a certain employer during a strike held justified as being merely in furtherance of the union’s objects and not done with any personal feeling against the plaintiff); *Haile v. Lillingstone* (1891), 35 Sol. Jo. 792 (distribution of notice by trade union secretary appealing for a boycott of a tradesman and calling him a blackleg and sweater: held justified, following *Peto v. Apperley*, *supra*); *Jenkinson v. Nield* (1892), 8 T. L. R. 540 (association of masters issued a “black list,” containing the plaintiff’s name, and asking all masters in the trade not to employ him and others who had been locked out: held no action lay, in the absence of evidence that the masters were actuated by any other motive than self-interest, or by a desire to injure the plaintiff); *Bulcock v. St. Anne’s Master Builders’ Federation* (1902), 19 T. L. R. 27 (masters’ federation allied to a central federation sent to the central federation a list of names of men who had struck and

(ii.) *When there is a Trade Dispute.*

1209. An act done in pursuance of an agreement or combination by two or more persons, if done in contemplation or furtherance of a trade dispute, is not actionable unless the act if done without any such agreement or combination would be actionable (*d*).

SUB-SECT. 3.—*Justification.*

1210. No justification is required where, in the case of an individual, the acts done are all legal, or, in the case of a combination, the acts done and their effect are all legal (*e*).

The acts of an individual, or the acts or effect of a combination, may, though illegal, be justified; and, though in the cases the distinction is not very clearly made, it appears that what may justify an illegal effect of a combination will not necessarily justify the illegal acts of an individual or a combination (*f*).

SECT. 6.

Torts
Arising
out of the
Operations
of Trade
Unions.

Combination
in furtherance
of trade
dispute.

When
justification
necessary.

found employment elsewhere, for the purpose of preventing such men from obtaining employment with any federated employer: held that this was no evidence of an unlawful threat; see note (*s*), p. 657, *ante*).

(*d*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 1. As to the meaning of "trade dispute," see pp. 662 *et seq.*, *post*; compare *Conway v. Wade*, [1908] 2 K. B. 844, C. A. (reversed, [1909] A. C. 506, without affecting this point), *per* COZENS-HARDY, M.R., at p. 849 ("Section 1 alters the law of conspiracy—or rather, I should say, repeals the law of conspiracy—where there is a trade dispute, but leaves it intact in every other case"). The effect of the provision seems to be to do away, in the case of trade disputes, with the doctrine that though all the overt acts be legal, the combination itself may be illegal by reason of its object; see p. 655, *ante*; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, *per* Lord ATKINSON, at p. 122 ("The 1st section simply aims at assimilating the civil and criminal law in respect of the particular kind of conspiracy mentioned in the section"). As to the general application of the provision, compare note (*o*), p. 647, *ante*.

(*e*) *Allen v. Flood*, [1898] A. C. 1, *per* Lord WATSON, at p. 94 ("Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse"); see *ibid.*, *per* Lord HERSHELL, at p. 138. As to the distinction between the acts of an individual and of a combination, see pp. 655 *et seq.*, *ante*. In *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A., COLLINS, M.R., at p. 739, said: "It is, however, desirable to guard against the notion that if the act done be illegal, 'just cause' may still be averred to purge the wrong. For instance, where illegal means have been used to bring about the breach of a contract to the detriment of a party thereto, 'just cause' cannot come into the discussion at all." If, however, this is so, it is not easy to see how "just cause" ever comes into the discussion; for if both the object and the means are legal it is not required as a defence; see *Allen v. Flood*, *supra*. The phrase "without justification" or its equivalent is frequently used in relation to acts which without justification would be illegal (see pp. 649, 656, 657, *ante*), and if the view of COLLINS, M.R., in *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, *supra*, is correct, the whole of the discussion as to what constitutes justification would appear to be unnecessary.

(*f*) In *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A.; S. C., [1892] A. C. 25, the overt acts were all held legal, but justification was nevertheless discussed, and BOWEN, L.J., in the Court of Appeal, at pp. 615, 617, 618, held it to be a justification that the act is an act of

SECT. 6.

Torts
Arising
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Operations
of Trade
Unions.

What
constitutes
justification.

1211. What is a sufficient justification is a matter to be decided by the court on the circumstances of each case (*g*). Any justification, to be available as a defence, must cover the whole conduct of those who set it up, the means as well as the end (*h*).

It is no justification that the object was to compel a person to pay, or to punish him for not paying, a debt or fine (*i*).

ordinary trade competition, as distinguished from an act done merely with the intention of causing harm. Whether this was relevant to the decision was doubted in *Allen v. Flood*, [1898] A. C. 1 (see note (*f*), p. 651, *ante*), but it may be explained perhaps by the presence of the element of conspiracy which might render a justification necessary (see note (*l*), p. 656, *ante*). The case may, therefore, be one of justification of the object or effect by the plea of competition. In *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, on the other hand, the overt acts, namely, the inducement of persons to break contracts, were illegal; and for such acts it was held no justification that the intention was to benefit both the doers of the acts and the other parties to the contracts, without any ill-will towards such other parties. In *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A., the overt acts were not illegal, but the combination was illegal, and it was held no justification that the intention was to compel the person injured to pay a debt. In *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A., the overt acts, namely, procuring breach of contract, were illegal, and it was held no justification that the parties injured had in fact, or that the union *bonâ fide* believed that such parties had, broken a prior contract between them and the union. As to cases where trade competition has been held a justification, see pp. 657, 658, *ante*; and title MASTER AND SERVANT, Vol. XX., pp. 268, 269. For acts such as damaging a person in his trade by fraud, misrepresentation, intimidation, molestation, or obstruction, there clearly can be no justification (*Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 614, C. A.; see note (*m*), p. 652, *ante*); but an act is not "molestation" or "obstruction" in an illegal sense merely because it damages another in his trade (*Allen v. Flood*, *supra*, per Lord HERSCHELL, at p. 138).

(*g*) *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra*, per BOWEN, L.J., at p. 618; *South Wales Miners' Federation v. Glamorgan Coal Co.*, *supra*; S. C., [1903] 2 K. B. 545, C. A., per ROMER, L.J., at p. 574. As to cases where it would be justifiable to advise a breach of contract, as, for instance, where the claims of relationship or guardianship demand an interference amounting to protection, compare *South Wales Miners' Federation v. Glamorgan Coal Co.*, *supra*, per Lord HALSBURY, L.C., at p. 245, per Lord JAMES OF HEREFORD, at p. 249, and per Lord LINDLEY, at p. 254; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*; *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, L.C., at p. 511.

(*h*) *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A., per COLLINS, M.R., at p. 737 (where a union threatened to call out its men as a protest against the employment of the plaintiff, such employment being believed by the union to constitute a breach of an agreement between the union and the employer, it was held, that the plaintiff, being in consequence dismissed, had a cause of action; for that whether the union was right or wrong in its interpretation of the agreement, there was no justification for combining to coerce the employers by threats to break their contract with the plaintiff).

(*i*) *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*. The presence or absence of a desire to punish is immaterial (*ibid.*); compare *Smithies v. National Association of Operative Plasterers*, *supra*; *Conway v. Wade*, *supra*; and see, generally, title MASTER AND SERVANT, Vol. XX., pp. 268, 269.

SECT. 7.—Agency.

SECT. 7.

Agency.

1212. The question of the responsibility of a trade union for the acts of its branches, or of its officials, or other persons who are alleged to have acted as its agents, no longer arises where the claim is in respect of a tort alleged to have been committed on behalf of the union (*k*), but it still arises in cases of contract (*l*).

Liability of union.

1213. Whether a central union and its branches stand in the relation of principal and agent is a question to be determined by examination of the rules regulating the relations between them, and of the circumstances of the case as proved in evidence (*m*).

Relation between union and branches.

In the absence of anything to the contrary in the rules, a union and a branch do not stand in the relation of principal and agent, or constitute one body so as to make the action and knowledge of the branch the action and knowledge of the union (*n*), though the union may be responsible for the act of a branch or its officials which it has in fact authorised or ordered (*o*).

The mere fact that a branch asks the union to sanction a strike and the union accedes to the request does not, it appears, affect the union with knowledge, possessed by the branch, that the strike will involve breaches of contract (*p*).

Agency is not created by the fact that the union is on certain conditions bound to furnish strike pay (*q*).

(*k*) See p. 665, *post*.

(*l*) As to a claim for an injunction against a threatened tort, see note (*n*), p. 666, *post*.

(*m*) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384, 389, 403 (the branches collected funds, defrayed local expenses therewith, handed the balance to the union for general expenses (including strike pay), elected branch officials and central officials, and sent delegates to a central council in which was vested the supreme government of the union; no branch was allowed to strike except after a ballot and on the vote of a specified majority, and the members were only entitled to strike pay after all peaceful means had been employed to secure settlement of the dispute and with the sanction of the union; and a plebiscite of the whole union might adopt a strike after it had commenced: held, that if a branch struck in violation of these rules, the branch delegates or officials or committees did not involve the union in responsibility for their acts; they are not agents of the union to procure even a lawful and regular strike, still less an unlawful irregular strike); compare *Mackendrick v. National Union of Dock Labourers in Great Britain and Ireland* (1910), 48 Sc. L. R. 17 (union held liable on a guarantee by a branch to its solicitor for his costs).

(*n*) *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 326, 331, and *per* KENNEDY, L.J., at p. 339; *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384.

(*o*) *Smithies v. National Association of Operative Plasterers*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 326; compare *Airey v. Weighill* (1905), *Times*, 11th February, C. A. This is now subject to the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1); see p. 665, *post*.

(*p*) *Smithies v. National Association of Operative Plasterers*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 331, and *per* KENNEDY, L.J., at p. 339, BUCKLEY, L.J., however, at p. 334, expressing a contrary view. As to breach of contract generally, see title CONTRACT, Vol. VII., pp. 438 *et seq*.

(*q*) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners'*

SECT. 7.

Agency.

Liability of
officials.

1214. *Primâ facie* the officials of trade unions cannot be presumed to have authority to do or sanction acts other than acts which unions may lawfully do (r).

An official of a union who calls men out in breach of contracts of which he is ignorant is not personally liable; nor is he personally liable if after knowledge that contracts have been broken he in correspondence with other officials supports their claim to a continuance of strike pay, and such strike pay passes through his hands (s).

In the absence of evidence of direct authority a district delegate is not the agent of a union or of its officials so as to make it or them liable for his tort (t).

SECT. 8.—Meaning of “Trade Dispute.”

Definitions.

1215. By a trade dispute is meant any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person; and by “workmen” is meant all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises (a).

Association, [1906] A. C. 384, 392. The situation as concerns third parties is not affected by the fact that strike pay has been furnished in contravention of the rules (*Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A. C. 384, 393); and see *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256.

(r) *Walters v. Green*, [1899] 2 Ch. 696, 703.

(s) *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A., at pp. 332, 341; compare *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, *supra*, at p. 407.

(t) *Flood v. Jackson*, [1895] 2 Q. B. 21, C. A.; reversed, without affecting this point, *sub nom. Allen v. Flood*, [1898] A. C. 1. As to torts generally, see title TORT, pp. 461 *et seq.*, *ante*.

(a) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5 (3), which extends the definitions in the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5 (3), to the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), and repeals the words “between employers and workmen” in *ibid.*, s. 3; and see the similar definition of a trade dispute in the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1). In *Quinn v. Leatham*, [1901] A. C. 495, it had been held (see particularly *ibid.*, at pp. 511, 528, 536, 541) that where a union called out the men of L., an employer, because he employed non-union men (though he had offered to pay all fines etc. due from his men and asked that they should be admitted to the union) thereby causing a breach of contract by one of the men so employed, and further threatened to call out the men employed by M., a customer of L., unless he withdrew his custom, thereby causing him to withdraw his custom but without breach of contract, these acts were not done in “contemplation or furtherance of a trade dispute between employers and workmen,” because L. had no quarrel with his men, and there was no trade dispute in the case of M.; compare *ibid.*, *per Lord LINDLEY*, at p. 541 (“I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section [Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3], even on an indictment for conspiracy”). Apparently, therefore, where an act was done causing damage to A., the protection afforded to the doers by the existence of a trade dispute only came into operation if A. had a dispute with the men in his own

1216. The dispute must be something fairly definite and of real substance, not a mere personal quarrel or a grumbling or an agitation (b). For an act to be done in contemplation or furtherance of a dispute, the dispute must be imminent, and the act must be done in expectation of and with a view to it, or it must be already existing and the act must be done in support of one of the parties to it (c).

SECT. 8.
Meaning of
"Trade
Dispute."
Requisites.

Workmen must be a party to it on each side, or workmen on one side and an employer on the other (d). There is no trade dispute where all that happens is that an intruder intervening as a mere mischief-maker, actuated by personal, sectarian, or political motives, stirs up strife which was previously not thought of by any of the employers or workmen concerned, and the dispute only exists in the mind of such intruder as a possible result of his intervention (e).

employment; whereas under the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), it comes into operation where another body of workmen have a dispute with the workmen in his employment, or where a body of workmen not in his employment have a dispute with another body of workmen not in his employment, or with their own employer, or with the employer of such other body; see *Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, C. A., where it was held a misdirection to say that a trade dispute meant a dispute between an employer and his men or between the men; and see the Report of the Royal Commission on Trade Disputes, 1906 [Cd. 2825], p. 15.

(b) *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, L.C., at p. 510. For the facts on which it was found that there was no trade dispute, see note (r), p. 653, *ante*.

(c) *Conway v. Wade*, *supra*, per Lord LOREBURN, L.C., at p. 512, and per Lord SHAW OF DUNFERMLINE, at p. 522. In *Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, C. A., VAUGHAN WILLIAMS, L.J., at p. 556, was of opinion that there was a trade dispute within the words of Lord LOREBURN, L.C., in *Conway v. Wade*, *supra*, where a union had circulated among customers of the plaintiffs a "fair list" in which the plaintiff's name was not included, with a request that they should employ only the persons mentioned in the list, and had written to one such customer stating that the plaintiffs "certainly cannot be recognised as conforming to trade union principles," and had threatened to withdraw their political support from such customer (a political association) unless it ceased to employ the plaintiffs. This was, however, unnecessary to the decision of the case, and a doubt was expressed upon it in S. C., [1913] A. C. 107, per Lord HALDANE, L.C., at p. 116, though the doubt was, apparently, only as to whether such a conclusion could be arrived at on the facts as stated in the statement of claim without hearing evidence on the point; see also *Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 28 T. L. R. 518, C. A.; *Scrutton, Ltd. v. Lewis* (1913), *Times*, 16th January, C. A.

(d) *Conway v. Wade*, *supra*, where Lord ATKINSON, at pp. 517, 518, seemed of the opinion that a disagreement between two single workmen might constitute a "trade dispute," but Lord SHAW OF DUNFERMLINE, at pp. 520, 521, said: "I cannot see my way to hold that 'trade dispute' necessarily includes accordingly every case of personal difference between any one workman and one or more of his fellows. It is true that after a certain stage even such a dispute, although originally grounded, it may be, upon personal animosity, may come to be a subject in which sides are taken, and may develop into a situation of a general aspect containing the characteristics of a trade dispute; but until it reaches that stage I cannot hold that a trade dispute necessarily exists."

(e) *Ibid.*, per Lord LOREBURN, L.C., at p. 512, per Lord ATKINSON, at pp. 517, 518, and per Lord SHAW OF DUNFERMLINE, at p. 522.

SECT. 8.
Meaning of
"Trade
Dispute."

Functions of
jury.

It is not, however, necessarily the case that the act protected, because done in contemplation or furtherance of a trade dispute, must be an act of one of the parties to the dispute (f).

1217. The question whether there was a trade dispute or not is one of fact for the jury (g).

SECT. 9.—*Rights of Action and Procedure.*

Trade union.

1218. Save in the case hereinafter stated, a registered trade union may sue and be sued in its registered name (h), and a union, registered or unregistered, may sue or be sued in a representative action if the parties are by their position fairly representative of the union (i).

(f) *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, at p. 512.

(g) *Ibid.*, at pp. 509, 513, 516, 519; see *Dallimore v. Williams and Jesson* (1912), 29 T. L. R. 67, C. A. (where a jury found that there was no trade dispute). As to the functions of a jury generally, see title JURIES, Vol. XVIII., pp. 225 *et seq.*

(h) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426; but see *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A. C. 421, per Lord ATKINSON, at p. 430, and per Lord ROBSON, at p. 438; and note (t), p. 612, *ante*. *Quære* whether any action lies against a branch, as distinguished from the union (*Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association* (1912), 28 T. L. R. 372, 373, 374).

(i) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, *supra*, per Lord MACNAGHTEN, at p. 438; and per Lord LINDLEY, at p. 433; *Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366, 375 (where the president, vice-president, treasurer and secretary were held to be sufficiently representative and the committee and trustees were not essential). In *Temperton v. Russell*, [1893] 1 Q. B. 435, C. A., officers and members of several unions were sued in tort in their representative capacity, but the words indicating such capacity were struck out on the ground that the words of R. S. C., Ord. 16, r. 9, "having the same interest in one cause or matter," only extended to persons having or claiming some beneficial or proprietary interest. In *Wood v. McCarthy*, [1893] 1 Q. B. 775, the right to a benefit was held to be such an interest, so that two members of a union, sued for a benefit (assuming that such an action was maintainable at all; as to which see p. 616, *ante*), could be authorised against their will to defend on behalf of all the members. But in *Bedford (Duke) v. Ellis*, [1901] A. C. 1, the *ratio decidendi* of *Temperton v. Russell*, *supra*, was disapproved, and it was held that for a person to sue in a representative character it is enough that he has a common interest with those he represents; though the decision in *Temperton v. Russell*, *supra*, was supported on the ground that the defendants were not in fact representative; and see *Taff Vale Railway v. Amalgamated Society of Railway Servants*, *supra*, at p. 439; *Parr v. Lancashire and Cheshire Miners' Federation*, *supra*. In *Charnock v. Court*, [1899] 2 Ch. 35, three members of a masters' union sued on behalf of themselves and all other members; but by agreement all the members were subsequently made plaintiffs, and some, who had been added without authority, were made defendants; see *Walters v. Green*, [1899] 2 Ch. 696, 703, n. Apparently, a branch secretary is not a person in a representative capacity (*Thomas v. Portsmouth "A" Branch of the Ship Constructive etc. Association*, *supra*, at pp. 373, 374). As to representative actions generally, see Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 23—25; R. S. C., Ord. 16, r. 9; and titles PARTNERSHIP, Vol. XXII., p. 67; PRACTICE AND PROCEDURE, Vol. XXIII., pp. 103, 104.

1219. The trustees of a registered trade union or any other officer of such union authorised by its rules to do so may bring or defend, or cause to be brought or defended, any action or prosecution touching or concerning the property, right, or claim to property of the union, and must and may in all cases concerning the real or personal property of the union sue and be sued in their proper names without other description than the title of their office (*k*).

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Rights of
Action and
Procedure.
Trustees and
officers.

No such action or prosecution is discontinued or abated by the death or removal from office of such persons or any of them, but it must and may be proceeded in by their successor or successors, and such successors pay or receive the like costs as if the action or prosecution had been commenced in their names, for the benefit of or to be reimbursed from the funds of the union (*l*).

The liability of such trustees to be sued in respect of the property of the union is apparently not confined to a case where specific property is in question, but extends to cases where the assets of the union are threatened by a claim for damages; and trustees so sued are entitled to be indemnified out of the funds of the union (*m*).

1220. No action lies against a trade union or any branch of a union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the union or branch, in respect of any tortious act alleged to have been committed by or on behalf of the union or branch (*n*), and the liability of the trustees to be sued does not

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from liability.

(*k*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9. An official of a union may sue the trustees for his salary (*Curle v. Lester* (1893), 9 T. L. R. 480); and, apparently, new trustees may maintain an action to recover the funds from former trustees; see *Cope v. Crossingham*, [1909] 2 Ch. 148, C. A., per COZENS-HARDY, M.R., at p. 159; but it is otherwise when trustees seek to recover funds from the trustees of a branch (*ibid.*; and see note (*h*), p. 619, *ante*).

(*l*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9. The summons to such trustee or other officer may be served by leaving it at the registered office of the union (*ibid.*). As to service of summons generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 114 *et seq.*

(*m*) *Linaker v. Pilcher* (1901), 70 L. J. (K. B.) 396 (a claim for damages for libel in a paper owned by the society and registered in the name of the trustees); but compare *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per FARWELL, J., at p. 431 ("Sections 8 and 9 of the Act of 1871 [Trade Union Act, 1871 (34 & 35 Vict. c. 31)] expressly provide for actions in respect of property being brought by and against the trustees and this express intention impliedly excludes such trustees from being sued in tort"); *Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, C. A., per FARWELL, L.J., at p. 560. As to the right of the trustees to be indemnified, see *ibid.*

(*n*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1); as to branches, see *ibid.*, s. 5 (2). *Ibid.*, s. 4 (1), was enacted for the purpose of modifying the decision in *Taff Vale Railway v. Amalgamated Society of Railway Servants*, *supra*, which was that (i.) a registered union may be sued in its registered name in respect of a tort committed by its agents; this, therefore, is no longer the law if it is a case of a tort alleged to have been committed by or on behalf of the union; (ii.) a trade union, registered or unregistered, may be sued in a representative action if the persons selected as defendants are by their position fairly representative of the union, as, for instance, the executive committee and the trustees (see note (*i*), p. 664, *ante*); this also is in the like case no longer the law; (iii.) a trade

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Procedure.

extend to an action in respect of any tortious act committed by or on behalf of a union in contemplation or furtherance of a trade dispute (o).

union is responsible for unlawful acts committed by men acting as agents of the union in furtherance of a strike sanctioned by the authorised officers of the union; as to this, an action no longer lies against the union or any officials or members in a representative capacity if the acts, being tortious, are alleged to have been committed by or on behalf of the union; (iv.) the trustees may be joined and an order made against them for payment of damages and costs out of the property of the union (*Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, per Lord LINDLEY, at p. 443); this is no longer the law where the claim is in respect of a tortious act committed by or on behalf of a union in contemplation or furtherance of a trade dispute; see note (o), *infra*; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, per Lord HALDANE, L.C., at p. 113, and per Lord ATKINSON, at p. 120. The provision is not retrospective, and afforded no defence to an action already commenced (*Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.; compare *Russell & Co. v. United Society of Boilermakers* (1907), 15 Scots Law Times, 118). The provision does not merely provide a defence to be pleaded, but forbids the court to entertain the action; and under it a statement of claim may be struck out without waiting till trial (*Vacher & Sons, Ltd. v. London Society of Compositors*, *supra*); and the court must take cognisance of the Act though it is not pleaded (*ibid.*, per Lord SHAW OF DUNFERMLINE, at p. 126, and per Lord MOULTON, at p. 127). The question of the liability of a trade union to be sued in its registered name had been touched upon in *Pink v. Federation of Trades and Labour Unions* (1892), 8 T. L. R. 216, 711, where an injunction was granted against the union, the objection being apparently not seriously pressed, and in *Lyons (J.) & Sons v. Wilkins*, [1896] 1 Ch. 811, C. A., where the society were originally joined as defendants, but struck out on motion; see *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255, 259, C. A. It is to be noted that an action against a union in its registered name and a representative action against a union are prohibited only in the case of a tortious act "alleged to have been committed"; *quære*, therefore, whether the provision prohibits such an action for an injunction against an act threatened but not yet committed. In general the right to an injunction depends upon the legal right to sue; compare *De Francesco v. Barnum* (1889), 43 Ch. D. 165, per CHITTY, J., at p. 172; *White v. Mellin*, [1895] A. C. 154, 163, 167, 170; and see title INJUNCTION, Vol. XVII., pp. 206 *et seq.* But, apparently, the provision does not make the tortious act any the less illegal, and it is probable that the prohibition of an action would be strictly confined within the words in which it is expressed. It seems possible, therefore, that an injunction may be obtained against the application of the funds of a union to assist the future commission of a tort; but see, *contra*, *Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, C. A., per FARWELL, L.J., at p. 559. *Quære* whether the provision prohibits an action against an individual for conspiring with a union; compare *R. v. Duguid* (1906), 75 L. J. (K. B.) 470. It does not prohibit an action for an injunction to restrain the misapplication of the funds or the expulsion of a member (*Parr v. Lancashire and Cheshire Miners' Federation*, [1913] 1 Ch. 366).

(o) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (2); and see note (n), p. 665, *ante*. In all other respects it seems that the liability of the trustees to be sued under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9, remains unaffected; and probably *Linaker v. Pilcher* (1901), 70 L. J. (K. B.) 396, is still the law in all cases where no trade dispute is in question; see *Vacher & Sons, Ltd. v. London Society of Compositors*, *supra*, at p. 115, where Lord HALDANE, L.C., pointed out the distinction between the union and its trustees, and said that Parliament appeared to have desired to preserve the liability of the trustees even in the case of tortious acts committed by the union, subject to their exemption when the act was

The prohibition of an action against the union applies whether a trade dispute exists or is in contemplation or not (p).

An official sued in his individual capacity is not protected even though he acted on behalf of the union (q).

SECT. 9.
Rights of
Action and
Procedure.

1221. A number of plaintiffs claiming to have suffered damage from acts of watching and besetting may be joined in one action (r), and a number of defendants can properly be joined against whom it is alleged that they committed a series of acts of watching and besetting, such acts having been jointly committed, and judgment may be recovered against such only as are proved to have committed the acts (s).

Joinder of
parties.

committed in contemplation or furtherance of a trade dispute; see *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, per Lord ATKINSON, at p. 125, and per Lord MACNAGHTEN, at p. 119; S. C., [1912] 3 K. B. 547, per KENNEDY, L.J., at p. 566; compare *Rickards v. Bartram* (1908), 25 T. L. R. 181, in so far as it decided that an action for libel lay against the trustees.

(p) *Vacher & Sons, Ltd. v. London Society of Compositors*, *supra* (where Lord HALDANE, L.C., and Lord MACNAGHTEN laid down broadly the proposition that the words of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1), were to be taken in their literal meaning, and were not in any way qualified by the words referring to a trade dispute in other provisions of the Act, or by anything in *ibid.*, s. 4 (2)). In S. C., [1912] 3 K. B. 547, C. A., it was said that the words "trade union" must be read as meaning "trade union as such," and that the provision did not protect a union in respect of a tortious act which was entirely outside of its sphere of operations as a trade union; see *ibid.*, per VAUGHAN WILLIAMS, L.J., at p. 555 ("If, for example, a trade union conducted a newspaper in which it criticised a book having no relation to trade unions, and in the course of the criticism defamed the author of the book, the Legislature cannot have intended that no action for libel should be entertained against the trade union or its officials"). The same suggestion was made by FARWELL, L.J., in his dissenting judgment (*ibid.*, at pp. 558—560), but there is nothing to support it in the judgment of KENNEDY, L.J. (*ibid.*, at p. 562), or in the judgments in the House of Lords (*Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107), nor does it seem necessary even according to the general view of the justice of the case taken by VAUGHAN WILLIAMS, L.J., and FARWELL, L.J., if, as appears probable, the trustees of the union remain liable for torts not committed in contemplation or furtherance of a trade dispute. It is to be noted, however, that FARWELL, L.J. (*Vacher & Sons, Ltd. v. London Society of Compositors*, [1912] 3 K. B. 547, at p. 560), was of the opinion that the liability of the trustees did not extend to cases of libel; compare *Rickards v. Bartram* (1908), 25 T. L. R. 181; but see *Bussy v. Amalgamated Society of Railway Servants* (1908), 24 T. L. R. 437.

(q) *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, per Lord MOULTON, at p. 130; *Bussy v. Amalgamated Society of Railway Servants*, *supra*; *United County Theatres, Ltd. v. Durrant* (1909), *Times*, 6th July, C. A.; and see *Dallimore v. Williams and Jesson* (1912), *Times*, 27th April, where, however, a new trial was ordered on the ground of misdirection as to the meaning of trade dispute (S. C. (1912), 29 T. L. R. 67, C. A.).

(r) *Walters v. Green*, [1899] 2 Ch. 696 (the right to relief arises out of one series of transactions, and there is a common question of fact and law); R. S. C., Ord. 16, r. 1; *Stroud v. Lawson*, [1898] 2 Q. B. 44, 52, C. A.; *Oxford and Cambridge Universities v. Gill (George) & Sons*, [1899] 1 Ch. 55; *Drineqbier v. Wood*, [1899] 1 Ch. 393; and see titles PLEADING, Vol. XXII., p. 443; PRACTICE AND PROCEDURE, Vol. XXIII., p. 104.

(s) *Walters v. Green*, *supra*, distinguishing *Sadler v. Great Western Rail. Co.*, [1896] A. C. 450; R. S. C., Ord. 16, r. 1.; see titles PLEADING, Vol. XXII., p. 443; PRACTICE AND PROCEDURE, Vol. XXIII., p. 104.

SECT. 9.
Rights of
Action and
Procedure.

Where the men watched and beset and induced to refrain from entering into employment are under contract to work for such firm in an employers' association as the association may decide or as a particular firm may decide, and at the time of the watching and besetting no such firm has been specified, the loss of the chance of employing a man is damage sufficient to enable an individual employer to sue (*t*).

Affidavit of
documents.

1222. In an action for damages for conspiracy to induce workmen to break their contracts it is no objection to the making of an order for an affidavit of documents by the defendant that the documents may tend to incriminate him (*u*).

Statute not
pleaded.

1223. It appears that in a High Court action the Trade Disputes Act, 1906 (*a*), may be relied on by way of defence without pleading it, but it is advisable to plead the Act where it applies (*b*).

SECT. 10.—*Relation of Trade Unions to Companies and Other Societies.*

Friendly
and similar
societies ;
companies.

1224. Trade unions are not subject to the provisions (*c*) of the Friendly Societies Acts (*d*) (with the exception hereafter stated (*e*)), the Industrial and Provident Societies Acts (*f*), or the Companies (consolidation) Act, 1908 (*g*), and the registration of a union under any of these Acts is void (*h*).

(*t*) *Walters v. Green*, [1899] 2 Ch. 696.

(*u*) *National Association of Operative Plasterers v. Smithies*, [1906] A. C. 434, approving *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A. As to particulars in such an action, see title PLEADING, Vol. XXII., pp. 454, 455. The objection can only be taken on oath to the production of documents ; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 82, 96, 110.

(*a*) 6 Edw. 7, c. 47.

(*b*) Compare *Richards v. Bartram* (1908), 25 T. L. R. 181, 182 ; and see note (*n*), p. 665, *ante*.

(*c*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 5, by which the deposit of the rules of any trade union made under the then existing Friendly Societies Acts before the passing of the Act ceased to be of any effect.

(*d*) See title FRIENDLY SOCIETIES, Vol. XV., p. 123.

(*e*) See p. 669, *post*.

(*f*) See title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., pp. 1 *et seq*.

(*g*) 8 Edw. 7, c. 69, s. 294. There is no power under this Act to wind up a trade union ; see title COMPANIES, Vol. V., pp. 46, 394. Apparently, however, an unregistered trade union which is an assurance company may be wound up in accordance with the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) ; see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15 ; and p. 669, *post*. Registration as a company is not conclusive that the association is rightly registered (*British Association of Glass-Bottle Manufacturers, Ltd. v. Nettlefold* (1911), 27 T. L. R. 527) ; and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 294, is merely declaratory (*British Association of Glass-Bottle Manufacturers, Ltd. v. Nettlefold, supra*, at p. 529).

(*h*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 5 ; Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 7 ; see title COMPANIES, Vol. V., p. 46 ; *Edinburgh and District Aerated Water Manufacturers Defence Association, Ltd. v. Jenkinson & Co.* (1903), 5 F. (Ct. of Sess.) 1159 ; *British Association of Glass-Bottle Manufacturers, Ltd. v. Nettlefold, supra*.

A trade union, registered or unregistered, which insures or pays money on the death of a child under ten years of age is, however, deemed to be within the provisions of the Friendly Societies Act, 1896 (*i*), relating to payments on the death of children (*j*).

SECT. 10.
Relation
of Trade
Unions to
Companies
and Other
Societies.

Medical
societies.

1225. A registered trade union or a branch of a registered trade union may contribute to the funds and take part by delegates or otherwise in the government of a medical society (*k*) as provided in the rules of the union or branch without becoming a branch of such medical society (*l*), and may not withdraw from contributing to the funds of such medical society except on three months' notice and payment of all contributions accrued or accruing due to the expiration of the notice (*m*).

1226. A registered trade union is not an "assurance company" within the Assurance Companies Act, 1909 (*n*), but an unregistered trade union is, if it carries on life, fire, accident, or employers' liability business, or bond investment business, as defined in the Act (*o*), and it may be wound up by order of the court in accordance with the Companies (Consolidation) Act, 1908 (*p*), but only on a petition of ten or more policy-holders owning policies of an aggregate value of not less than £10,000, which may only be presented by

Assurance
companies.

(*i*) 59 & 60 Vict. c. 25, ss. 62—67, 84 (*f*), (*g*), re-enacting the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 28, the provision referred to in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 2; see title FRIENDLY SOCIETIES, Vol. XV., pp. 155, 156.

(*j*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 2. Apparently, trade unions are also industrial assurance corporations within the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), if they grant assurances on any one life for a less sum than £20; see *ibid.*, ss. 1, 13.

(*k*) That is, a society for the purpose of relief in sickness by providing medical attendance and medicine (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 22 (2)).

(*l*) *Ibid.*, s. 22 (1), (2).

(*m*) *Ibid.*, s. 22 (3); and see title FRIENDLY SOCIETIES, Vol. XV., p. 171. Apparently, the medical society is not precluded by the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, from suing a union which violates this provision; but, apparently, a dispute cannot be referred to arbitration under the rules of the medical society; see *Snell v. Vine* (1890), Diprose and Gammon's Friendly Society Cases, 313.

(*n*) 9 Edw. 7, c. 49, s. 1; see title COMPANIES, Vol. V., pp. 620, 625.

(*o*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1; see note (*j*), *supra*. By the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 7, the Life Assurance Companies Acts did not apply to trade unions, but this provision was repealed by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 37, Sched. IX. As to the duties and liabilities of assurance companies under the Act, see title COMPANIES, Vol. V., pp. 620 *et seq.* It is to be noted, however, that the definition of life assurance does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment, or of the dependants of such persons (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 29); and a policy is not deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered (*ibid.*, s. 28 (3)); see title COMPANIES, Vol. V., p. 622.

(*p*) 8 Edw. 7, c. 69; see title COMPANIES, Vol. V., pp. 390 *et seq.*

SECT. 10.
Relation
of Trade
Unions to
Companies
and Other
Societies.

leave of the court on the establishment to its satisfaction of a *prima facie* case and on the giving of reasonable security for costs (*q*).

The Assurance Companies Act, 1909 (*r*), however, does not apply where the trade union carries on employers' liability insurance business and is an association of employers which satisfies the Board of Trade that it is carrying on or about to carry on business wholly or mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen employed by them, either alone or in conjunction with insurance against any other risk incident to their trade or industry, and an unregistered trade union originally established more than twenty years before the 1st July, 1910 (*s*), may be exempted by the Board of Trade from the Act in the same manner as a registered union (*t*).

National
health
insurance.

1227. Any registered trade union and any unregistered trade union whose constitution is of the prescribed character, which complies with certain requirements, may become an approved society for the purposes of national health insurance (*u*).

Unemploy-
ment
insurance.

With regard to unemployment insurance, the Board of Trade has power, on the application of any trade union of workmen (*a*) the rules of which provide for payments to its members, being workmen in an insured trade (*b*) or any class thereof, whilst unemployed, to make an arrangement with such union that, in lieu of the payment of unemployment benefit to workmen who prove that they are members of the union, there shall be repaid periodically to the union out of the unemployment fund (*c*) such sum as appears to be, as nearly as may be, equivalent to the aggregate amount which such workmen would have received during that period by way of unemployment benefit if no such arrangement had been made, but in no case exceeding three-fourths of the amount of the payments made during that period by the union to such workmen while unemployed (*d*).

(*q*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15.

(*r*) 9 Edw. 7, c. 49, s. 33 (1) (*a*); see title COMPANIES, Vol. V., pp. 622, 623.

(*s*) The date of the commencement of the Act (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 38).

(*t*) *Ibid.*, s. 35; see title COMPANIES, Vol. V., p. 625.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 23 (1). As to national health insurance, see title WORK AND LABOUR.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (1), which speaks of "any association of workmen." As to unemployment insurance, see title WORK AND LABOUR.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VI. The insured trades are building, construction of works, shipbuilding, mechanical engineering, ironfounding, construction of vehicles and sawmilling (including machine woodwork) carried on in connexion with any other insured trade or of a kind commonly so carried on; see *ibid.* As to the power to extend the provisions of the Act to other trades, see *ibid.*, s. 103; to exclude subsidiary occupations, *ibid.*, s. 104. As to the definition of "workman," see *ibid.*, s. 107 (1); as to the power to vary that definition, see *ibid.*, s. 103.

(*c*) As to this fund, see *ibid.*, s. 92.

(*d*) Where such an arrangement is made, the contributions due from any of the members to the unemployment fund or any part thereof may be treated as if they formed part of the subscriptions payable by those

In the case of a trade union (*e*) the rules of which provide for payments to persons whilst unemployed, whether workmen in an insured trade (*f*) or not, the Board of Trade may, with the consent of the Treasury and on such conditions, and either annually or at such other intervals as the Board may prescribe, repay out of moneys provided by Parliament (*g*) to the union such part (not exceeding one-sixth) as the Board think fit of the aggregate amount which the union has expended on such payments during the preceding year or other prescribed period, exclusive of the sum, if any, repaid in respect of workmen in an insured trade under an arrangement of the kind above stated, and exclusive, in the case of payments exceeding 12s. a week, of so much of those payments as exceed that sum (*h*).

SECT. 10.
Relation
of Trade
Unions to
Companies
and Other
Societies.

Part VIII.—Slander of Title and Trade Libel.

SECT. 1.—*In General.*

1228. Trade libel is a term frequently though loosely applied to the action on the case (*i*) which arises from words which disparage a person's property without being defamatory of the person himself (*k*).

Action on the
case.

The action is analogous to the action of slander of title, and there is no hard and fast line between the two (*l*).

members to the union, and the rates of such subscriptions may be reduced accordingly (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (2)).

(*e*) *Ibid.*, s. 106 (1), which in this case speaks of "any association of persons not trading for profit."

(*f*) See note (*b*), p. 670, *ante*.

(*g*) Not out of the unemployment fund, as in the preceding case; see the text, *supra*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 106 (1). No repayment under this provision may be made in respect of any period before the expiration of six months from the 15th July, 1912, the date of the commencement of the Act (*ibid.*, s. 106 (2)); see, further, title WORK AND LABOUR.

(*i*) As to actions on the case generally, see titles ACTION, Vol. I., pp. 39, 40; LIBEL AND SLANDER, Vol. XVIII., pp. 611, 719.

(*k*) *Griffiths v. Benn* (1911), 27 T. L. R. 346, C. A., *per* COZENS-HARDY, M.R., at p. 350. As to what words are defamatory in the strict sense and what are not, see, further, title LIBEL AND SLANDER, Vol. XVIII., pp. 606 *et seq.*, 618 *et seq.*, 630 *et seq.*; *Ridge v. English Illustrated Magazine, Ltd.* (1913), 29 T. L. R. 592.

(*l*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 527, C. A.; *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218, 223. In *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L., where the words were a notice to the trade of intention to proceed against persons selling goods under certain labels, Lord DAVEY, at p. 99, described the action as "slander of title," and Lord JAMES OF HEREFORD, at p. 101, described it as "trade libel," as did Lord ROBERTSON, at p. 103. In *Halsey v. Brotherhood* (1881), 19 Ch. D. 386, C. A., a case of threats of proceedings by a person claiming a patent, Lord COLERIDGE, C.J.,

SECT. 2.

Slander of
Title.SECT. 2.—*Slander of Title.*SUB-SECT. 1.—*In General.*

When action
lies.

1229. The action of slander of title lies against any person who, whether orally or in writing (*m*), asserts falsely (*n*) and with actual malice, or in circumstances where malice will be implied (*o*), that an owner of property, real or personal (*p*), has no title to it (*q*), or no right to deal with it (*r*), if, but only if, such assertion causes special damage (*s*).

at p. 386, treated the action as slander of title, while BAGGALLAY, L.J., at p. 389, apparently confined the term "slander of title" to cases of real estate; see, further, title TORT, p. 474, *ante*; as to threats by a patentee, generally, see title PATENTS AND INVENTIONS, Vol. XXII., p. 227; and compare title LIBEL AND SLANDER, Vol. XVIII., p. 677.

(*m*) *Malachy v. Soper* (1836), 3 Bing. (N. C.) 371, 385, 386.

(*n*) See p. 674, *post*.

(*o*) See p. 673, *post*.

(*p*) Though it has been suggested that the term "slander of title" applies only to cases of real estate (*Halsey v. Brotherhood* (1881), 19 Ch. D. 386, 389, C. A.), it seems clear that it may be applied even in its strictest sense to cases of personal property (*Wren v. Weild* (1869), L. R. 4 Q. B. 730, 734; *Baker v. Piper* (1886), 2 T. L. R. 733); and purely personal property was in question in *Newman v. Zachary* (1646), Aleyn, 3; *Rowe v. Roach* (1813), 1 M. & S. 304; *Green v. Button* (1835), 2 Cr. M. & R. 707; *Gutsole v. Mathers* (1836), 1 M. & W. 495; *Carr v. Duckett* (1860), 5 H. & N. 783; *Steward v. Young* (1870), L. R. 5 C. P. 122. As to leaseholds, see *Smith v. Spooner* (1810), 3 Taunt. 246; *Millman v. Pratt* (1824), 2 B. & C. 486; *Watson v. Reynolds* (1826), Mood. & M. 1. It is immaterial whether the plaintiff's title is in possession or in reversion or remainder (*Bliss v. Stafford* (1573), Owen, 37; *Vaughan v. Ellis* (1608), Cro. Jac. 213; *Baker v. Piper*, *supra*). If a plaintiff alleges a right to sell property and that he put such property up for sale, it is not sufficient to prove that he put up for sale a lease of the property; for the right to lease may be doubtful, and the defendant ought to have an opportunity of raising the question of the validity of the proposed lease (*Millman v. Pratt*, *supra*). But the point there raised would now be met by amendment on terms.

(*q*) The slander must be such as goes to defeat the plaintiff's title (*Cane v. Golding* (1649), Sty. 169, 176; *Hargrave v. Le Breton* (1769), 4 Burr. 2422, 2423); or causes another to disturb the plaintiff's possession (*Newman v. Zachary*, *supra*); or to withhold property to which the plaintiff is entitled (*Green v. Button*, *supra*).

(*r*) *Manning v. Avery* (1673), 3 Keb. 153 (allegation that the plaintiff had mortgaged all his land); *Green v. Button*, *supra*; *Pater v. Baker* (1847), 3 C. B. 831.

(*s*) *Law v. Harwood* (1628), Cro. Car. 140 (no such action lies without showing "special prejudice . . . without showing particularly the cause of loss . . . as that he could not let or sell the said lands"); *Cane v. Golding*, *supra*, at p. 176 ("a particular damage"; "a special damage"); *Hargrave v. Le Breton*, *supra*; *Green v. Button*, *supra*; *Gutsole v. Mathers*, *supra*; *Malachy v. Soper*, *supra*, at p. 386; *Pater v. Baker*, *supra*; *Brook v. Rawl* (1849), 19 L. J. (EX.) 114; *Wren v. Weild*, *supra*; *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L., *per* Lord DAVEY, at p. 99; and see *Mildmay's Case* (1584), 1 Co. Rep. 175 a, 177 a; and the notes to *Coryton v. Lithebye* (1670), 2 Wms. Saund. (ed. 1871) 361, 383. There is no slander of title in a man giving his own house a name identical with that of his neighbour's house, and thereby causing annoyance and inconvenience to his neighbour (*Day v. Brownrigg* (1878), 10 Ch. D. 294, C. A. (where, in addition to there being no violation of legal right, there was no allegation of malice

The words complained of must be set out *verbatim* as in the case of libel and slander (*t*).

SECT. 2.
Slander of
Title.

SUB-SECT. 2.—*Damage.*

1230. The particularity required in the allegation of special damage depends upon the circumstances: for instance, a plaintiff who has lost an intended sale cannot be expected to set out the names of persons who would have been prepared to purchase (*a*). Special damage.

It is sufficient evidence of such damage that the person to whom the words were spoken wrongfully deprived the plaintiff of his property, and it is no answer to say that the only remedy is against such person (*b*).

1231. According to the old cases it was necessary in proof of special damage to show that before the words were spoken there had been a communication or *colloquium* between the plaintiff and some person with regard to a sale of, or other dealing with, the property, and that by reason of the words such sale or dealing went off (*c*), and it was not enough that the plaintiff merely intended to sell or deal with the property (*d*), or merely had an interest therein (*e*). Colloquium.

These cases, however, may possibly have afforded merely instances of the special damage necessary (*f*), though it is necessary that there shall be at the least an express allegation of some particular damage (*g*).

SUB-SECT. 3.—*Malice.*

1232. Malice must be proved by the plaintiff and will not be inferred (*h*). Necessity for proof.

or intent to injure)); compare *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156 (where the adoption by the defendants of a telephone address identical with the name by which the plaintiffs were known was held to give no cause of action, even on proof of special damage, there being no intent to injure or representation that the defendants were carrying on the plaintiff's business).

(*t*) *Gutsole v. Mathers* (1836), 1 M. & W. 495; and see title LIBEL AND SLANDER, Vol. XVIII., p. 643.

(*a*) *Hargrave v. Le Breton* (1769), 4 Burr. 2422, 2423; as to the cases on trade libel relating to this point, see p. 678, *post*.

(*b*) *Green v. Button* (1835), 2 Cr. M. & R. 707, doubting *Vicars v. Wilcocks* (1806), 8 East, 1, and *Morris v. Langdale* (1800), 2 Bos. & P. 284, *per* Lord ELDON, at p. 289; as to *Vicars v. Wilcocks*, *supra*, see also note (*t*), p. 649, *ante*.

(*c*) *Gresham v. Grinsley* (1606), Yelv. 88; *Smead v. Badley* (1616), Cro. Jac. 397; *Tasburgh v. Day* (1618), Cro. Jac. 484; *Lovett v. Weller* (1616), 1 Roll. Rep. 409; *Cane v. Golding* (1649), Sty. 169, 176.

(*d*) *Smead v. Badley*, *supra*; *Manning v. Avery* (1673), 3 Keb. 153.

(*e*) *Smead v. Badley*, *supra*.

(*f*) *Malachy v. Soper* (1836), 3 Bing. (N. C.) 371, 384.

(*g*) *Ibid.*, at p. 384 (where it was held not sufficient to allege that the plaintiff was injured in his rights and the shares held by him were depreciated in value and that he had been hindered from selling them); apparently, as in slander not actionable *per se*, the plaintiff can only recover such damages as he alleges and proves; see title LIBEL AND SLANDER, Vol. XVIII., pp. 610, 719.

(*h*) *Smith v. Spooner* (1810), 3 Taunt. 246. In *Watson v. Reynolds* (1826), Mood. & M. 1, evidence of the truth of the statements was admitted

SECT. 2.
Slander of
Title.

Malice in this case means a bad motive (i), and it is no evidence of malice if all that is shown is that the defendant wrote or spoke honestly, even though wrongly, in defence of a real or supposed title to the property (k), or in the honest execution of a real or supposed duty (l).

In judging of the *bona fides* of the defendant, the question is not whether his belief was founded on such grounds as would persuade a man of sound sense and business knowledge, but whether in all the circumstances he acted *bonâ fide* considering his character and situation, his prejudices and passions, for it is important that a person interested in the property should have liberty to put forward his objections to the title (m) and that a purchaser should be protected from the possibility of buying property which may involve him in a lawsuit (n).

When malice
inferred.

1233. Want of reasonable and probable cause may, but does not necessarily, lead to the inference of malice (o); but it is clearly

to disprove malice even though no justification had been pleaded: compare title LIBEL AND SLANDER, Vol. XVIII., p. 719.

(i) *Pater v. Baker* (1847), 3 C. B. 831, 868, 869, *per* MAULE, J.; *Brook v. Rowl* (1849), 19 L. J. (EX.) 114, *per* PARKE, B., at p. 115 (to benefit a friend who was a bidder, or to obtain the premises for himself at a lower price, or otherwise to injure the plaintiff); see title TORT, p. 467, *ante*; as to the distinction between malice implied by law and express or actual malice, see title LIBEL AND SLANDER, Vol. XVIII., pp. 608, 609, 722. Apparently, if a statement is partly *bonâ fide* and partly *malâ fide* and causes injury, the person injured is not entitled to recover damages unless he can trace the injury to that part of the statement which is *malâ fide* (*Brook v. Rowl*, *supra*).

(k) *Gerard v. Dickenson* (1590), 4 Co. Rep. 18 a; *Davis v. Gardiner* (1593), 4 Co. Rep. 16 b, 17 a; *Pennyman v. Rabanks* (1595), Cro. Eliz. 427; *Lovett v. Weller* (1616), 1 Roll. Rep. 409; *Smith v. Spooner* (1810), 3 Taunt. 246; *Carr v. Duckett* (1860), 5 H. & N. 783; *Steward v. Young* (1870), L. R. 5 C. P. 122; as to the cases on trade libel relating to this point, see p. 679, *post*.

(l) *Pater v. Baker*, *supra* (where the plaintiff put up certain houses for sale, and a district surveyor announced that he would not allow the houses to be finished or occupied, and said he had power to stop certain buildings till the roads were made good, though in fact he had no power to stop the buildings); *Olover v. Royden* (1873), L. R. 17 Eq. 190 (where the defendants, the officials of an underwriters' association which kept a register of vessels, placed opposite to the name of the plaintiffs' vessel the words "class suspended," because the plaintiffs had made alterations of which the defendants *bonâ fide* disapproved: held, that the defendants were justified, in the absence of any proof of malice).

(m) *Pitt v. Donovan* (1813), 1 M. & S. 639, 644—646, 648; see *Hargrave v. Le Breton* (1769), 4 Burr. 2422, 2423.

(n) *Hargrave v. Le Breton*, *supra*; *Watson v. Reynolds* (1826), Mood. & M. 1.

(o) *Pater v. Baker*, *supra*, *per* MAULE, J., at p. 868; *Atkins v. Perrin* (1862), 3 F. & F. 179 (where the jury were asked to say (i.) whether the belief of the defendant was genuine, and (ii.) whether, if genuine, it was such as a reasonable man might hold; but in that case the defendant had alleged the existence of a will which might throw doubt upon the plaintiff's title after he had been definitely told that no will existed and more than a year had elapsed since the death of the deceased); compare *Watson v. Reynolds*, *supra*, *per* LITTLEDALE, J.; *Green v. Button* (1835), 2 Cr. M. & R. 707, *per* PARKE, B., at p. 715 (action held maintainable "though the defendant makes a claim of right, if it be

evidence of malice if the defendant puts forward a claim which he in fact knows to be unfounded (*p*). The claim must be made in defence of the defendant's own title: a mere stranger interfering in a matter in which he is not interested is not entitled to the same indulgence (*q*).

SECT. 2.
Slander of
Title.

1234. An agent of the person interested stands in the same position as his principal (*r*). Agent.

SECT. 3.—*Trade Libel.*

SUB-SECT. 1.—*In General.*

1235. Words which disparage property may also impute misconduct to its owner or the person who deals in it and so be defamatory in the strict sense, being a libel or slander upon a person in his trade (*s*).

Requisites of
trade libel.

made maliciously and without reasonable or probable cause and the special damage accrues from the claim so made"); and see title LIBEL AND SLANDER, Vol. XVII., p. 677, note (*p*).

(*p*) *Gerard v. Dickenson* (1590), 4 Co. Rep. 18 a; see *Atkins v. Perrin* (1862), 3 F. & F. 179; *Mildmay's Case* (1584), 1 Co. Rep. 175 a, 177 b, note (N). But the mere fact that the plaintiff has told the defendant, who claims under a bill of sale, that the bill is invalid is not evidence of malice on the defendant's part (*Steward v. Young* (1870), L. R. 5 C. P. 122); and it is no evidence of malice that an officer acting under complicated Acts of Parliament makes a mistake as to the law (*Pater v. Baker* (1847), 3 C. B. 831), or that, having a proper motive, and being bound to select some person against whom to take action, he selects the plaintiff as the most influential person concerned (*ibid.*, per WILDE, C.J., at p. 865).

(*q*) *Mildmay's Case*, *supra*, at p. 177 a; *Pennyman v. Rabanks* (1595), Cro. Eliz. 427; *Northumberland (Earl) v. Byrt* (1607), Cro. Jac. 163; *Pitt v. Donovan* (1813), 1 M. & S. 639, 646 (where the defendant had an interest in that he was the husband of a woman to whom the property might come); *Rowe v. Roach* (1813), 1 M. & S. 304 (plea held bad as not showing any connexion between the defendant and the persons who had an interest); and see *Johnson v. Smith* (1584), Moore (K. B.), 187.

(*r*) *Hargrave v. Le Breton* (1769), 4 Burr. 2422 (where a slight and immaterial variation from his instructions was held not to show malice); *Watson v. Reynolds* (1826), Mood. & M. 1; and see *Johnson v. Smith*, *supra*. Apparently, if the agent, exceeding his instructions, makes a statement which is unauthorised and untrue, the question is, would the principal have acted honestly if he had made that statement, and, if so, the agent is also protected (*Watson v. Reynolds*, *supra*).

(*s*) As to this point, see, generally, title LIBEL AND SLANDER, Vol. XVIII., pp. 610 *et seq.*, 618, 628, 629, and the cases there referred to; see also *Burnet v. Wells* (1700), 12 Mod. Rep. 420 (the statement "he has nothing but rotten goods in his shop" is actionable (apparently, as a libel or slander), whereas the statement "he has rotten goods" would not be actionable); *Ingram v. Lawson* (1840), 6 Bing. (N. C.) 212 (it is libellous to say of a man that the ship of which he is the captain was in such a state as to require additional hands to keep her afloat and that she was sold to the Jews to carry convicts); S. C., as reported 9 L. J. (C. P.) 145, per COLTMAN, J., at p. 147 ("The case is as if it were said of an innkeeper that his wine was poison; or of a tea dealer that his teas were turned from black to green by being prepared on copper and that they would kill those by whom they were consumed"); *Evans v. Harlow* (1844), 5 Q. B. 624 (where words cautioning persons against buying from the plaintiff, "a person stating that he is the sole inventor, manufacturer and patentee, thereby monopolising high prices at the expense of the public," denying that the plaintiff had a patent, and

SECT. 3.
Trade
Libel.

Where such words are not thus defamatory (*t*), they are actionable, whether written or oral (*a*), if they are false (*b*), published with malice (*c*) and calculated in the ordinary course to produce, and if they do produce, actual damage (*d*).

saying that the plaintiff's machines wasted tallow, were held not libellous, as implying no imputation of fraud or misrepresentation; the case was not decided merely on the absence of special damage; see *White v. Mellin*, [1895] A. C. 154, per Lord HERSCHELL, L.C., at p. 164; *Jenner v. A'Beckett* (1871), L. R. 7 Q. B. 11 (words describing the title of plaintiff's goods as "very silly, very slangy, and very vulgar, and which has been forced upon the public *ad nauseam*," held capable of being a libel); *Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch. D. 763, C. A.; S. C., on motion (1877), 6 Ch. D. 582 (words warning customers against a company "in seeking to foist upon the public an article which they pretend is the same as that manufactured" by the plaintiff's predecessor in title, held a libel). In *Clark v. Freeman* (1848), 11 Beav. 112, advertisements by the defendants of pills called "Sir James Clarke's Consumption Pills" (using, slightly altered, the name of the plaintiff, who was a well-known specialist on consumption) were discussed on the basis that they were a libel in the strict sense; and see *Dockrell v. Dougall* (1899), 80 L. T. 556, C. A.; and title LIBEL AND SLANDER, Vol. XVIII., p. 632. The question in the case of *Clark v. Freeman*, *supra*, was the power of the Court of Chancery to grant injunctions in libel, as to which see *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551, 561; *Dixon v. Holden* (1869), L. R. 7 Eq. 498; and title LIBEL AND SLANDER, Vol. XVIII., pp. 733 *et seq.*; and see *Byron (Lord) v. Johnston* (1816), 2 Mer. 29 (injunction granted against the publication under the plaintiff's name of poems which were not by the plaintiff, the defendant being unable to swear that they were by the plaintiff); *Routh v. Webster* (1847), 10 Beav. 561 (injunction granted against placing the plaintiff's name against his will on a list of trustees of a company and thus exposing him to possible liability); *Lee v. Gibbings* (1892), 67 L. T. 263; and title LIBEL AND SLANDER, Vol. XVIII., p. 736. As to acts which are libellous or analogous thereto, see *Plunket v. Gilmore* (1724), Fortes. Rep. 211 (procuring a person to come to the plaintiff's house dressed as a woman and causing a mob to cry out "a bawdy-house" and to break windows); and title LIBEL AND SLANDER, Vol. XVIII., p. 606, note (*g*). As to a case where circulars falsely representing that a business in the hands of a receiver and manager was at an end, and inviting customers to transfer their custom, was held a contempt of court, see *Helmore v. Smith* (2) (1886), 35 Ch. D. 449, C. A.; and title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 281, 288. As to the right of a corporation to sue, see title LIBEL AND SLANDER, Vol. XVIII., pp. 612, 613. As to the functions of judge and jury respectively, see *ibid.*, pp. 652 *et seq.* As to the question whether words of praise may be actionable if spoken maliciously in circumstances which give rise to special damage, see *Kelly v. Partington* (1833), 5 B. & Ad. 645, per LITTLEDALE, J., at pp. 648, 650.

(*t*) The burden lies upon the plaintiff to show that they are (*Griffiths v. Benn* (1911), 27 T. L. R. 346, C. A., per COZENS-HARDY, M.R., at p. 350); see title LIBEL AND SLANDER, Vol. XVIII., p. 630, note (*n*).

(*a*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 527, C. A.; and see p. 672, *ante*.

(*b*) On a motion for an interlocutory injunction the burden is upon the plaintiff to satisfy the court as to their untruth (*Anderson v. Liebig's Extract of Meat Co., Ltd.* (1881), 45 L. T. 757; *Burnett v. Tak* (1882), 45 L. T. 743). There is no decision as to the burden of proof on the trial of the action; but, apparently, the same rule would apply, for, the words being *prima facie* not actionable, no cause of action arises till their untruth, *inter alia*, is established; see *Hatchard v. Mège* (1887), 18 Q. B. D. 771, 775.

(*c*) See p. 679, *post*; as to the same principle in slander of title, see pp. 672, 673, *ante*.

(*d*) *Ratcliffe v. Evans*, *supra*, at p. 527; *Evans v. Harlow* (1844), 5 Q. B. 624; *Young v. Macrae* (1862), 3 B. & S. 264, 269 (where the defendants

SUB-SECT. 2.—*Damage.*

SECT. 3.

Trade
Libel.**1236.** The damage done is the gist of the action (e). It must beSpecial
damage.

compared the plaintiff's oil with another to the disadvantage of the former, and the court, while admitting that an action might lie for a false and malicious disparagement of another's goods causing special damage, held that this had not been sufficiently alleged, for "it may be that all the falsehood consists in this, that the defendant has alleged what is true of the plaintiff's oil and what is false of that of some other man, by attributing to that other man's oil a character of superiority which it does not possess"); *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218, distinguishing *Young v. Macrae* (1862), 3 B. & S. 264; *Halsey v. Brotherhood* (1881), 19 Ch. D. 386, C. A.; S. C. (1880), 15 Ch. D. 514, *per* JESSEL, M. R., at p. 518; *Hatchard v. Mège* (1887), 18 Q. B. D. 771, 775; *South Hetton Coal Co. v. North-Eastern News Association*, [1894] 1 Q. B. 133, C. A.; *White v. Mellin*, [1895] A. C. 154, *per* Lord HERSCHELL, L. C., at p. 160, and *per* Lord WATSON, at pp. 166, 167; *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L., *per* Lord DAVEY, at p. 99; *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot* (1903), 20 T. L. R. 88; *Alcott v. Millar's Karri and Jarrah Forests, Ltd.* (1904), 21 T. L. R. 30, 31, C. A.; *Lyne v. Nicholls* (1906), 23 T. L. R. 86. In *Riding v. Smith* (1876), 1 Ex. D. 91, KELLY, C. B., at p. 93, said: "If a man states of another who is a trader earning his livelihood by dealing in articles of trade anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons resorting to the place of business, and it so leads to loss of trade, it is actionable"; and in *Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch. D. 763, C. A., MALINS, V.-C., at p. 774, treated this case as establishing the propositions that "you may not issue any advertisement calculated to injure a person in his business," and, at p. 780, that it is not necessary to prove damage if the thing is itself calculated to be injurious. In *Thomas v. Williams* (1880), 14 Ch. D. 864, where the words alleged that the plaintiffs' needles were spurious, a final injunction was granted without proof of special damage, on the ground that the libel was calculated to do serious injury, approving *Riding v. Smith*, *supra*, and citing *Thorley's Cattle Food Co. v. Massam*, *supra*, as showing that positive injury is not necessary if the libel is itself calculated to injure. But the words in *Thorley's Cattle Food Co. v. Massam*, *supra*, were held by the Court of Appeal to be libellous in the strict sense; the dicta of MALINS, V.-C., if they were intended to apply to words not libellous in themselves, seem clearly too wide, and *Riding v. Smith*, *supra*, is of doubtful authority; see *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 534, C. A. In *White v. Mellin*, *supra*, Lord WATSON, at p. 166, said, "the fact that the representations made by the defendant . . . might be calculated to disparage the food manufactured by the plaintiff and to interfere with its sale can afford no cause of action." As to the possibility that in certain cases an injunction may be granted before the damage has been caused; see p. 681, *post*; as to injunctions generally, see titles INJUNCTION, Vol. XVII., pp. 197 *et seq.*; LIBEL AND SLANDER, Vol. XVIII., pp. 628, note (l), 629, 719; as to threats by patentees generally, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 227, 228. A company may sue on words causing damage (*Linotype Co., Ltd. v. British Empire Typesetting Machine Co., Ltd.* (1899), 81 L. T. 331, 333, H. L.).

(e) *Ratcliffe v. Evans*, *supra*, at p. 532 (for a discussion of the different meanings of special damage, see *ibid.*, at pp. 527, 528; in the present case it means "the actual and temporal loss which has occurred"); *Evans v. Harlow* (1844), 5 Q. B. 624; *Dicks v. Brooks* (1880), 15 Ch. D. 22, C. A.; *Halsey v. Brotherhood*, *supra*, at p. 388; *Hatchard v. Mège*, *supra*, at p. 775; *White v. Mellin*, *supra*, *per* Lord HERSCHELL, L. C., at p. 161; *Royal Baking Powder Co. v. Wright, Crossley & Co.*, *supra*, *per* Lord DAVEY, at p. 99, *per* Lord JAMES OF HEREFORD, at p. 101 ("specific money damage"), and *per* Lord ROBERTSON, at p. 103 ("loss which can be and is specified"); *quære* whether a general decline of

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Libel.

intended by the defendant and be the direct and probable result of his words (*f*).

There is no damage on which a claim can be sustained if the loss merely arises because the plaintiff is prevented from doing something which he is not legally entitled to do (*g*).

Proof of
damage.

1237. The damage must be alleged and proved with such certainty and particularity as are reasonable having regard to the circumstances; sometimes a general loss is the natural and direct result of the words, and particular instances of loss cannot from the nature of the case be specified (*h*).

business is sufficient; but see note (*h*), *infra*; *Barrett v. Associated Newspapers, Ltd.* (1907), 23 T. L. R. 666, C. A. (allegation that a house was haunted, but no evidence of special damage, the depreciation in the value of the house being due to previous allegations of a similar kind by others); see the cases on slander of title at pp. 672, 673, *ante*; and, as to special damage, see title LIBEL AND SLANDER, Vol. XVIII., pp. 620, note (*i*), 730 *et seq.* The plaintiff can only recover the special damage which he alleges and proves; see *ibid.*, p. 719.

(*f*) *Miller v. David* (1874), L. R. 9 C. P. 118, 126; *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot* (1903), 20 T. L. R. 88; compare *Lynch v. Knight* (1861), 9 H. L. Cas. 577; *Chamberlain v. Boyd* (1883), 11 Q. B. D. 407, C. A.

(*g*) *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L.

(*h*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 531, 532, C. A. (where evidence of general loss of business was held admissible); *Riding v. Smith* (1876), 1 Ex. D. 91 (where a general loss of business was held to give a cause of action when the wife of the plaintiff, a trader, was charged with adultery; but as to this case, see note (*d*), p. 677, *ante*; *Ratcliffe v. Evans*, *supra*, at p. 534); *Dicks v. Brooks* (1879), 15 Ch. D. 22, C. A. (there must be a "sensible, appreciable damage"); *Hatchard v. Mège* (1887), 18 Q. B. D. 771 (allegation that the plaintiff was greatly injured in his trade held sufficient); and see *Iveson v. Moore* (1699), 1 Ld. Raym. 486, *per* GOULD, J., at p. 489 ("In actions upon the case where damages are only recoverable, a precise certainty of the damages is not necessary to be shown in the declaration"); *Evans v. Harries* (1856), 1 H. & N. 251, *per* MARTIN, B., at p. 254. In *Evans v. Harlow* (1844), 5 Q. B. 624, 633, it was said: "It is a caution against the goods . . . which is not actionable unless it were shown that the plaintiff by reason of the publication was prevented from selling his goods to a particular person"; but, apparently, this may be taken as an instance rather than a rule; see p. 672, *ante*. In *Lyne v. Nicholls* (1906), 23 T. L. R. 86, where the words reflected upon the circulation of the plaintiffs' newspaper, SWINFEN EADY, J., held that damage was not sufficiently shown by proving that the plaintiffs accepted lower rates from advertisers (who referred to the alleged circulation of the defendant's paper) than they thought the circulation warranted, as it was not shown that the said advertisers were old customers, and it therefore did not follow that the rates would in other circumstances have been higher. The plaintiffs also failed to show that the advertisement revenue had fallen off. In *Alcott v. Millar's Karri and Jarrah Forests, Ltd.* (1904), 91 L. T. 722, C. A., there was held to be sufficient evidence of special damage where the words were contained in a letter written to a road authority which was about to enter into a contract, and the plaintiff in consequence had to reduce his price and allow special terms, although a circular which might have contributed to that result was also before the authority, and there was a public agitation on the subject. In *Dicks v. Brooks*, *supra*, it was apparently not regarded as evidence of any sufficient damage that one customer, having bought goods from the plaintiff, returned them; see, generally, title LIBEL AND SLANDER, Vol. XVIII., p. 733.

SUB-SECT. 3.—*Malice.*

SECT. 3.

Trade
Libel.Proof of
malice.

1238. Malice is an essential element in the cause of action (*i*). There is no evidence of malice if all that is shown is that the defendant wrote or spoke honestly, even though wrongly, in defence of a real or supposed right or title to the property (*k*) or merely for the purpose of advancing the sale of his own goods (*l*) or in pursuance of a duty (*m*).

(*i*) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, per Lord BLACKBURN, at p. 777; see the cases cited in note (*d*), p. 676, *ante*, and the cases on slander of title relating to this point, cited at pp. 673, 674, *ante*; as to malice generally, see titles LIBEL AND SLANDER, Vol. XVIII., pp. 608, 711 *et seq.*; TORT, p. 467, *ante*. The question whether the words were false and malicious is for the jury (*Hatchard v. Mège* (1887), 18 Q. B. D. 771, 775; *Halsey v. Brotherhood* (1881), 19 Ch. D. 386, C. A., per BAGGALLAY, L.J., at p. 389). In *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218, BRAMWELL, B., at p. 222, doubted whether "actual malice" was necessary, and regarded "maliciously" as possibly meaning "without reasonable cause calling for a statement by the defendants on the subject," or "without lawful occasion"; see *ibid.*, per POLLOCK, B., at p. 223 ("I do not attach any special meaning to the word 'maliciously,' except so far as it must be taken with the words 'contriving and intending to injure the plaintiffs.' I think that deprives the plaintiffs of what I may call any legal occasion or opportunity on which they might use words of this kind"). See also *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1900), 18 R. P. C. 95, H. L. (where Lord DAVEY, at p. 99, described maliciously as meaning "without just cause or excuse . . . the threat to sue must be shown to have been made for the purpose of injuring the plaintiffs and not for the *bonâ fide* protection of the defendants' rights and without any real intention to follow it up by action or other legal proceedings"); *Halsey v. Brotherhood*, *supra*, per BAGGALLAY, L.J., at p. 389 ("reasonable and probable cause" is necessary). But it is not essential that the defendant should actually follow up a threat by proceedings; the question is, was the threat made *bonâ fide* (S. C. (1880), 15 Ch. D. 514, per JESSEL, M.R., at pp. 517, 518, disapproving *Rollins v. Hinks* (1872), L. R. 13 Eq. 355, in so far as it decided that there was no presumption in favour of the validity of a patent); *Axmann v. Lund* (1874), L. R. 18 Eq. 330; as to threats by patentees, see, generally, title PATENTS AND INVENTIONS, Vol. XXII., pp. 227, 228.

(*k*) *Halsey v. Brotherhood*, *supra*, per Lord COLERIDGE, C.J., at p. 388: "there must be some evidence either from the nature of the statement itself or otherwise to satisfy the court or the jury that the statement was not only untrue, but was made *malâ fide* for the purpose of injuring the plaintiff and not in the *bonâ fide* defence of the defendants' own property"; *Burnett v. Tak* (1882), 45 L. T. 743; *Capital and Counties Bank v. Henty*, *supra*, per Lord BLACKBURN, at p. 777; *Royal Baking Powder Co. v. Wright, Crossley & Co.*, *supra*, per Lord DAVEY, at p. 99; *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot* (1903), 20 T. L. R. 88; and see the cases on slander of title relating to this point, p. 674, *ante*. It does not matter whether the defendant's title be legal or equitable (*Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot*, *supra*, at p. 90); and there is no distinction between the defence of a legal right under a patent and the defence of any other legal right (*Halsey v. Brotherhood*, *supra*, affirming S. C. (1880), 15 Ch. D. 514, per JESSEL, M.R., at p. 518); as to threats by patentees, see, generally, title PATENTS AND INVENTIONS, Vol. XXII., pp. 227, 228.

(*l*) *White v. Mellin*, [1895] A. C. 154, per Lord HERSCHELL, L.C., at p. 160; *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot*, *supra*.

(*m*) *Clover v. Royden* (1873), L. R. 17 Eq. 190; see note (*l*), p. 674, *ante*.

SECT. 3.

Trade
Libel.

Puffs.

A mistake of law is no evidence of malice (*n*), but it is clearly malicious to publish the words knowing them to be untrue (*o*).

1239. It is not actionable for a trader to proclaim that his own goods are equal or superior to those of his rivals, even though the words be false and cause special damage (*p*), but it is otherwise when the words go beyond a mere puff and constitute definite untrue statements of fact about the goods of a rival (*q*).

SUB-SECT. 4.—*Miscellaneous.*Devolution of
cause of
action.

1240. The cause of action survives to an executor or administrator (*r*), and passes to a trustee in bankruptcy (*s*).

(*n*) *Dicks v. Brooks* (1879), 15 Ch. D. 22, C. A., *per* BRAMWELL, L.J., at p. 39 (where it was suggested that the defendants, who complained that a printed pattern for wool work was an infringement of their copyright in a picture, might with impunity have warned the public that that particular kind of copy was a piracy, though the statement was wrong in law; whereas a statement that the defendants had the sole subsisting copyright might reasonably be taken as a wrong statement of fact that they had got such a right in the picture that any reproduction of it in any form was an infringement; but the plaintiff failed through absence of special damage; and it seems doubtful whether there is any substance in the above distinction); see also the cases on slander of title relating to this point, cited in note (*p*), p. 675, *ante*. As to mistake generally, see title MISTAKE, Vol XXI., pp. 1 *et seq*.

(*o*) *White v. Mellin*, [1895] A. C. 154, *per* Lord HERSHELL, L.C., at p. 160; *Halsey v. Brotherhood* (1880), 15 Ch. D. 514, *per* JESSEL, M.R., at p. 518; and see the cases on slander of title relating to this point, cited at p. 675, *ante*.

(*p*) *Evans v. Harlow* (1844), 5 Q. B. 624; *Young v. Macrae* (1862), 3 B. & S. 264; *White v. Mellin*, *supra*; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, C. A.; *Alcott v. Millar's Karri and Jarrah Forests, Ltd.* (1904), 91 L. T. 722, C. A.; and see *Harman v. Delany* (1731), 2 Stra. 898; *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218, *per* BRAMWELL, B., at p. 221; *Spalding Brothers v. Gamage (A. W.), Ltd., and Benetfink & Co., Ltd.* (1913), 29 T. L. R. 541. But, apparently, the case may be otherwise where the parties are not rivals in trade (*Hubbuck & Sons, Ltd. v. Wilkinson Heywood and Clark*, *supra*, at p. 94); and see, generally, title LIBEL AND SLANDER, Vol. XVIII. pp. 627, 628.

(*q*) As, for instance, a statement that the circulation of the defendant's newspaper is twenty to one of that of the plaintiff's paper (*Lyne v. Nicholls* (1906), 23 T. L. R. 86; compare *Heriot v. Stuart* (1796), 1 Esp. 437); that the wood paving blocks of the plaintiff are "in a rotten condition" (*Alcott v. Millar's Karri and Jarrah Forests, Ltd.*, *supra*, distinguishing *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood and Clark Ltd.*, *supra*); that the defendant's goods are the only genuine ones and the article manufactured by others is spurious (*James v. James* (1872), L. R. 13 Eq. 421); *Young v. Macrae*, *supra* (to compare the plaintiff's goods to those of another is not actionable, for the only falsehood therein may be in attributing superiority to the latter; but to make untrue disparaging statements about the plaintiff's goods is actionable if done with malice and causing special damage; see *ibid.*, *per* WIGHTMAN, J., at p. 270 ("There is no statement in the alleged libel that the article sold or manufactured by the plaintiffs is a bad article; it is only said that it is inferior to that of someone else; and that is consistent with the plaintiffs' article being in itself a very good article"))).

(*r*) *Hatchard v. Mège* (1887), 18 Q. B. D. 771; see titles EXECUTORS AND ADMINISTRATORS, Vol. XV. pp. 226, 227; LIBEL AND SLANDER, Vol. XVIII., p. 613.

(*s*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137 *et seq.*, 164 *et seq.*; LIBEL AND SLANDER, Vol. XVIII., p. 612.

1241. In general no injunction will be granted where no special damage is alleged or proved, for no injunction lies unless an actionable wrong is shown (t); but an exception may perhaps be made where the words are clearly false and malicious and are calculated and intended naturally, directly, and immediately to cause damage which is so highly probable as to be properly described as imminent (a).

(t) *White v. Mellin*, [1895] A. C. 154, per Lord HERSCHELL, L.C., at pp. 162, 163, per Lord WATSON, at p. 167, and per Lord MORRIS, at p. 170; *Canham v. Jones* (1813), 2 Ves. & B. 218; *Halsey v. Brotherhood* (1881), 19 Ch. D. 386, C. A., per Lord COLERIDGE, C.J., at p. 386.

(a) *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot* (1903), 20 T. L. R. 88, distinguishing *White v. Mellin*, *supra*, on the ground that in that case there was no evidence that the words were false or false to the defendant's knowledge or calculated to cause damage; *Burnett v. Tak* (1882), 45 L. T. 743 (where an interlocutory injunction was refused because the plaintiff failed to prove the statements false); see *ibid.*, per KAY, J., at p. 744, explaining *Halsey v. Brotherhood* (1880), 15 Ch. D. 514, per JESSEL, M.R., at p. 520 ("There may be a case nevertheless in which although at the moment an action could not be maintained for damages for slander of title, still the court of equity would grant an injunction: but under what circumstances? Under these: if the plaintiff has said 'If you go on making these representations which I tell you are false, I shall bring an action for an injunction in order to prove that they are false'; and when that is proved . . . then the court will grant an injunction . . . But if the argument goes so far as to say that in a case where there is no *mala fides* whatever and no damages could under any possible circumstances be obtained the court will grant an injunction, all I can say is that I know of no authority whatever for that proposition"); see also *Anderson v. Liebig's Extract of Meat Co., Ltd.* (1881), 45 L. T. 757 (where it was recognised that an injunction would be granted where statements are made with reference to the infringement of a patent or the invasion of a trade mark and the like, if it is proved that they are untrue; but an interlocutory injunction was refused for want of such proof); and title LIBEL AND SLANDER, Vol. XVIII., p. 736; as to restraining publication of a libel, see *Hinrichs v. Berndes*, [1878] W. N. 11; and title LIBEL AND SLANDER, Vol. XVIII., p. 733. As to the granting of an injunction against the circulation of libellous statements injurious to property, see *Dixon v. Holden* (1869), L. R. 7 Eq. 488; commented on in *Mulkern v. Ward* (1872), L. R. 13 Eq. 619; and titles INJUNCTION, Vol. XVII., pp. 260, 261; LIBEL AND SLANDER, Vol. XVIII., pp. 733 *et seq.* For a case of the granting of an injunction against the circulation of untrue statements calculated to injure property where the statements are also a breach of duty under an agreement, see *Ward v. Beeton* (1874), L. R. 19 Eq. 207, 215; and, generally, title INJUNCTION, Vol. XVII., pp. 205, 260, 261.

TRADE BOARDS.

See TRADE AND TRADE UNIONS.

TRADE DESCRIPTIONS.

See TRADE MARKS, TRADE NAMES, AND DESIGNS.

TRADE DISPUTES.

See TRADE AND TRADE UNIONS.

TRADE LIBEL.

See LIBEL AND SLANDER; TRADE AND TRADE UNIONS.

TRADE MARKS, TRADE NAMES, AND DESIGNS.

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<i>Forgery of Trade Marks</i>	-	-	CRIMINAL LAW AND PROCEDURE.
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Part I.—Registered Trade Marks.

SECT. 1.

SECT. 1.—Definitions.

Definitions.

“Mark.”

1242. “Mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof (*a*).

“Trade mark.”

“Trade mark” means a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale (*b*).

“Registered trade mark.”

“Registered trade mark” means a trade mark which is actually upon the register (*c*).

“Register.”

“The register” means the register of trade marks kept at the Patent Office under the provisions of the Trade Marks Act, 1905 (*d*).

SECT. 2.—Nature of Property in Trade Marks.

Unregistered marks.

1243. Unregistered marks can only be directly protected by an action for infringement when they were used before the 13th August, 1875, and have been refused registration (*e*).

The owner of such mark may still bring an action for passing off (*f*).

Extent of right.

1244. Trade mark law protects the trader who has established a reputation from the unfair competition of other persons who might sell their goods in such a guise that the purchaser would think that they were his. Although the owner of a registered trade mark (*g*) has now a statutory monopoly, and it is no longer necessary for the

(*a*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 3.

(*b*) *Ibid.*

(*c*) *Ibid.* As to what trade marks may be registered, see pp. 687 *et seq.*, *post*.

(*d*) 5 Edw. 7, c. 15, s. 3. As to registration, see pp. 703 *et seq.*, *post*.

(*e*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 42. There is no report of any case under this provision or the corresponding provisions of the former Acts; compare note (*i*), p. 746, *post*.

(*f*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 45. As to passing off, see p. 744, *post*; and compare title MISREPRESENTATION AND FRAUD, Vol. XX., p. 676.

(*g*) For the definition of a registered trade mark, see the text, *supra*.

proprietor of such a mark to show that the use by other persons of the mark has in fact prejudicially affected his trade (*h*), yet the registration of a trade mark may be terminated if the mark is not being used in trade (*i*), and such mark cannot be transferred apart from the goodwill in the trade or in the goods for which it is registered (*j*).

SECT. 2.
Nature of
Property
in Trade
Marks.

1245. The Board of Trade may permit a person or association undertaking the examination of any goods in respect of origin, material, manufacture, quality, accuracy or other characteristics, to register a trade mark which shall certify the result of such examination. Such marks are only transmissible or assignable by permission of the Board of Trade (*k*).

Standardisa-
tion marks.

SECT. 3.—*The Register of Trade Marks.*

1246. A register is kept at the Patent Office (*l*) in which are entered all registered trade marks (*m*). All registers kept under former statutes (*n*) are incorporated with and deemed to form part of the register. The trade marks entered in such previous registers retain their date of registration, and their validity is, in general, to be tested by the statutory provisions in force at the date of their registration (*o*).

General
register.

1247. The marks for cotton goods (*p*) are entered in a register called the Manchester register, kept in duplicate in London and Manchester (*q*). The right of inspection in the case of this register extends to all applications for marks, whether registered, pending, refused, lapsed, expired, withdrawn, abandoned, or cancelled (*r*), and certificates are issued as to certain contents of such applications (*s*).

Manchester
register.

(*h*) See note (*h*), p. 710, *post*. The first statute relating to trade marks was passed in 1875. The following list of Acts should be remembered in considering decisions of various dates :—Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91); Trade Marks Registration Amendment Act, 1876 (39 & 40 Vict. c. 33); Trade Marks Registration Extension Act, 1877 (40 & 41 Vict. c. 37); Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57); Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50). The first three of these Acts were repealed by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). The Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57), and 1888 (51 & 52 Vict. c. 50), so far as they related to trade marks, except the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 82—84, were repealed by the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 73.

(*i*) See pp. 717, note (*o*), 719, *post*.

(*j*) See pp. 718, 719, *post*.

(*k*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 62; Trade Marks Rules 1906 (Stat. R. & O., 1906, p. 765), rr. 42—46.

(*l*) As to the Patent Office generally, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 125 *et seq*.

(*m*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 4.

(*n*) As to these statutes, see note (*h*), *supra*.

(*o*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 6. But a mark is not to be removed if it would be entitled to registration under this Act (*ibid.*, s. 41); see note (*k*), p. 715, *post*.

(*p*) For the definition of "cotton goods," see note (*m*), p. 707, *post*.

(*q*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64 (1), (2).

(*r*) *Ibid.*, s. 64 (11).

(*s*) *Ibid.*, s. 64 (12). As to what marks may not be registered in these classes, see Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64 (10). As the

SECT. 3.

The
Register
of Trade
Marks.Sheffield
register.Contents of
register.Inspection
and extracts.

The registrar.

1248. A register is kept by the Cutlers' Company at Sheffield in which are entered marks for metal goods (*t*), if the applicant for such mark carries on business in Hallamshire or within six miles thereof, and also any marks assigned by the Cutlers' Company and actually used before the 1st January, 1884 (*u*). The Sheffield register forms part of the register, and marks entered on it are also entered in London (*w*).

1249. The register contains all registered trade marks, with the names and addresses of the proprietors, and notices of assignments and transmissions, disclaimers, conditions, and limitations (*a*). No notice of trust is to be entered on the register (*b*).

The register is open to inspection at all convenient times, and certified copies of any entry must be supplied to any person (*c*). Such certified extracts are evidence in all courts in the King's dominions without further proof (*d*). In the case of marks entered in the Sheffield or Manchester registers the extracts may be similarly certified by the Master of the Cutlers' Company (*e*), or the Keeper of Cotton Marks (*f*), and in the latter case this power extends also to pending applications and marks which have lapsed or expired or have been refused or withdrawn, abandoned, or cancelled (*g*). The registrar, if requested, will cause a search to be made to ascertain if there are any marks conflicting with a proposed mark (*h*).

1250. The register is under the charge of the registrar (*i*). The

Manchester register is part of the register, the statutory provisions relating to the latter apply; see Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64 (2).

(*t*) For the definition of "metal goods," see note (*o*), p. 708, *post*.

(*u*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 63 (2). The "Lordship and Liberty of" Hallamshire is one of the manors making up the borough of Sheffield. As to the formation of the Cutlers' Company, see stat. (1623) 21 Jac. 1, c. 31; stat. (1791) 31 Geo. 3, c. 58.

(*w*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 63 (1).

(*a*) *Ibid.*, s. 4. Other matters to be entered may be prescribed from time to time, and by the Trade Marks Rules, 1906, r. 64, these include the date of registration, the goods for which the mark is registered, the occupation of the proprietor and such other particulars as the registrar deems necessary. As to marks for cotton goods, see Trade Marks Rules, 1912 (Stat. R. & O. 1912, p. 1229); and p. 685, *ante*, p. 707, *post*. If a notice of agreement as to user is entered on the register its purport should be set out; see note (*f*), p. 700, *post*.

(*b*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 5. As to what notices may be entered under the corresponding provision of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 66, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 179, 180.

(*c*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 7. This also applies to the Sheffield register (*ibid.*, s. 63 (11)) and the Manchester register (*ibid.*, s. 64 (12)); see also Trade Marks Rules, 1906, rr. 96, 102—104.

(*d*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 50, 51.

(*e*) *Ibid.*, s. 63 (11).

(*f*) *Ibid.*, s. 64 (8).

(*g*) *Ibid.*, s. 64 (11), (12).

(*h*) Trade Marks Rules, 1906, r. 95.

(*i*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 4. The registrar is here defined as the Comptroller-General of Patents, Designs, and Trade Marks (*ibid.*, s. 4). As to the Comptroller-General, see title PATENTS

registrar is empowered to deal with questions of registration, alteration of marks etc. (*k*), but in no case may he exercise any power, whether discretionary or otherwise, adversely to an applicant or registered owner without giving him an opportunity of being heard (*l*). The registrar may in any case of doubt or difficulty apply to the law officers for directions (*m*). There is an appeal to the Board of Trade against any decision of the registrar (*n*). There is also in certain cases an appeal to the court direct (*o*). The court can also, in connexion with any question as to rectification, review a decision of the registrar (*p*).

SECT. 3.
The
Register
of Trade
Marks.

1251. The Patents, Designs, and Trade Marks Office is a branch of the Board of Trade, which has very general powers for making rules, prescribing forms, and generally regulating the business of the office (*q*), and may appoint persons to exercise any of its functions (*r*). Further, the Board is in general the tribunal of appeal from any decision of the office (*s*), but it has the power to refer any such appeal to the High Court (*t*); otherwise the decision of the Board is final (*a*).

Patents,
Designs, and
Trade Marks
Office.

1252. Provision is made for the employment of agents for such matters as may be prescribed by the rules or permitted by the Board of Trade (*b*).

Employment
of agents.

SECT. 4.—*Registrable Trade Marks.*

SUB-SECT. 1.—*Essential Particulars.*

1253. A trade mark to be registrable must contain, or consist of, at least one of certain essential particulars. These may be divided

Character of
mark.

AND INVENTIONS, Vol. XXII., p. 153, note (*f*). He must issue an annual report on the execution of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), including it (*ibid.*, s. 57) in his annual report on the execution of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29); see *ibid.*, s. 76.

(*k*) As to the powers of the registrar, see pp. 503 *et seq.*, *post*.

(*l*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 53.

(*m*) *Ibid.*, s. 56.

(*n*) *Ibid.*, s. 54.

(*o*) *Ibid.*, ss. 12 (3), 14 (6).

(*p*) *Ibid.*, s. 54.

(*q*) *Ibid.*, s. 60; compare title PATENTS AND INVENTIONS, Vol. XXII., pp. 152, 153.

(*r*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 58.

(*s*) *Ibid.*, s. 54. The case of marks on the Sheffield register is an exception, the only appeal being to the court (*ibid.*, s. 63 (9)).

(*t*) See *ibid.*, s. 3.

(*a*) *Ibid.*, s. 59. As to proceedings before the Board of Trade in respect of a patent, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 197, 198.

(*b*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 55. The present rules practically permit all matters to be conducted by a properly authorised agent (Trade Marks Rules, 1906, r. 10). There is no limitation on the persons who may act as trade mark agents, or describe themselves as such, but the registrar is not bound to recognise as agents persons who have been convicted criminally or have been struck off the roll of solicitors or the register of patent agents (*ibid.*). As to the register of patent agents, see title PATENTS AND INVENTIONS, Vol. XXII., p. 230.

SECT. 4.
Registrable
Trade
Marks.

Names.

into (1) names and signatures; (2) words; (3) other distinctive marks (c).

1254. The name of a company, individual, or firm represented in a special or particular manner (d), or the signature of the applicant, or of some predecessor in his business (e), may form an essential feature, as may other names and signatures which are specially declared to be distinctive marks by an order of the Board of Trade or of the High Court (f). Names of imaginary individuals may be registrable as word marks (g).

Words.

1255. Registrable words other than names fall into three sections:—

(1) Invented words (h).

(2) Words having no direct reference to the character or quality of the goods, and not being in their primary signification geographical terms (i).

(3) Words not coming within these classes, but of such a nature that they are in themselves, or have become from user, adapted to distinguish the goods of the applicant. This class includes "old marks," and marks consisting of a word or words declared to be a distinctive mark by order of the Board of Trade or of the High Court (k). Words which from their nature are incapable of being, or becoming, adapted to distinguish the goods of any particular person are not registrable (l).

Invented
words.

1256. The test of an invented word is that it must have been substantially new at the date of registration, or have been

(c) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9.

(d) *Ibid.*, s. 9 (1). This provision does not apply to names in the possessive case (*Re Pirie's Trade Mark, Pirie & Sons v. Goodall & Sons* (1891), 9 R. P. C. 17, C. A.; [1892] 1 Ch. 35 (*Pirie's Parchment Bank*); *Re Lea (R. V.) Ltd.'s Application for Registration of a Trade Mark* (1913), 30 R. P. C. 216, C. A.; [1913] 1 Ch. 446); or to a name in ordinary letters even if surrounded by an oval (*Re Carroll's Application to Register a Trade Mark* (1899), 16 R. P. C. 82 ("Princess Christian"); *Re Murphy's Trade Mark* (1890), 7 R. P. C. 163, 166); see also *Benz et Cie's Application to Register a Trade Mark* (1913), 30 R. P. C. 177, C. A.; and note (g), p. 694, *post*. A surname, being only part of the name of an individual, is not within the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (1) (*Teofani & Co., Ltd. v. Teofani* (1913), 30 R. P. C. 460, C. A.; 109 L. T. 114), but may be registered under the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5). Initials may be registered, but only if they are sufficiently distinctive (*Registrar of Trade Marks v. Du Cros (W. & G.), Ltd.*, [1913] A. C. 624). A name written in oriental characters may be registered (*Re Rotherham's Trade-mark* (1880), 14 Ch. D. 585, C. A.; *Orr Ewing v. Registrar of Trade-marks* (1879), 4 App. Cas. 479, *per Lord Cairns*, L.C., at p. 485; see also *Gout v. Aleploglu* (1833), 6 Beav. 69, n.).

(e) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (2). Under former Acts the signature must have been that of the existing firm (*Re Trade Mark "Macfarlane & Co."*, *Macmillan v. Ehrmann Brothers, Ltd.* (1904), 21 R. P. C. 357).

(f) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5); see p. 694, *post*.

(g) *Re Holt & Co.'s Trade Mark, Holt & Co. v. Saunders, Green & Co.* (1896), 13 R. P. C. 118, C. A.; [1896] 1 Ch. 711 ("Trilby").

(h) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (3); see the text, *infra*.

(i) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (4); see p. 690, *post*.

(k) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5); see p. 694, *post*.

(l) As, for instance, "Pain Killer" (*Perry Davis v. Harbord* (1890), 15 App. Cas. 316).

SECT. 4.
Registrable
Trade
Marks.

substantially new when first used by the applicant, and have been only used to denote his goods down to the date of registration (*m*). It is not necessary that its production should have involved any great ingenuity or anything like "invention" in the sense in which the term is used in patent law (*n*).

A word may be an invented word, although it conveys a meaning to the reader, and the restriction against registering words having reference to the character or quality of the goods does not apply to invented words (*o*). The use of an old word in a new sense, as, for instance, of an adjective as a substantive, does not, however, constitute invention (*p*), and the mere addition of a common prefix or suffix to a known word may not be sufficient to form an invented word (*q*), especially if the word so formed resembles a word which would be descriptive of the goods (*r*). So the combination of two or more ordinary English words will not usually be considered an invented word (*s*), nor will a common foreign word of a descriptive nature (*t*), though the court will not be acute to detect resemblances to words in foreign languages (*a*). Misspelling is not sufficient to

What
constitutes
invention.

(*m*) *Re Kodak, Ltd.'s, Trade Marks, Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd., Kodak, Ltd. v. Houghton & Sons* (1903), 20 R. P. C. 337, 350; 20 T. L. R. 297. As to words invented as the name of a new article, see note (*i*), p. 697, note (*p*), p. 760, *post*.

(*n*) *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark* (1898), 15 R. P. C. 476, 485, H. L.; [1898] A. C. 571; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 134 *et seq.* It is not necessary that the application should be made by the actual inventor of the word or that there should have been no publication in this country (*Re Linotype Co.'s Application for a Trade Mark* (No. 2) (1900), 17 R. P. C. 385; [1900] 2 Ch. 238); see also *Re Kodak, Ltd.'s, Trade Marks, Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd., Kodak, Ltd. v. Houghton & Sons, supra*, at p. 350.

(*o*) *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*, at p. 485. This case entirely revolutionised the law as to registration of invented words, it having previously been held that an invented word must not refer to the character or quality of the goods. Earlier decisions on this point are therefore of little value, and practically the whole law on the subject is contained in this case; see also *Re Burroughs, Wellcome & Co.'s Trade Marks* (1904), 21 R. P. C. 217, 226, C. A.; [1904] 1 Ch. 736; *Re Farbenfabriken Vormals Fried. Bayer & Co.'s Application for a Trade Mark* (1893), 11 R. P. C. 84, C. A., *per* LINDLEY, L.J., at p. 90; 10 T. L. R. 260. Some of the earlier cases are cited in note (*d*), p. 690, *post*.

(*p*) *Re Trade Mark "Hæmatogen," Hommel v. Gebrüder, Bauer & Co.* (1904), 21 R. P. C. 576, 581; 20 T. L. R. 585.

(*q*) *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*, at pp. 483, 487; but see *ibid.*, at p. 485.

(*r*) As, for instance, "Absorbine" "Orlwoola"; see note (*d*), p. 690, *post*; but compare *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*, at p. 485.

(*s*) See *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*, at p. 483 ("Cheapandgood"); *Re National Biscuit Co.'s Application for a Trade Mark* (1902), 19 R. P. C. 281, C. A.; [1902] 1 Ch. 783 ("Uneda").

(*t*) *Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*, at p. 483.

(*a*) *Ibid.*, at p. 400; see also *Re Davis, Bergendahl & Co.'s Trade Marks, Davis & Co. v. Stribott & Co.* (1888), 6 R. P. C. 207; 59 L. T. 854;

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make a word an invented word (b). The question is really one of fact depending on the circumstances of each particular case (c), the guiding principle being, in the case of invented words and the words considered in the next paragraph, that no registration must be allowed that would monopolise part of the general vocabulary of the trade, or restrict the use of words that a trader would be likely to need to describe his goods (d).

Modification
of former
strictness.

1257. The introduction of the word "direct" in the description of registrable words shows that the mere fact of words having some reference to the goods does not render them incapable of registration, and was intended to correct the tendency to find some

Re Densham & Sons' Trade Mark (1895), 12 R. P. C. 75, 271, C. A.; [1895] 2 Ch. 176; *Re Trade Mark No. 58,405, "Bovril"* (1896), 13 R. P. C. 382, C. A.; [1896] 2 Ch. 600; *Re Trade Mark No. 96,997, "Savonol," Field (J. C. & J.), Ltd. v. Wagel Syndicate, Ltd.* (1900), 17 R. P. C. 266; [1900] 1 Ch. 651; *contra, Re Jackson & Co.'s Trade Mark* (1888), 6 R. P. C. 80; 60 L. T. 93 ("Kokoko").

(b) *Re Eastman Photographic Material Co., Ltd.'s, Application for a Trade Mark* (1898), 15 R. P. C. 476, 480, H. L.; [1898] A. C. 571; *Re Ripley (Edward) & Son's Application for a Trade Mark* (1898) 15 R. P. C. 151, C. A.; 78 L. T. 367 ("Pirle"); see also *Re National Biscuits Co.'s Application for a Trade Mark* (1902), 19 R. P. C. 281, C. A.; [1902] 1 Ch. 783 ("Uneeda"); *Re Brock (H. N.) & Co., Ltd.* (1909), 26 R. P. C. 683, 850, C. A.; [1910] 1 Ch. 130 ("Orlwoola").

(c) *Re Trade Mark, No. 58,405, "Bovril," supra.*

(d) *Re Eastman Photographic Material Co., Ltd.'s, Application for a Trade Mark, supra.* The following words have been held to be invented words:—"Mazawattee" (*Re Densham & Sons' Trade Mark* (1895), 12 R. P. C. 271, C. A.; [1895] 2 Ch. 176); "Kynite" (*Kynoch (G.) & Co.'s Trade Mark* (1897), 14 R. P. C. 905); "Solio" (*Re Eastman Photographic Materials Co., Ltd.'s, Application for a Trade Mark, supra*); "Savonol" (*Re Trade Mark No. 96,997, "Savonol," Field (J. C. & J.), Ltd. v. Wagel Syndicate, Ltd., supra*); "Kodak" (*Re Kodak, Ltd.'s, Trade Marks, Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd., Kodak, Ltd. v. Houghton & Sons* (1903), 20 R. P. C. 337; 20 T. L. R. 297); "Vezet" (*Re Verschure and Zoon's Application to Register a Trade Mark* (1905), 22 R. P. C. 568; 74 L. J. (CH.) 684); "Lacto-bacilline" (*La Société le Ferment's Application to Register a Trade Mark* (1912), 29 R. P. C. 497, C. A.; 81 L. J. (CH.) 724; reversing S. C., 29 R. P. C. 149). The following words have been held not to be invented words:—"Uneeda" (*Re National Biscuits Co.'s Application for a Trade Mark, supra*); "Panoram" for cameras (*Re Kodak, Ltd.'s, Trade Marks, Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd., Kodak, Ltd. v. Houghton & Sons, supra*); "Absorbine" for ointment (*Christy & Co. v. Tipper & Son* (1904), 21 R. P. C. 755, C. A.; [1905] 1 Ch. 1); "Bioscope" (*Re Trade Mark No. 216,821, Warwick Trading Co., Ltd. v. Urban* (1904), 21 R. P. C. 240); "Hæmatogen" (*Re Trade Mark "Hæmatogen," Hommel v. Gebrüder, Bauer & Co.* (1904), 21 R. P. C. 576; 20 T. L. R. 585); "Diabolo" (*Re Philippart's Trade Mark, Philippart v. Whiteley (William), Ltd.* (1908), 25 R. P. C. 565; [1908] 2 Ch. 274); "Orlwoola" (*Re Brock (H. N.) & Co., Ltd., supra*). The following decisions were prior to *Eastman Photographic Material Co., Ltd.'s, Application for a Trade Mark, supra* (see note (o), p. 689, ante): "Satinine" for soap (*Re Meyerstein's Application* (1890), 7 R. P. C. 114; 43 Ch. D. 604); "Somatose" for medicines (*Re Farbenfabriken Vormals Fried. Bayer & Co.'s Application for a Trade Mark* (1893), 11 R. P. C. 84, C. A.; 10 T. L. R. 260); "Eboline" for silk (*Re Salt (Sir Titus, Bart.), Sons & Co.'s Application* (1894), 11 R. P. C. 517; [1894] 3 Ch. 166); "Electrozone" for medicines (*Re British Electrozone Co.'s Application to Register a Trade Mark* (1896), 13 R. P. C. 447).

commendatory or descriptive reference in any word that might be proposed. It allows the registration of a number of words really fitted to form the name of goods although they may suggest some object or quality of such goods (e).

The rule as to geographical names has also been modified by only excluding words which are ordinarily regarded as geographical names (f), and the registration of christian names is now permitted (g).

(e) See *Re Compagnie Industrielle des Petroles' Application to Register a Trade Mark* (1907), 24 R. P. C. 585, 592; [1907] 2 Ch. 438; *Re Crosfield (Joseph) & Sons, Ltd.'s, Application to Register a Trade Mark ("Perfection")* (1909), 26 R. P. C. 837, 854, C. A.; [1910] 1 Ch. 130.

(f) As to when a word is to be considered a geographical name, see *Re Magnolia Metal Co.'s Trade Marks* (1897), 14 R. P. C. 621, 628, C. A.; [1897] 2 Ch. 27. The following words were held to be geographical terms under the old law:—"El Destino" (*Pinto v. Badman* (1891), 8 R. P. C. 181, C. A.; 7 T. L. R. 317); "Eboline" (*Re Salt (Sir Titus, Bart.), Sons & Co.'s Application* (1894), 11 R. P. C. 517; [1894] 3 Ch. 166). The following were held not to be geographical:—"Magnolia" (*Re Magnolia Metal Co.'s Trade Marks, supra*); "St. Raphael" (*Re Clement et Cie.'s Trade Mark* (1899), 16 R. P. C. 173; 80 L. T. 230).

(g) See *Re Harris's Trade Marks* (1892), 9 R. P. C. 492 ("The Beatrice"); *Re Holt & Co.'s Trade Mark, Holt & Co. v. Saunders, Green & Co.* (1896), 13 R. P. C. 118, C. A.; [1896] 1 Ch. 711 ("Trilby"); *Re Carroll's Application to Register a Trade Mark* (1899), 16 R. P. C. 82 ("Princess Christian"). "Motorine" for lubricating oil has been held not to have direct reference to the character or quality of the goods under the Trade Marks Act, 1905 (5 Edw. 7, c. 15) (*Re Compagnie Industrielle des Petroles' Application to Register a Trade Mark, supra*). "Ribbon" for dental cream has been held to have direct reference (*Re Colgate & Co.'s Application* (1913), 30 R. P. C. 262; 29 T. L. R. 326). The following words were held not to be fancy words not in common use under the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), repealed:—"Gem" for air guns (*Re Arbenz's Application* (1887), 4 R. P. C. 143, C. A.; 35 Ch. D. 248); "Hand Grenade Fire Extinguisher" (*Harden Star Hand Grenade Fire Extinguisher Co.'s Trade Mark and Designs* (1886), 3 R. P. C. 132; 55 L. J. (CH.) 596); "Electric" for velveteen (*Leaf's Trade Mark* (1887), 4 R. P. C. 31, C. A.; 34 Ch. D. 623); "Melrose" for hair restorers (*Re Van Duzer's Trade Mark, Re Leaf's Trade Mark* (1887), 4 R. P. C. 31, C. A.; 34 Ch. D. 623); "Ben Ledi" for whisky (*Re Ainslie & Co.'s Trade Mark* (1887), 4 R. P. C. 212); "The Self Washer" for soap (*Lever v. Goodwin* (1887), 4 R. P. C. 492, C. A.; 36 Ch. D. 1); "Sanitas" for medicine (*Re Sanitas Co.'s Trade Mark* (1887), 4 R. P. C. 533; 56 L. T. 621); "Jubilee" for paper (*Towgood Brothers v. Pirie (Alexander) & Sons, Ltd.* (1887), 4 R. P. C. 67; 56 L. T. 394); "Old Innishowen" for whisky (*Watt v. O'Hanlon* (1886), 4 R. P. C. 1 (an Irish case)); "Reversi" for a game (*Re Waterman's Trade Mark, Waterman v. Ayres* (1888), 5 R. P. C. 368, C. A.; 39 Ch. D. 29); "Brymbo" (geographical name) (*Re Batt's Trade Mark* (1889), 6 R. P. C. 493); "Washerine" for cleansing fluid (*Re Burland's Trade Mark, Burland v. Broxburn Oil Co.* (1889), 6 R. P. C. 482; 42 Ch. D. 274); "Bokol" for beer (Norwegian word for beer) (*Re Davis, Bergendahl & Co.'s Trade Marks, Davis & Co. v. Stribolt & Co.* (1889), 6 R. P. C. 207; 59 L. T. 854); "Fruit Salt" for medicine (*Re Dunn's Trade Mark* (1889), 7 R. P. C. 311, H. L.; 15 App. Cas. 252); "Tower Tea" (*Great Tower Street Tea Co. v. Smith* (1889), 6 R. P. C. 165; 5 T. L. R. 232); "Kokoko" (Chippeway Indian word for owl, a common mark in the trade) for cotton (*Re Jackson Co.'s Trade Mark* (1888), 6 R. P. C. 80); "Stone Ales" (geographical term) (*Re Joule's Trade Marks, Thompson v. Montgomery* (1889), 6 R. P. C. 404, C. A.; 41 Ch. D. 35); "Manor" (applicants' factory at Manor Works)

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1258. Besides the above classes of words any distinctive mark consisting of letters, words, or numerals, which was used before the 13th August, 1875, by the applicant or his predecessors in business, and which has continued to be used without substantial alteration down to the date of application, may be registered (*h*). For such a

(*Re Thompson's Trade Mark* (1889), 6 R. P. C. 213); "Monobrut" for champagne (*Re Vignier's Trade Mark* (1889), 6 R. P. C. 490; 61 L. T. 495); "Electroid Anti-fouling Composition" (*Re Hannay's Trade Mark* (1889), 7 R. P. C. 46); "Apollinaris" (*Re Apollinaris Co., Ltd.'s, Registered Trade Marks* (1890), 8 R. P. C. 137, C. A.; [1891] 2 Ch. 186); "Parchment Bank" for paper (*Re Pirie's Trade Mark, Pirie & Sons v. Goodall & Sons* (1892), 9 R. P. C. 17, C. A.; [1892] 1 Ch. 35); "The Beatrice" for shoes (*Re Harris's Trade Marks* (1892), 9 R. P. C. 492); "Britannia" for perfumery (*Re Hodgson and Simpson's Trade Mark, Hodgson v. Sinclair* (1891), 9 R. P. C. 22; 8 T. L. R. 45); "John Bull" for ales (*Re Paine's Trade Mark* (1892), 9 R. P. C. 130; 61 L. J. (CH.) 365); "Carnival" for cigarettes (*Re Lloyd & Sons' Trade Mark* (1893), 10 R. P. C. 281); "Emolliolorum" for harness dressing (*Re Talbot's Trade Mark* (1894), 11 R. P. C. 77; 8 R. 149); "Shakspeare" for cigars (*Re Banks and James' Trade Marks, Banks and James v. Ainstie* (1895), 12 R. P. C. 333; 44 W. R. 32); "Roadster" for boots (*Re Thompson's Trade Mark, Thompson v. Miller* (1895), 13 R. P. C. 35); "Triticumina" for wheat products (*tritium, Latin for wheat*) (*Re Registered Trade Mark No. 52,389, Meaby & Co., Ltd. v. Triticine, Ltd.* (1897), 15 R. P. C. 1; 14 T. L. R. 42); "National Sperm" for candles (*Re Price's Patent Candle Co.* (1884), 27 Ch. D. 681). The following words were held to be fancy words not in common use under the repealed Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57):—"Oomoo" for wines (Australian native word meaning "choice") (*Re Burgoyne's Trade Mark* (1889), 6 R. P. C. 227; 61 L. T. 39); "Osman" for towels (*Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, C. A.); "Mazawattee" for tea (*Densham & Sons' Trade Mark* (1895), 12 R. P. C. 271, C. A.; [1895] 2 Ch. 176); "Bovril" (*Re Trade Mark No. 58,405, "Bovril"* (1896), 13 R. P. C. 382, C. A.; [1896] 2 Ch. 606); "Tabloid" for medicines (*Re Burroughs, Wellcome & Co.'s Trade Marks* (1904), 21 R. P. C. 217, C. A.; [1904] 1 Ch. 736); "Alpine" for cotton goods (*Re Trade Mark "Alpine"* (1885), 29 Ch. D. 877). The following words were held not to have reference to the character or quality of the goods under the repealed Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50):—"Trilby" for gloves (*Re Holt & Co.'s Trade Mark, Holt & Co. v. Saunders, Green & Co.* (1896), 13 R. P. C. 118, C. A.; [1896] 1 Ch. 711); "Brownie" and "Bullseye" for cameras and films (*Re Kodak, Ltd.'s, Trade Marks, Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd., Kodak, Ltd. v. Houghton & Sons* (1903), 20 R. P. C. 337; 20 T. L. R. 297); "Quaker" for whisky (*Re Ellis & Co.'s Trade Marks* (1904), 21 R. P. C. 617). The following words were held to have reference to the character or quality of the goods under the repealed Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict. c. 50):—"Filtered Blue" (*Re Edge's Trade Marks* (1891), 8 R. P. C. 207); "Typograph" for machinery (*Re Linotype Co.'s Application for a Trade Mark* (1897) 14 R. P. C. 900); "Pirle" for wool (*Re Ripley (Edward) & Son's Application for a Trade Mark* (1898), 15 R. P. C. 151, C. A.; 78 L. T. 367); "Nectar" for tea (*Re Harrison and Crosfield's Application to Register a Trade Mark* (1900), 18 R. P. C. 34); "Century" for machinery (*Re Printing Machinery Co.'s Application to Register a Trade Mark* (1905), 23 R. P. C. 38); "Desicated Soup" (*Re King (Frederick) & Co.'s Trade Mark* (1892), 9 R. P. C. 350, 354, C. A.; [1892] 2 Ch. 462).

(*h*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5). Marks containing other matters than words, letters, or numerals do not come within this provision (*Re Wright, Crossley & Co.'s Application for a Trade Mark* (1900), 17 R. P. C. 386; [1900] 2 Ch. 218 ("Royal Baking Powder")).

mark to be registrable it must be shown that it is adapted to distinguish (*i*), not being merely descriptive (*k*), and also that it was during the period claimed used by itself as a trade mark (*l*), and was not merely a part of such mark (*m*). The provision that there must

But a mere scroll is not sufficient to take the mark out of the scope of the provision (*Re Hopkinson's Trade Marks* (1892), 9 R. P. C. 102, 108; [1892] 2 Ch. 116); and the words "White Rose" round a rose have been registered (*Re Application to Register the Trade-mark "White Rose"* (1885), 30 Ch. D. 505). It is unnecessary to specify in the application the members of a firm at different dates (*Re Wright, Crossley & Co.'s Application for a Trade Mark* (1900), 17 R. P. C. 386; [1900] 2 Ch. 218; *Re Hopkinson's Trade Marks, supra* ("J. & J. Hopkinson")). A name of a firm comes within the provision (*Re Wright, Crossley & Co.'s Application for a Trade Mark, supra*; *Re Hopkinson's Trade Marks, supra*; and see *Re Heddle (James) & Co.'s Applications to Register Trade Marks* (1903), 20 R. P. C. 599). As to what user negatived abandonment of an old mark under the former law, see *Re Wright, Crossley & Co.'s Application for a Trade Mark, supra*, at p. 397; *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398. Slight proof of user prior to 1875 is sufficient (*Re Chorlton and Dugdale's Trade Mark* (1885), 1 T. L. R. 643).

(*i*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5). The mark must be adapted to distinguish at the date of registration (*Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar, Ltd.* (1902), 20 R. P. C. 105; [1903] 1 Ch. 211 ("Swanbill"). Where user by another person had been permitted it was held to destroy distinctiveness (*Re Wood's Trade Mark, Wood v. Butler* (1886), 3 R. P. C. 81, C. A.; 32 Ch. D. 248 ("Eton cigarettes"))).

(*k*) *Perry Davis v. Harbord* (1890), 7 R. P. C. 336, H. L.; 15 App. Cas. 316 ("Pain Killer"). The following words have been held to be special and distinctive:—"Bodega" (*Bodega Co., Ltd. and Riviere v. Owens* (1889), 6 R. P. C. 236; 23 L. R. Ir. 371); "Frigi Domo" (*Re Edginton's Trade Mark* (1889), 6 R. P. C. 513; 61 L. T. 323); "J. & J. Hopkinson" (*Re Hopkinson's Trade Marks, supra*); "Vaseline" and "Vasogen" (*Re Chesebrough Manufacturing Co.'s Trade Mark* (1902), 19 R. P. C. 342, C. A.; [1902] 2 Ch. 1); "Family Salve" (*Reinhardt v. Spalding* (1879), 49 L. J. (CH.) 57). The following words have been held not to be special and distinctive:—"Pain Killer" (*Perry Davis v. Harbord, supra*); "Dewar's Whisky" (*Dewar (John) & Sons, Ltd. v. Dewar (J. H.)* (1900), 17 R. P. C. 341).

(*l*) Generally speaking, the user should be on the goods as sold to the public. Thus, user on a packing case is not generally sufficient if there are other marks on the goods (*Re Powell's Trade Mark* (1894), 11 R. P. C. 4, H. L.; [1894] A. C. 8 ("Yorkshire Relish")). See also *Richards v. Butcher (Monopole Trade Marks)* (1891), 8 R. P. C. 249, per Lord ESHER, M.R., at p. 255; [1891] 2 Ch. 522 ("Monopole"); *Day v. Riley and Whittaker* (1900), 17 R. P. C. 517; 48 W. R. 556 ("Black Drink"); but see, *contra*, *Re European Blair Camera Co.'s Trade Mark* (1896), 13 R. P. C. 600; 75 L. T. 63 ("Bull's-eye"). There are dicta to the effect that a trade mark should be something visible on the goods as sold; see *Re Kinahan & Co.'s Application for a Trade Mark* (1893), 10 R. P. C. 393, 397 ("Kinahan"); *Re Powell's Trade Mark* (1893), 10 R. P. C. 195, C. A., per BOWEN, L.J., at p. 200; [1893] 2 Ch. 388 ("Yorkshire Relish"); *Re Palmer's (J. B.) Trade Mark* (1883), 24 Ch. D. 504, C. A. ("Braided Fixed Stars").

(*m*) *Re Spencer's Trade Marks* (1886), 3 R. P. C. 73, C. A.; 54 L. T. 659 ("Diamond Cast Steel"); *Re Grossmith's Trade Mark* (1889), 6 R. P. C. 180; 60 L. T. 612 ("Emollio"); *Perry Davis v. Harbord, supra* ("Pain Killer"); *Re Meeus' Application* (1890), 8 R. P. C. 25; [1891] 1 Ch. 41 ("Geneva"); *Richards v. Butcher (Monopole Trade Marks), supra* ("Monopole"); *Re Kinahan & Co.'s Application for a Trade Mark, supra* ("Kinahan"); *Dewar (John) & Sons, Ltd. v. Dewar (J. H.), supra* ("Dewar's

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have been no substantial alteration relaxes the stringency of the old rules as to the necessity of proof of user in the exact form sought to be registered (*n*).

The user must have been on goods substantially the same as those for which registration is sought (*o*), and must have been user in this country (*p*).

Special orders
as to marks.

1259. The Board of Trade and the court have also power to make orders permitting the registrar to register a name, signature, word, or words, not coming within the above classes, but in fact adapted to distinguish the goods of the applicant (*q*), and power is specifically given to them, in the case of marks already in use, to consider how far such user has rendered the mark distinctive (*r*). These powers allow of the registration of two classes of words, those which the tribunal can see for itself are suitable to form the name of particular goods, though not within the foregoing classes, and those where it holds that the word might be adapted to distinguish and the applicant shows, as proof that it is so adapted, that it has in fact distinguished his goods (*s*). There are, however, words of a purely laudatory or descriptive nature, which the court holds cannot be adapted to distinguish, and no proof of user avails in such cases. The amount of user necessary to satisfy the court varies with the nature of the

Whisky"); *Re King (Frederick) & Co.'s Trade Mark* (1892), 9 R. P. C. 350, C. A.; [1892] 2 Ch. 462 ("Desiccated Soup"); *Re Heddle (James) & Co.'s Applications to Register Trade Marks* (1903), 20 R. P. C. 599. This applies even if the mark has been used alone on one part of the article if there were other indications of origin on other parts (*ibid.*), the contrary decision in *Reinhardt v. Spalding* (1879), 49 L. J. (CH.) 57 ("Family Salve"), being no longer law. But the fact that it has been used with other marks which merely denoted quality and not origin (*Re Barrow's Trade-marks* (1877), 5 Ch. D. 353, 364, C. A.), or the use in addition of "puffing" matter (*Re Chorlton and Dugdale's Trade Mark* (1885), 1 T. L. R. 643), does not prevent registration; nor does the fact that the marks were used to denote quality if they also denoted the origin of the goods (*Ransome v. Graham* (1882), 51 L. J. (CH.) 897).

(*n*) See the cases cited in note (*h*), p. 692, notes (*l*), (*m*), p. 693, *ante*.

(*o*) This rule was applied very strictly; thus, user on garden shears did not cover sheep shears, though user on hatchets covered axes (*Re Schmidt's Trade Mark, Jackson & Co. v. Napper* (1886), 4 R. P. C. 45, 56; 3 T. L. R. 238).

(*p*) *Ibid.*, at pp. 56, 59; *Re Harrison's Trade Mark, Harrison v. Woodroffe* (1889), 7 R. P. C. 25, 29 ("Albion"). User on goods exposed for sale in this country, even if imported and intended for re-exportation, would be user here (*ibid.*); but, apparently, not user on goods merely opened in bond (*ibid.*; see also *Re Meeus' Application* (1890), 8 R. P. C. 25, 33; [1891] 1 Ch. 41 ("Geneva")).

(*q*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5). In exceptional circumstances a surname may be registered under this provision (*Teofani, Ltd. v. Teofani* (1913), 30 R. P. C. 460, C. A.; 109 L. T. 114, disapproving *Re Pope's Electric Lamp Co., Ltd.'s Application for a Trade Mark* (1911), 28 R. P. C. 629; [1911] 2 Ch. 382, and *Re Lea (R. J.), Ltd.'s Application*, [1912] 2 Ch. 32, *per* JOYCE, J., at p. 41). As to the registration of initials, see *Registrar of Trade Marks v. Du Cros (W. & G.) Ltd.* (1913), 29 T. L. R. 772, H. L. As to the special procedure prescribed for such an application, see p. 704, *post*.

(*r*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9.

(*s*) As, for instance, certain geographical names, such as "Monte Rosa Cigarettes," or the name of a person, as "Liebig"; but see the cases cited in note (*q*), *supra*.

word, but a greater amount is required than in a passing-off case, as the title given by registration is a title against the world (t).

The user must be user as a trade mark to distinguish the goods of a particular trader, and where the user has been really as the name of a particular article the word will not be registered, at any rate if the article was a patented one (u).

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1260. Apart from word marks, the only general requirement with regard to a mark (a) is that it must be distinctive, that is, adapted to distinguish the goods of one manufacturer from those of others (b).

Other marks.

(t) *Re Crosfield (Joseph) & Sons, Ltd.'s Application to Register a Trade Mark* ("Perfection") (1909), 26 R. P. C. 837, C. A.; [1910] 1 Ch. 130, C. A.; *Re California Fig Syrup Co.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 846, C. A.; [1910] 1 Ch. 130 ("California Syrup of Figs"); see also *Standard Ideal Co. v. Standard Sanitary Manufacturing Co.* (1910), 27 R. P. C. 789, 795, P. C.; 103 L. T. 440. The user must apparently be user of the mark sought to be registered by itself as a trade mark (*ibid.*; compare the rules as to old marks, notes (k), (m), p. 693, *ante*). As to whether surnames are to be considered as distinctive, see note (q), p. 694, *ante*.

(u) *Re Gestetner's Trade Mark* (1907), 25 R. P. C. 156, C. A.; [1907] 2 Ch. 478 ("Cyclostyle"); *Re Bowden's (E. M.) Patent Syndicate, Ltd.'s Application for Registration of a Trade Mark* (1909), 26 R. P. C. 205 ("Bowden"); but compare *Re Whitfield's Bedsteads, Ltd.'s Application to Register a Trade Mark* (1909), 26 R. P. C. 657; [1909] 2 Ch. 373 ("Lawson Tait"). The following words have been registered or kept on the register by the court under this provision:—"Apollinaris" (*Actien Gesellschaft Apollinaris Brunnen vormals Georg Kreuzberg's Application to Register a Trade Mark* (1907), 24 R. P. C. 436); "Oswego" (*Re National Starch Co.'s Application for the Registration of a Trade Mark* (1908), 25 R. P. C. 802; [1908] 2 Ch. 698); "Lawson Tait" (*Re Whitfield's Bedsteads, Ltd.'s Application to Register a Trade Mark, supra*); "California Syrup of Figs" (*Re California Fig Syrup Co.'s Application for the Registration of a Trade Mark, supra*); "Primus" (*Aktiebolaget (B. A. F.), Hjorth & Co.'s Application for the Registration of a Trade Mark* (1910), 27 R. P. C. 461; [1910] 2 Ch. 64); "Itala" (*Itala Fabbrica di Automobili's Application to Register a Trade Mark* (1910), 27 R. P. C. 493; 54 Sol. Jo. 652); "Karlsbader Wasser" (*City of Karlsbad's Application to Register a Trade Mark* (1912), 29 R. P. C. 162). The following words have been refused registration or have been removed from the register:—"Cyclostyle," name of a patented article (*Re Gestetner's Trade Mark, supra*); "Royal Worcester" (*Royal Worcester Corset Co.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 185; [1909] 1 Ch. 459); "Bowden," name of patented article (*Re Bowden's (E. M.) Patent Syndicate, Ltd.'s Application for Registration of a Trade Mark, supra*); "Perfection" (*Re Crosfield (Joseph) & Sons, Ltd.'s Application to Register a Trade Mark* ("Perfection"), *supra*); "Orlwoola" (*Re Orlwoola Trade Marks* (1909), 26 R. P. C. 850, C. A.; [1910] 1 Ch. 130); "Diamine" (*Re Cassella (Leopold) & Co.'s Application to Register a Trade Mark* (1910), 27 R. P. C. 453, C. A.; [1910] 2 Ch. 240); "Gramophone" (*Re Gramophone Co., Ltd.'s Application to Register "Gramophone" as a Trade Mark* (1910), 27 R. P. C. 689; [1910] 2 Ch. 423); "Health" (*Re Trade Mark "Health," Thorne (Henry) & Co., Ltd. v. Sandow* (1912), 29 R. P. C. 440; 106 L. T. 926); see also note (q), p. 694, *ante*.

(a) As to the definition of a mark, see p. 684, *ante*.

(b) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5); *Registrar of Trade Marks v. Du Cros (W. & G.), Ltd.* (1913), 29 T. L. R. 772, H. L. In the case of initials the rights of other traders who might have the same initials must be considered (*ibid.*).

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Whether or not it is so adapted is a matter of fact, and previous decisions are only useful as showing what evidence has affected the courts in certain cases (c). The novelty may lie either in essential features (d) or in the general arrangement (e), and the registrar or other tribunal may take into account how far user has rendered the mark adapted to distinguish (f).

Provision is made for a mark to be registered for, or limited to, particular colours, and in such cases colour will be considered on the question whether the mark is distinctive (g).

Other
requirements.

1261. The above classifications of essential particulars only deal with what a mark must possess if it is to be registered. It is in all cases necessary that the mark should be also in fact distinctive. Thus, words or marks, or parts of marks which are in fact common to the trade (h), or resemble other registered or unregistered marks, will either be refused registration or only registered with a disclaimer. Registration may be refused if the mark is merely the

(c) *Re Boake, Roberts & Co., Ltd.'s Trade Marks, Boake, Roberts & Co., Ltd. v. Wayland & Co.* (1909), 26 R. P. C. 257, 258 ("K. M. S."). A surname, even if written in a peculiar manner, cannot be registered without a special order (*Re Benz et Cie.'s Application to Register a Trade Mark* (1913), 30 R. P. C. 177; 108 L. T. 589, C. A.; see *Re Lea (R. J.), Ltd.'s Application for Registration of a Trade Mark* (1913), 30 R. P. C. 216, C. A.; [1913] 1 Ch. 446). A simple scroll or border, or a picture of an ordinary medal, is not usually held distinctive (*Re Bryant and May's Trade Mark* (1890), 8 R. P. C. 69; 59 L. J. (CH.) 763; *Re Bradley's Trade Mark* (1892), 9 R. P. C. 205; *Re Clement et Cie.'s Trade Mark* (1899), 16 R. P. C. 611, C. A., per ROMER, L.J., at p. 618; 69 L. J. (CH.) 52). It is, of course, no objection that the mark would be capable of registration as a design (*Re United States Playing Card Co.'s Application* 1907), 24 T. L. R. 140).

(d) A photograph may be a distinctive mark (*Rowland v. Mitchell* (1896), 14 R. P. C. 37, C. A.; [1897] 1 Ch. 71), though it is otherwise where the photograph is of a person whose name is open to the trade (*Re Anderson's Trade-mark* (1884), 26 Ch. D. 409 ("Baron Liebig Brand")). A pictorial representation of an unregistrable word may also be a distinctive mark (*Re Magnolia Metal Co.'s Trade Marks* (1897), 14 R. P. C. 621, C. A.; [1897] 2 Ch. 371).

(e) See *Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, H. L. ("Great Two D. Brand"). It is not necessary that all parts of a combination mark should be visible at the same time (*Re Crompton & Co., Ltd.'s Trade Mark* (1902), 19 R. P. C. 265, 272; [1902] 1 Ch. 758; see also *Re Birmingham Vinegar Brewery Co.'s Application* (1894), 11 R. P. C. 195; 8 R. 237 ("Worcestershire Sauce")). For cases where combinations have been held distinctive, see, *inter alia*, *Re Crompton & Co., Ltd.'s Trade Mark, supra*; *Leahy, Kelly and Leahy v. Glover, supra*, reversed on another point.

(f) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5); *Registrar of Trade Marks v. Du Cros (W. & G.), Ltd.* (1913), 29 T. L. R. 772, H. L.

(g) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 10. Formerly this was not so (*Re Turney & Sons' Trade Mark* (1893), 11 R. P. C. 37; 10 T. L. R. 175; *Re Worthington & Co.'s Trade-mark* (1880), 14 Ch. D. 8, 13, C. A.).

(h) As to when a mark is common to the trade, see *Re Bass, Ratcliff and Gretton's Registered Trade Marks* (1902), 19 R. P. C. 529, C. A.; [1902] 2 Ch. 579; *Louise & Co., Ltd. v. Gainsborough* (1902), 20 R. P. C. 61; 87 L. T. 591 (Duchess of Devonshire); *Re Anglo-Swiss Condensed Milk Co.'s Trade Marks, Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston and Tee, Ltd.* (1903), 20 R. P. C. 509; 20 T. L. R. 238 (Milkmaid); *Re Hudson's Application for a Trade Mark* (1907), 24 R. P. C. 582 (Thunderer); *Boord & Son v. Thom & Cameron, Ltd.* (1907), 24 R. P. C. 697 (Cat and Barrel).

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name of a special article (*i*), or if there is no present intention on the part of the applicants to deal in this country in the goods in respect of which the registration is desired, as, for instance, if by virtue of an agreement they have no power to sell any of their goods in this country (*j*). Registration may also be refused if the mark has been previously used in a fraudulent manner (*k*), or if the word "registered" has been used on it, though this is not always done (*l*). Further, there is no absolute right to the registration of a mark. The registrar has a discretion to refuse any mark (*m*), and, though this discretion is subject to the control of the court, it will not be interfered with in cases of real doubt (*n*).

(*i*) Where a new article has been invented and protected by a British patent, the name by which it is known can be used by anyone to denote it, and protection or registration has accordingly been refused to such names, whether the name actually appears in the specification or not; see *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15, and the other cases cited in note (*o*), p. 760, *post*; *Linoleum Manufacturing Co. v. Nairn* (1878), 7 Ch. D. 834; *Re Palmer's (J. B.) Trade-mark* (1883), 24 Ch. D. 504, 514, C. A. ("Braided Fixed Stars"); *Re Ralph's Trade-mark, Ralph v. Taylor* (1883), 25 Ch. D. 194, 199 ("Homewasher"); *Re Davis' Trade-marks* (1897), 14 R. P. C. 903 ("Compactum"); *Re Gestetner's Trade Mark* (1907), 25 R. P. C. 156, C. A.; [1907] 2 Ch. 478 ("Cyclostyle"); *Re Bowden's (E. M.) Patent Syndicate, Ltd.'s, Application for the Registration of a Trade-mark* (1909), 26 R. P. C. 205. The same rule was said to apply where the new article was manufactured by a secret process (*Re Magnolia Metal Co.'s Trade Marks* (1897), 14 R. P. C. 621, 627, C. A.; [1897] 2 Ch. 371); but this case seems quite inconsistent with *Rey v. Lecouturier* (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262, where the right to the monopoly in the name of an article manufactured by a secret process was fully recognised; compare also *Cotton v. Gillard* (1874), 44 L. J. (CH.) 90. Where the manufacture of the article has been open to the trade from the first, the decisions vary. In some cases the mark has been upheld either as a common law or registered mark, or registration has been permitted; see *Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, C. A. ("Osman"); *Re Chesebrough Manufacturing Co.'s Trade Mark* (1901), 19 R. P. C. 342, C. A.; [1902] 2 Ch. 1 ("Vaseline"); *Re Boake, Roberts & Co., Ltd.'s Trade Marks, Boake, Roberts & Co., Ltd. v. Wayland & Co.* (1909), 26 R. P. C. 257 ("K. M. S."); *Re Whitfield's Bedsteads, Ltd.'s Application to Register a Trade Mark* (1909), 26 R. P. C. 657; [1909] 2 Ch. 313 ("Lawson Tait"); compare also *Re Magnolia Metal Co.'s Trade Marks, supra*. A contrary course was taken in *Re Gros-smith's Trade Mark* (1889), 6 R. P. C. 180; 60 L. T. 612 ("Emolio"); *Re Harrison's Trade Mark, Harrison v. Woodroffe* (1889), 7 R. P. C. 25 ("Albion"); *Re Formalin Hygienic Co.'s Application for the Registration of a Trade Mark* (1900), 17 R. P. C. 486; *Re Philippart's Trade Mark, Philippart v. White* (1908), 25 R. P. C. 565, 572; [1908] 2 Ch. 274 ("Diabolo"); compare also *Re Gestetner's Trade Mark, supra*, at p. 159.

(*j*) *Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349; [1913] 2 Ch. 291.

(*k*) *Re Fuente's Trade Marks* (1891), 8 R. P. C. 214; [1891] 2 Ch. 166; *Re Heaton's Trade-Mark* (1884), 27 Ch. D. 570, 574.

(*l*) *Re Altman's Application for a Trade Mark* (1904), 21 R. P. C. 753; *Re Lyle and Kinahan, Ltd.'s Application to Register a Trade Mark* (1907), 24 R. P. C. 249, C. A.

(*m*) *Re Turney & Son's Trade-mark* (1893), 10 T. L. R. 175; see also *Registrar of Trade Marks v. Du Cros (W. & G.), Ltd.* (1913), 29 T. L. R. 772, H. L.

(*n*) *Re Booth's Distillery Co., Ltd.'s Applications for the Registration of Trade Marks* (1903), 21 R. P. C. 18 ("Jock Scott"); *Re La Union Agricola Sociedad Anonima's Trade Marks* (1907), 25 R. P. C. 295, C. A.; *Re*

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This discretion entitles the registrar to refuse to register marks on the ground of similarity to other marks, even where the owners of the latter have consented (o).

SUB-SECT. 2.—*What may not be Registered.*

Marks
prohibited.

1262. Certain classes of marks are forbidden by statute to be registered, and in certain other cases the registrar may refuse to register either absolutely or until fulfilment of a condition (p).

Thus, in the case of cotton piece goods and cotton yarn no mark consisting only of a word or words (q), and in the case of cotton piece goods no mark consisting of a line heading alone (r), can be registered.

Marks containing representations of the Royal Arms or crests or colourable imitations thereof, or of the British Royal crowns, or national flags, or the word "Royal" or anything calculated to give the impression that the applicant has Royal patronage or authorisation, may not be registered (s).

In addition, the registrar is given power to refuse marks containing any such words as "patent," "registered," or "copyright," or representations of the Sovereign or of any member of the Royal Family (t).

In the case of marks containing representations of the arms of a city, body corporate etc., or foreign State, or the representation of any person, living or dead, he may require proof that the applicant is authorised to use those devices (u).

Dunn's Trade Mark (1890), 7 R. P. C. 311, H.L.; 6 T.L.R. 379 ("Fruit Salt"); *Re Australian Wine Importers' Trade Mark* (1889), 6 R. P. C. 311, C. A.; 41 Ch. D. 278 ("Golden Fleece"); *contra, Re Bagots, Hutton & Co., Ltd.'s, Application for the Registration of a Trade Mark* (1912), 29 R. P. C. 702. It has been said that where the registrar is doubtful he is entitled to say he will not register without the direction of the court (*Re Price's Patent Candle Co.* (1884), 27 Ch. D. 681, *per* PEARSON, J., at p. 686).

(o) *Re Dewhurst's Application for a Trade Mark* (1896), 13 R. P. C. 288, C. A.; [1896] 2 Ch. 137 ("Golden Fan").

(p) As to the power of the Registrar to impose conditions, see pp. 704 *et seq.*

(q) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64 (10) (a).

(r) *Ibid.*, s. 64 (10) (b).

(s) Trade Marks Rules, 1906, r. 12. There is an exception with regard to certain old marks (*ibid.*). As to what is a representation of the British Royal crown, see *Re Koenig and Ebhardt's Trade Mark* (1896), 13 R. P. C. 449; [1896] 2 Ch. 236. As to marks referring to the Royal Family, see *Re Carroll's Application to Register a Trade Mark* (1899), 16 R. P. C. 82 ("Princess Christian"); *Re Harris's Trade Marks* (1892), 9 R. P. C. 492 ("The Beatrice"). It is a criminal offence, punishable on summary conviction, for a person to represent falsely that any goods are made by a person holding a Royal Warrant or for the service of the Royal Family or any Government department (Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 20; see p. 722, *post*).

(t) Trade Marks Rules, 1906, r. 11.

(u) *Ibid.*, rr. 13—15. A person may not, after the 18th August, 1911, without the authority of the Army Council, use for the purposes of his trade or business the heraldic emblem of the red cross on a white ground or the words "Red Cross" or "Geneva Cross" (Geneva Convention Act,

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Marks.Scandalous
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marks.

1263. No mark may be registered which contains any matter which is contrary to law or morality, or any scandalous design or matter which by reason of its being calculated to deceive or otherwise would be disentitled to protection in a court (*w*). A mark may be deceptive under this rule either because of some misrepresentation therein, relating, for instance, to the goods (*a*), or because it would be liable to be confused with another mark, whether registered or unregistered (*b*), or with a trade name (*c*). User to defeat registration must be clearly proved, and if such user was fraudulent in view of the applicant's common law rights it will be of no effect (*d*).

1264. No mark other than an old mark may be registered, except by an order of the court, if it so closely resembles the mark of another proprietor which is registered for the same goods or description of goods as to be calculated to deceive (*e*). The court has

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1911 (1 & 2 Geo. 5, c. 20), s. 1). There is a limitation in favour of the proprietor of a trade mark registered before the passing of the Act (*ibid.*, ss. 1—3).

(*w*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 11. This provision has been held to extend to matter which was disentitled to protection as being *publici juris* (*Re Anderson's Trade-mark* (1884), 26 Ch. D. 409, *per* FRY, J., at p. 415 ("Baron Liebig Brand")), but this decision has not been followed, the point being dealt with by means of disclaimer. As to disclaimer, see p. 706, *post*.

(*a*) It will not be assumed that the mark will be used dishonestly (*Re Kutnow's Trade Mark* (1893), 10 R. P. C. 401, 411; *Re Watson (Angus) & Co.'s Application for Registration of a Trade Mark* (1911), 28 R. P. C. 313, 321). For cases where marks have been refused on this ground, see *McGlennon's Application* (1908), 25 R. P. C. 797 ("Shamrock"); *Re Heaton's Trade-Mark* (1884), 27 Ch. D. 570, 574; see also *Re Orwoola Trade Marks* (1909), 26 R. P. C. 846, 850, C. A.; [1910] 1 Ch. 130. For a case where it was held that the objection failed, see *Re Van de Leeuw's Application to Register a Trade Mark* (1911), 28 R. P. C. 708; 105 L. T. 626. In *Re Bryant and May, Ltd.* (1888), 4 T. L. R. 675, it was held not to be an objection that the mark had been used without the word "limited"; compare *Re Baker (Albert) & Co. (1908), Ltd.'s Application for a Trade Mark* (1908), 25 R. P. C. 524; [1908] 2 Ch. 86 ("A.B.C.").

(*b*) *Re Dunn's Trade Mark* (1890), 7 R. P. C. 311, H. L.; 15 App. Cas. 252 ("Fruit Salt"); *Re Thewlis and Blakey's Trade Mark, Re Hughes and Young's Trade Mark* (1893), 10 R. P. C. 369; 9 T. L. R. 592 ("Ancross"). In *Re Sphinxer Grip Armoured Hose Co.'s Trade Mark* (1893), 10 R. P. C. 84, a resemblance to an advertisement of another firm was held sufficient to justify refusal. But this is not sufficient to remove a mark when registered (*Re Verity's Trade Mark* (1901), 19 R. P. C. 58; 18 T. L. R. 214 ("Badger")). In *Booth's Distillery Co., Ltd.'s Application for the Registration of Trade Marks* (1903), 21 R. P. C. 18 ("Jock Scott"), a mark was refused on the ground of similarity to a previously refused mark.

(*c*) See *Re Dunn's Trade Mark*, *supra*.

(*d*) *Re Arbenz' Application* (1886), 3 R. P. C. 345; 55 L. T. 480.

(*e*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 19. With regard to marks used before the 13th August, 1875, the former rule was that three similar marks, but no more, might be registered; if more persons had used a mark, it was considered as common to the trade (Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 74 (3)). Probably this will govern future practice. It was of course not necessary to show that the user by more than three persons had been user as a trade mark (*Re Wragg's Trade-mark* (1885), 29 Ch. D. 551, 556); see also *Re Thewlis and Blakey's Trade Mark, Re Hughes and Young's Trade Mark* (1893), 10 R. P. C. 369; 9 T. L. R. 592. Where the mark is of a class common in the trade smaller

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power in the case of honest concurrent user or other special circumstances to permit the registration of identical, or nearly identical, trade marks for the same description of goods, and may impose terms as to user (*f*).

The question whether or not two or more marks resemble each other so closely as to be deceptive is one of fact in each case. The general principle to be adopted by the court in deciding such cases is to consider the impression produced by the marks as a whole (*g*), and to bear in mind that the danger to be guarded against is that the person seeing one mark will think it to be the same as another which he has seen before, and that the purchaser will not see the two marks side by side so as to notice small differences (*h*). Further, the circumstances in which a mark will generally be used are to be taken into consideration, as, for instance, whether it is liable to become effaced, or will have to be represented on a small scale or in a

differences may suffice (*Orr Ewing v. Registrar of Trade-marks* (1879), 4 App. Cas. 479; *Re Bagots, Hutton & Co., Ltd.'s Application for the Registration of a Trade Mark* (1912), 29 R. P. C. 702). In deciding whether goods are of similar descriptions the court is not bound by the classes adopted for registration purposes. It considers rather whether confusion is in fact likely to occur, as, for instance, whether the goods would be sold in the same shops; see *Re Gutta Percha and Rubber Manufacturing Co. of Toronto, Ltd.'s Application for Registration of Two Trade Marks* (1909), 26 R. P. C. 428, C. A.; [1909] 2 Ch. 10. For cases where goods have been held so similar as to cause confusion, see *Re Hargreaves' Trade-mark* (1879), 11 Ch. D. 669; *Re Australian Wine Importers' Trade Mark* (1889), 6 R. P. C. 311, C. A.; 41 Ch. D. 278; *Re Turney & Sons' Trade Mark* (1893), 11 R. P. C. 37; 10 T. L. R. 175; *Boord & Son v. Huddart* (1903), 20 T. L. R. 142; *Re La Union Agrícola Sociedad Anonima's Trade Marks* (1908), 25 R. P. C. 295; see also *Re Kodak Trade Mark, Eastman Photographic Materials Co., Ltd. v. Griffiths (John) Cycle Corporation, Ltd.* (1898), 15 R. P. C. 105. For decisions to the contrary, see *Re Braby (F.) & Co.'s Applications, Re Shropshire Iron Co.'s Trade-Marks* (1882), 21 Ch. D. 223; *Re Edwards' Trade-mark, Edwards v. Dennis* (1885), 30 Ch. D. 454, 476, C. A.; followed in *Re Suter, Hartmann and Rahtjen's Composition Co., Ltd.'s Trade Marks* (1901), 19 R. P. C. 42; *Re Lake and Elliot's Application for a Trade Mark* (1903), 20 R. P. C. 605; *Re Leiner's Application to Register a Trade Mark* (1903), 20 R. P. C. 253; *Re Birmingham Small Arms Co.'s Application for a Trade Mark* (1907), 24 R. P. C. 563; [1907] 2 Ch. 397.

(*f*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 21; *Re Aerated Bread Co.'s Applications for a Trade Mark* (1908), 25 R. P. C. 513, C. A.; [1908] 2 Ch. 86 ("A. B. C."). If there is an agreement as to user, its purport, not merely a note that there is an agreement, should be entered on the register (*Re Mitchell & Co.'s Trade-Mark, Re Houghton and Hallmark's Trade-Mark* (1885), 28 Ch. D. 666; *Re Keep's Trade-mark* (1884), 26 Ch. D. 187). As to honest concurrent user, see *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398.

(*g*) *Re Christiansen's Trade Mark* (1886), 3 R. P. C. 54, C. A.; see pp. 755, 756, 766, *post*. If the sole ground of objection is likeness to a registered mark, then the court only considers the opponent's mark as registered, not a different mark which he may use (*Re Lyndon's Trade Mark* (1886), 3 R. P. C. 102, C. A.; 32 Ch. D. 109). Resemblance to a mark used may, however, cause the mark to be deceptive. Where in a case of rectification the respondent's mark is actually in use, the appearance as used will be considered (*Re Christiansen's Trade Mark, supra*).

(*h*) *Re Farrow's Trade Mark* (1890), 7 R. P. C. 260, 262; 63 L. T. 233.

position which renders it difficult to see details (*i*). The court will not, however, assume that the applicant intends deliberately to use his mark in an imperfect form for fraudulent purposes (*k*). A mark is considered as calculated to deceive if there would be confusion either to the eye or the ear; a word mark or device may, therefore, be deceptive as resembling a previous device or word mark if the new mark is calculated to suggest the same idea as the old mark or to cause the goods to be called by a name which would suggest such an idea (*l*). Again, even if the marks as a whole are different, registration of the second mark may be refused, if its essential particulars resemble those in the first (*m*). Where, however, the only resemblance is in matters which have been disclaimed the second mark will not be refused (*n*). The applicant is considered as *in petitorio*, and must

(*i*) *Re Lyndon's Trade Mark* (1886), 3 R. P. C. 102, C. A.; 32 Ch. D. 109; *Re Speer's Trade Mark* (1887), 4 R. P. C. 521; 55 L. T. 880; *Re Biegel's Trade Mark* (1887), 4 R. P. C. 525; 37 L. T. 247; *Re Lambert's Trade Mark* (1889), 6 R. P. C. 344, C. A.; 61 L. T. 158; *Re Farrow's Trade Mark* (1890), 7 R. P. C. 260, 262; 63 L. T. 233; *Re Turney & Son's Trade Mark* (1893), 10 T. L. R. 175; *Re Georg Schicht Actien Gesellschaft's Applications to Register Trade Marks* (1912), 29 R. P. C. 483, 487; 28 T. L. R. 375. As to the possibility of confusion where the word is imperfectly heard, see *Re British Drug Houses, Ltd.'s Trade Mark "Herogen"* (1912), 30 R. P. C. 73; 107 L. T. 756. Where both marks have actually been in use for a long time, the court will take into account that no confusion has occurred (*Re Lambert's Trade Mark*, *supra*, at p. 352; *Re Talbot's Trade Mark* (1894), 11 R. P. C. 77, 81; 8 R. 149; *Re Holbrook, Ltd.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 791; see also *Re an Application to Register the Trade-mark "White Rose"* (1885), 30 Ch. D. 505; *Re Carborundum Co.'s Application for Registration of a Trade Mark* (1909), 26 R. P. C. 504).

(*k*) *Re Lyndon's Trade Mark*, *supra*; *Re Biegel's Trade Mark*, *supra*; *Re Worthington & Co.'s Trade-Mark* (1880), 14 Ch. D. 8, 18, C. A. (Beccles Church). In this case the rule was laid down that a mark would not be registered if any fair user of it, that is, any user that might have taken place had the existence of the old mark been unknown, might produce confusion, as, for instance, if it was printed in very dark colours.

(*l*) *Re La Société Anonyme des Verreries de l'Etoile's Trade Mark* (1894), 11 R. P. C. 142, 147, C. A.; [1894] 2 Ch. 26 ("Red Star Brand"); *Re Dewhurst's Application for a Trade Mark* (1896), 13 R. P. C. 288, C. A.; [1896] 2 Ch. 137 ("Golden Fan"); *Re Pomril, Ltd.'s Application for Registration of a Trade Mark* (1901), 18 R. P. C. 181; 17 T. L. R. 279 ("Pomril"); *Orr Ewing & Co. v. Johnston & Co.* (1880), 13 Ch. D. 434, 451; *Derby Photographic Dry Plate Co., Ltd. v. Pollard, Graham & Co.* (1886), 2 T. L. R. 276; *Re Baschiera's Trade-Mark* (1889), 5 T. L. R. 480; see also *Re Georg Schicht Actien Gesellschaft's Applications to Register Trade Marks*, *supra*, at p. 488; but see *Re Shamrock & Co.'s Application* (1907), 24 R. P. C. 569; *Re Watson (Angus) & Co.'s Application for Registration of a Trade Mark* (1911), 28 R. P. C. 313; *Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349; [1913] 2 Ch. 291.

(*m*) *Re Murphy's Trade Mark* (1890), 7 R. P. C. 163; *Re Currie & Co.'s Application for a Trade Mark* (1896), 13 R. P. C. 681 ("Cock o' the North").

(*n*) *Re Loftus' Trade Mark* (1893), 11 R. P. C. 29; [1894] 1 Ch. 193. It has been said that where parts of word marks are descriptive only the remainder will be considered in determining the question of resemblance (*Re Horsburgh & Co.'s Application* (1878), 53 L. J. (CH.) 237, n. ("Valvoleum")); *Re Neuchatel Asphalte Co.'s Application*, *supra*, at p. 355; but compare *Trade Mark No. 96,997, "Savonol," Field (J. C. & J.), Ltd. v. Wagel Syndicate, Ltd.* (1900), 17 R. P. C. 266; [1900] 1 Ch. 651; *Re Brock (H. N.) & Co.'s Application for a Trade Mark ("Osowool")*, *Re Trade*

SECT. 4.
Registrable
Trade
Marks.

Associated
marks.

establish beyond reasonable doubt that his mark is not liable to be confused with any other mark (o).

1265. Where an applicant applies for a new mark so closely resembling a mark belonging to him which is already registered for

Marks ("Orlwoola") (1909), 26 R. P. C. 681, 690; 25 T. L. R. 695; reversed, without affecting this point, [1910] 1 Ch. 130, C. A.

(o) *Re Dunn's Trade Mark* (1890), 7 R. P. C. 311, 315, H. L.; 15 App. Cas. 252 ("Fruit Salt"). The following word marks were held too near:—"Emollio" to "Emolline" (*Re Grossmith's Trade Mark* (1889), 6 R. P. C. 180; 60 L. T. 612); "Jock Scott" to "Scotch Jock" (*Re Booth's Distillery Co., Ltd.'s Applications for the Registration of Trade Marks* (1903), 21 R. P. C. 18); "Tablones" to "Tabloids" (*Re Capsuloid Co., Ltd.'s Application* (1906), 23 R. P. C. 782); "Savoline" to "Savonol" (*Re Trade Mark No. 96,997, "Savonol," Field (J. C. & J.) Ltd. v. Wagle Syndicate, Ltd.* (1900), 17 R. P. C. 266; [1900] 1 Ch. 651); "Motricine" to "Motorine" (*Re Compagnie Industrielle des Petroles' Application to Register a Trade Mark* (1907), 24 R. P. C. 585; [1907] 2 Ch. 435); "Osowoolo" to "Orlwoola" (*Re Brock (H. N.) & Co., Ltd.'s Application for a Trade Mark ("Osowoolo")*, *Re Trade Marks "Orlwoola"* (1909), 26 R. P. C. 681, 690; 25 T. L. R. 695) "State room" to "State Express" (*Re United Kingdom Tobacco Co., Ltd.'s Application to Register a Trade Mark* (1912), 29 R. P. C. 489 (there was evidence that opponent's cigarettes were often called "State" cigarettes); "Aqua-Repela" to "Repellus" (*Wilks' (Frederick) Application for the Registration of a Trade Mark* (1911), 29 R. P. C. 21). The following word marks were held not too near:—"Valvoleum" to "Valvoline" (*Re Horsburgh & Co.'s Application* (1878), 53 L. J. (CH.) 237, n.); "Emolliolorum" to "Molliscorium" (*Re Talbot's Trade Mark* (1894), 11 R. P. C. 77, 81; 8 R. 149); "Night Cap" to "Red Cap" (*Re Hedley's Trade Marks* (1900), 17 R. P. C. 719); "Neola" to "Pianola" (*Re Pianotist Co., Ltd.'s Application for the Registration of a Trade Mark* (1906), 23 R. P. C. 774); "Lanco" to "Lancashire" (*Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1906), 23 R. P. C. 621); "Carvino" to "Wincarnis" (*Re Trade Mark "Carvino," Coleman & Co., Ltd. v. Smith (Stephen) & Co., Ltd.* (1911), 21 R. P. C. 81, C. A.; 27 T. L. R. 533; varied 29 R. P. C. 81, C. A.; [1911] 2 Ch. 572); "Herogen" to "Ceregen" (*Re British Drug Houses, Ltd.'s Trade Mark "Herogen"* (1912), 30 R. P. C. 73; 107 L. T. 756; "Limit" to "Summit" (*Re Smith (Thomas A.), Ltd.'s Application* (1913), 30 R. P. C. 363). The following are other cases of marks held not to resemble too closely:—*Re Lyndon's Trade Mark* (1886), 3 R. P. C. 102, C. A.; 32 Ch. D. 109; *Re Lambert's Trade Mark* (1889), 6 R. P. C. 344, 351, C. A.; 61 L. T. 138; *Re Haines, Batchelor & Co.'s Trade Mark* (1888), 5 R. P. C. 669; *Re Loftus' Trade Mark* (1893), 11 R. P. C. 29; [1894] 1 Ch. 193 ("Unco' guid"); *Re Shamrock & Co.'s Application* (1907), 24 R. P. C. 569; *Re Holbrooks, Ltd.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 791; *Re Godfrey Phillips & Sons' Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 121 ("Guinea Gold"); *Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349; [1913] 2 Ch. 291. In the following cases the marks were held to resemble too closely:—*Re Christiansen's Trade Mark* (1886), 3 R. P. C. 54, C. A.; *Re Speer's Trade Mark* (1887), 4 R. P. C. 521; 55 L. T. 880; *Re Biegel's Trade Mark* (1887), 4 R. P. C. 525; 57 L. T. 247; *Australian Wine Importers' Trade Mark* (1889), 6 R. P. C. 311, C. A.; 41 Ch. D. 278 ("Golden Fleece"); *Re Farrow's Trade Mark* (1890), 7 R. P. C. 260; 63 L. T. 233; *Re Murphy's Trade Mark* (1890), 7 R. P. C. 163, 166; *Re Dexter's Trade Mark, Re Wills' Trade Marks* (1893), 10 R. P. C. 269; [1893] 2 Ch. 262; *Re Dewhurst's Application for a Trade Mark* (1896), 13 R. P. C. 288, C. A.; [1896] 2 Ch. 137 ("Golden Fan"); *Re Currie & Co.'s Application for a Trade Mark* (1896), 13 R. P. C. 681 ("Cock o' the North"); *Re Pomril, Ltd.'s Application for Registration of a Trade Mark* (1901), 18 R. P. C. 181; 17 T. L. R. 279 ("Pomril"); *Re La Union Agrícola Sociedad*

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Registrable
Trade
Marks.

the same goods or description of goods that it would be calculated to cause confusion if used by a person other than the applicant, he may be required to register such mark as an associated trade mark (*p*). Similarly, an applicant may register a series of marks for the same description of goods differing in regard to statements as to the nature of the goods, number, price, quality or names of places, or in colour or matter of a non-distinctive character not substantially affecting the identity of the mark. Such marks are to be deemed associated marks (*q*). A further case of associated marks is where a trader registers a whole trade mark and also separate parts of the same (*r*). In this last case user of the whole mark is to be deemed user of a mark separately registered, and in other cases the tribunal may accept user of an associated trade mark, or of a trade mark with unimportant additions or alterations, as an equivalent for user of other marks of the series (*s*). Associated trade marks can only be assigned as a whole (*t*).

SECT. 5.—Registration.

1266. Any person claiming to be the proprietor of a trade mark may apply to register it in the prescribed manner (*a*). No previous user is necessary and no statement as to use is required, except in the case of marks alleged to have been used before the 31st August, 1875 (*b*).

Who may
apply.

The applicant is required to state whether or not he is applying under the special provision by which the Board of Trade or the court may declare marks consisting of names, signatures, or

Application.

Anonima's Trade Marks (1908), 25 R. P. C. 295, C. A.; *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181.

(*p*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 24. It has been held that this provision does not apply if the marks are identical (*Re Birmingham Small Arms Co.'s Application for a Trade Mark* (1907), 24 R. P. C. 563, 567; [1907] 2 Ch. 397). As to when goods are considered similar, see this case and the other cases cited in note (*e*), p. 699, *ante*. As to the former practice, see *Re Player (John) & Sons' Application for a Trade Mark* (1901), 18 R. P. C. 65; [1901] 1 Ch. 382; but compare *Re Crompton & Co., Ltd.'s Trade Mark* (1902), 19 R. P. C. 265, 271; [1902] 1 Ch. 758.

(*q*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 26.

(*r*) *Ibid.*, s. 25.

(*s*) *Ibid.*, ss. 25, 27; *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181.

(*t*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 27. As to assignment, see further, pp. 718, 719, *post*.

(*a*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 12 (1). "Claiming to be the proprietor" is really equivalent to claiming to have the right to use the mark in question as his trade mark. As to the mode of application and forms to be used, see Trade Marks Rules, 1906, r. 17—28. The applicant must give his address and occupation, and if not resident or carrying on business in this country, an address for service here. A translation of foreign words in the mark may be required (*ibid.*, r. 28). Even where registration of the mark has been previously refused, a fresh application may be made (*Re Hunt (William) & Sons, The Brades, Ltd.'s Application for the Registration of Trade Marks* (1911), 28 R. P. C. 302).

(*b*) Trade Marks Rules, 1906, r. 20. As to cotton marks, see p. 707, *post*. It is no longer necessary to state what are the essential features of the mark claimed, or to insert disclaimers in the form of application. As to disclaimers, see p. 706, *post*.

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Registra-
tion.

words to be distinctive(c). A separate form of application is required for each class of goods, and the application must state for what goods of the class the mark is to be registered (d).

Searches.

1267. On receipt of an application a search is made among registered marks and pending applications relating to the same or similar goods to see if there are any so closely resembling the mark as to make it calculated to deceive(e). The registrar may, as the result of such search, accept the mark absolutely or subject to conditions, amendments or modifications, or refuse it(f), but in case of any such refusal or conditional acceptance, the applicant has the right to a written statement of the grounds of the registrar's decision and to a hearing(g), and may appeal against an adverse decision to the Board of Trade or the court(h).

Special order.

In the case of an application rendering necessary a special order of the Board of Trade or the court(i), the search is made as in the case of an ordinary application, and the result notified to the applicant, who must, within a month lodge a written case for the Board or the court at his option. In the event of the decision being in his favour, the advertisement and registration of the mark proceed in the usual manner(k).

Special trade
mark.

1268. In the case of an application for a special trade mark the registrar makes a report to the Board of Trade, and the Board subsequently hears him and the applicant. If the decision is in favour of the applicant, the advertisement and registration of the mark proceed in the usual manner(l).

Advertise-
ment.

1269. When the application has been accepted it is to be advertised in the *Trade Marks Journal* as the registrar may direct(m).

(c) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5); Trade Marks Rules, 1906, r. 35; and see pp. 694, 695, *ante*.

(d) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 8; Trade Marks Rules, 1906, r. 24. As to the classification of goods, see *ibid.*, r. 5, Sched. III.

(e) Trade Marks Rules, 1906, r. 29.

(f) *Ibid.*, r. 30, 34.

(g) *Ibid.*, rr. 31, 32.

(h) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 12 (3)—(5); see p. 705, *post*.

(i) See pp. 694, 695, *ante*.

(k) Trade Marks Rules, 1906, rr. 35—41. The effect of the order of the Board of Trade or the court is to give the registrar power to proceed with the application, although the mark does not come within the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (1)—(4), as to which see pp. 687 *et seq.*, *ante*. It is open to him to refuse the mark on opposition on the ground that further evidence shows that it is not distinctive. As to the effect of the order of the Board of Trade or the court, see *Re Crosfield (Joseph) & Sons, Ltd.'s Application to Register a Trade Mark ("Perfection")* (1909), 26 R. P. C. 837, 856, 859, C. A.; [1910] 1 Ch. 130; *Re Aktiebotaget Hjorth & Co.'s Application for the Registration of a Trade Mark* (1910), 27 R. P. C. 461, 467; [1910] 2 Ch. 64; *Re Itala Fabbrica di Automobili's Application to Register a Trade Mark* (1910), 27 R. P. C. 493, 497, 54 Sol. Jo. 652; *Re Teofani & Co.'s Trade Mark* (1913), 30 R. P. C. 460, C. A.; 109 L. T. 114.

(l) Trade Marks Rules, 1906, rr. 42—46. As to special trade marks, see p. 685, *ante*.

(m) Trade Marks Act, 1906 (5 Edw. 7, c. 15), s. 13; Trade Marks Rules, 1906, rr. 47—49. The advertisement is in practice only inserted once.

Any condition attached to the acceptance must be set forth in the advertisement (*n*).

SECT. 5.
Registra-
tion.
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Opposition.

1270. Any person may within one month of the last advertisement lodge a notice of opposition to the registration of any trade mark (*o*). The notice must state the grounds of opposition; these are not limited in any way, but in practice the commonest are that the proposed mark has not any of the necessary essential features (*p*), or that it takes something which is common to the trade, or is used by the opponent, or that it is liable to be confused with some mark registered or unregistered, or will in some way restrict the opponent's legitimate trade, or is a mark in which the opponent has rights (*q*).

Within a month of the lodging of this notice the applicant must file a counter-notice, and then both sides are given an opportunity of filing evidence. The registrar hears both parties and gives his decision (*r*). The tribunal has full powers as to giving extension of time, or leave to amend or to file further evidence, and may award costs and require security from an opponent not resident in this country (*s*).

1271. Any party may appeal to the court against any decision of the registrar in an opposition (*t*), or any decision refusing a mark or imposing conditions (*a*). An appeal is by motion, and the decision of the court may be appealed against in the ordinary way (*b*). It is also open to parties to appeal to the Board of Trade, but in the case of an opposition only by the consent of all Appeals.

(*n*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 13.

(*o*) *Ibid.*, s. 14.

(*p*) As to the essential features, see pp. 687 *et seq.*, *ante*.

(*q*) If the opponent's mark is registered, the registrar has no power to consider whether it is rightly registered, and any grounds of objection thereto must be raised by a motion to rectify. If such motion is made, an appeal from the decision refusing the mark will be heard at the same time (*Re Brock (H. N.) & Co., Ltd.'s Application for a Trade Mark ("Osowoolo")*, *Re Trade Marks "Orlwoola"* (1909), 26 R. P. C. 681; 25 T. L. R. 695; reversed without affecting this point, [1910] 1 Ch. 130, C. A.). As to the effect of these various matters on registrability, see pp. 687 *et seq.*, *ante*. It seems that where the user by the opponent is more recent than that of the applicant, it gives no ground for opposition (*Re Kenrick and Jefferson's Application for a Trade Mark* (1909), 26 R. P. C. 641; *Re Southall Brothers and Barclay, Ltd.'s Trade Mark* (1911), 28 R. P. C. 481).

(*r*) Apparently, if an opponent is successful, and a fresh application is made and he opposes again, the matter is *res judicata* (*Re Hunt (William) & Sons, The Brades, Ltd.'s Application for the Registration of Trade Marks* (1911), 28 R. P. C. 302).

(*s*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 14. As to withdrawal, if grounds of opposition other than those in the notice are raised, see p. 706, *post*.

(*t*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 16 (5).

(*a*) *Ibid.*, s. 12 (3); as to refusal after acceptance, see *ibid.*, s. 16; Trade Marks Rules, 1906, r. 63.

(*b*) As to the practice and procedure on motions in the High Court and appeals, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 192 *et seq.*

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tion.

parties (c). Such appeal is by means of a written case, followed by a hearing.

No objection other than one taken below can be taken against a mark on appeal except by leave of the tribunal, and in case such leave is given the applicant has the right to withdraw the application without payment of costs (d). In the case of an opposition the tribunal hearing the appeal may give leave to have the mark modified in any manner not substantially affecting its identity, but a mark so modified must be advertised again in the prescribed manner (e). The tribunal hearing the appeal may give costs, probably, in the case of the Board of Trade, including costs before the registrar (f). The declarations used before the registrar are admissible on appeal, and further evidence may be adduced by leave (g).

Disclaimers.

1272. Disclaimers may be required by the registrar, the Board of Trade, or the court, if the mark contains parts not separately registered as trade marks or which are non-distinctive or common to the trade. These requirements may be made either before registration, or in a case where there is a question of whether such mark shall remain upon the register, but disclaimers will only be required where the tribunal thinks that they are really necessary in the interests of the public (h).

(c) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 12 (3), 14 (5). The Board of Trade has power to refer any such application to the court. A course sometimes taken by the Board of Trade in appeals against the decision of the registrar refusing to accept a mark on the ground of similarity to other registered marks, is to refer the appeal to the court and direct that the owners of such marks shall be served with notice. In such a case the court will not hear the appeal till such condition has been complied with (*Re Extract of Meat (Baron Liebig) Photograph Brand, Ltd.'s Application for the Registration of a Trade Mark* (1900), 17 R. P. C. 161). Persons so served have a right to be heard (*Re Royal Worcester Corset Co.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 185, 189), and an order for costs can be made in their favour (*ibid.*, at p. 190), or against them (*Re Itala Fabbrica de Automobili's Application for the Registration of a Trade Mark* (1910), 27 R. P. C. 493, 497; 54 Sol. Jo. 652); see also *Re Georg Schicht Actien Gesellschaft's Applications to Register Trade Marks* (1912), 29 R. P. C. 486, 488. Such persons can rely on grounds not raised by the registrar without affecting their right to costs (*Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349, 355, 358; [1913] 2 Ch. 291).

(d) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 14 (8); Trade Marks Rules, 1906, rr. 51—61; but see *Re Neuchatel Asphalte Co.'s Application*, *supra*.

(e) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 14 (9).

(f) *Ibid.* s. 14 (10). The courts have no power to interfere with the costs before the registrar (*Re Brandreth's Trade-mark* (1878), 9 Ch. D. 618; *Re Australian Wine Importers' Trade Mark* (1889), 6 R. P. C. 311, 319, C. A.; 41 Ch. D. 278). As to the registrar's costs, see note (d), p. 721, *post*.

(g) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 4, 14 (7); *Re Ogston and Tenant, Ltd.'s Application for Registration of Trade-mark* (1909), 26 T. L. R. 40 (where leave to adduce further evidence was given).

(h) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 15; *Baker (Albert) & Co.* (1898), *Ltd.'s Application for a Trade-mark* (1908), 25 R. P. C. 513, 525; [1908] 2 Ch. 86; *Re Bagots, Hutton & Co., Ltd.'s Application for the Registration of a Trade Mark* (1913), 29 R. P. C. 702. For earlier decisions where disclaimers were required, see *Re Royal Baking Powder Co.'s Application for a*

1273. The applicant may at any time correct any error in his application or amend the same with the leave of the registrar, the court, or the Board of Trade as the case may be (*i*).

SECT. 5.
Registration.

1274. If the time for opposition has elapsed without any person opposing, or after an opposition has been decided in favour of the applicant, the registrar must, unless the Board of Trade otherwise directs, register the mark and issue a certificate of registration to the applicant. The mark bears the date of application (*k*). In the case of registration not being completed within twelve months owing to some default of the applicant, the registrar may give him notice to complete within a certain time, and if he fails to do so the application is deemed to be abandoned (*l*).

Correction and amendment.
Certificate of registration.

1275. Applications for marks for goods in the cotton classes are made to the Manchester branch, and must state the length of user, if any (*m*); but the decision as to whether or not the applications shall proceed lies with the registrar, who may, however, consult the Trade Merchandise Marks Committee of the Manchester Chamber of Commerce (*n*).

Manchester register.

1276. Applications for registration of a trade mark used on metal goods made by persons carrying on business in Hallamshire, or

Sheffield register.

Trade-mark (1902), 19 R. P. C. 261; 50 W. R. 454 (directions for use disclaimed); *Re Faulder's Trade Mark* (1901), 18 R. P. C. 535, C. A.; 83 L. T. 726 ("Silverpan"); *Re Edge's Trade Marks* (1891), 8 R. P. C. 207 ("Filtered Blue"); *Re Burland's Trade-mark, Burland v. Broxburn Oil Co.* (1889), 6 R. P. C. 482, 489; 42 Ch. D. 274 ("Washerine"); *Re Swift's Specific Co.'s Trade Mark* (1889), 6 R. P. C. 352, 355 ("Swift's Specific"); *Baker v. Rawson* (1890), 8 R. P. C. 89; 45 Ch. D. 519 (part of label common to trade disclaimed). For cases in which they were not required, see *Re Clement et Cie.'s Trade Mark* (1899), 16 R. P. C. 611, C. A.; 80 L. T. 230 ("St. Raphael"); *Re Colman's (J. & J.) Application for a Trade Mark* (1894), 11 R. P. C. 129 ("Colman's Mustard"); *Re Smokeless Powder Co.'s Trade Mark* (1892), 9 R. P. C. 109; [1892] 1 Ch. 590 ("Smokeless Powder"); *Re Meeus' Application* (1890), 8 R. P. C. 25, 34; [1891] 1 Ch. 41 ("Geneva Key Brand"); *Re Apollinaris Co.'s Registered Trade Marks* (1890), 8 R. P. C. 137, 164, C. A.; [1891] 2 Ch. 186 (words forming part of a distinctive label need not be disclaimed).

(*i*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 12 (6).

(*k*) *Ibid.*, s. 26. A direction not to register is to be treated as a refusal, and can be appealed against accordingly (Trade Marks Rules, 1906, r. 63).

(*l*) Trade Marks Rules, 1906, r. 62.

(*m*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64; Trade Marks Rules, 1906, rr. 113—120. Cotton goods are defined as goods in classes 23, 24, and 25, at the date of the passing of the Act, namely, all cotton goods, including cotton yarn and sewing cotton, other than articles of clothing; see Trade Marks Acts, 1905 (5 Edw. 7, c. 15), s. 64 (2).

(*n*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 64 (14). The committee is advisory only, and the duty of deciding lies on the registrar (*Orr Ewing v. Registrar of Trade-marks* (1879), 4 App. Cas. 479, H. L.). The procedure is the same as with ordinary applications, except that the search is made by the Keeper of the Cotton Marks, and not only includes registered marks but also marks on the B list (namely, marks used before 1876, but which were considered by the Manchester Committee as non-distinctive), lapsed and refused marks and pending applications; see Trade Marks Rules, 1912 (Stat. R. & O., 1912, p. 1229). The appeal is either to the Board of Trade or the court, which in the case of applications for cotton marks includes the Palatine Court (Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 71).

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tion.

within six miles thereof, are to be made to the Cutlers' Company and entered on the Sheffield Register (o). Where the applicants for such marks do not reside in such area the application and the proceedings thereon are notified by the registrar to the Cutlers' Company (p).

Registration
of foreign
marks.

1277. Provision is made for arrangements with foreign States and British colonies by which certain advantages are given to persons who have applied for a trade mark in such State or colony and who wish to register the same mark in this country or *vice versa*. The effect of these provisions is to give the applicant priority as of his date of application in such State or colony, provided that the application here is made within four months of the foreign or colonial applications (q). The mark must, however, be one which is entitled to registration here (r), and there can be no infringement before the actual registration in this country (s). These provisions only apply to the States and colonies named in Orders in Council (t).

Duration of
registration.

1278. The registration lasts for fourteen years, but the proprietor has the right to renew the registration on making application within the prescribed period and paying a further fee (a). A notification

(o) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 63. Metal goods are defined as "all metals whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal" (*ibid.*, s. 63 (10)). The register also contains the old marks assigned by the Cutlers' Company, and the owner of any mark so assigned and actually used before the 1st January, 1884, is entitled to have it entered; see *Re Lambert's Trade Mark* (1889), 6 R. P. C. 344, C. A.; 61 L. T. 138. The procedure as to application, opposition etc. is the same as with an ordinary application, the Cutlers' Company taking the place of the registrar, but if the latter objects to the registration of any mark the company cannot proceed without the direction of the court. The only appeal from the company is to the court. The other provisions of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), and Rules as to registration apply to this register. All marks entered on the Sheffield Register are also entered on the London one, and any alteration in the former is notified to the registrar; see Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 63; Trade Marks Rules, 1906, rr. 107—112.

(p) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 63 (8).

(q) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91; *Re California Fig Syrup Co.'s Trade Mark* (1888), 6 R. P. C. 126; 40 Ch. D. 620. The enactment seems to mean that if an application is made within four months of the application in any such country (often called a Convention country), the priority of such application can be claimed; compare note (e), p. 736, *post*. There is no rule, as in the case of patents, that the period is to be reckoned from the date of the first foreign application; as to the rule in the case of patents, see title PATENTS AND INVENTIONS, Vol. XXII., p. 229.

(r) *Re Carter Medicine Co.'s Trade Mark* (1892), 9 R. P. C. 401; [1892] 3 Ch. 472. It must also be a mark which could be used here (*Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349; [1913] 2 Ch. 291).

(s) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91 (1) (b).

(t) *Ibid.*, s. 91 (4), (5). The foreign States and British Dominions to which these provisions apply are the same as those specified in title PATENTS AND INVENTIONS, Vol. XXII., p. 230, note (q), together with Ecuador, Greece and Rumania.

(a) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 28, 29; as to the procedure on renewal, see Trade Marks Rules, 1906, rr. 68—75.

that the registration is about to expire must be sent to the proprietor, and there are provisions for the renewal of the registration if application is made within a month of the expiration (*b*). An expired trade mark is treated as still on the register for the purpose of any application for registration for one year after the date of removal, unless it is shown that there has been no *bonâ fide* user for the two years preceding the removal (*c*).

SECT. 5.
Registration.
—

SECT. 6.—*Effects of Registration.*

1279. The person for the time being registered as proprietor of a trade mark has, subject to anything appearing on the Register, power to assign the same, and to give effectual receipts for the consideration for such assignment, but equities may be enforced as in the case of other personal property (*d*).

Power to
assign.

1280. Subject to certain exceptions (*e*), the valid registration of a trade mark gives the proprietor the exclusive right to the use of such trade mark upon or in connexion with the goods in respect of which it is registered (*f*), and any invasion of this right is an infringement of the trade mark. It is probable that to constitute infringement there must be an actual use of the mark upon something, and that mere use of a registered word mark in a verbal description would not be sufficient, though the use of such a mark on an invoice, or on an advertisement, would be (*g*).

Exclusive
user.

(*b*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 30; Trade Marks Rules, 1906, r. 72.

(*c*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 31.

(*d*) *Ibid.*, s. 38. As to assignment, see pp. 718, 719, *post*; and as to notices which may be entered on the register, see p. 686, *ante*.

(*e*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 39. The exceptions there given deal with the rights of each of several co-proprietors to use the mark, the rights given by conditions entered on the register and the rights given by *ibid.*, s. 41, to persons who can prove user prior to that of the registered proprietor; see pp. 719, 720, *post*; see also Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 43; p. 712, *post*.

(*f*) User on other goods cannot be infringement, though it may be passing off (*Hart v. Colley* (1890), 7 R. P. C. 93; 44 Ch. D. 193; *Jay v. Ladler* (1888), 6 R. P. C. 136; 5 T. L. R. 57). But user on goods for which the mark is registered is apparently infringement, even if the mark is not used by the plaintiff on these goods, unless the registration is attacked. There may be an exception if the mark is such that it could only be used on goods of a particular kind; compare *Hargreaves v. Freeman* (1891), 8 R. P. C. 237, 240; [1891] 3 Ch. 39; but see *Finlay v. Shamrock Co.* (1905), 22 R. P. C. 301, *per* PORTER, M.R., at p. 306. Under the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), s. 3, where the provision was differently worded, it was held in *Re Edwards' Trade-mark*, *Edwards v. Dennis* (1885), 30 Ch. D. 454, 470, C. A.; followed in *Hargreaves v. Freeman*, *supra*, that there could be no infringement unless the mark was used on goods of the same kind as those on which the plaintiff used it.

(*g*) The following acts have been held to constitute infringement:—user on an invoice (*Re Kodak, Ltd.'s Trade Marks*, *Kodak, Ltd. v. London Stereoscopic and Photographic Co., Ltd.*, *Kodak, Ltd. v. Houghton & Sons* (1903), 20 R. P. C. 337, 344; 20 T. L. R. 297; in this case it is not clear whether merely supplying goods in response to orders was held to be infringement or passing off, but this was held to be infringement in *Peters* (C. A.),

SECT. 6.
Effects of
Registra-
tion.

Infringement
not neces-
sarily fraudu-
lent.

Test of
infringement.

1281. If infringement is proved, it is not a defence to show that by reason of the class of goods sold by the plaintiff and defendant respectively, or the markets in which they trade, there is no risk of confusion (*h*). The existence of fraudulent intent is only material as evidence of infringement, and is not a necessary part of the cause of action (*i*).

1282. What is protected is the whole mark as registered. The use of part of a mark is not an infringement, unless that part is so important, or is accompanied by other matter so resembling other parts of the trade mark registered, that it amounts to a substantial

Ltd. v. Domestic Inventions Co. (1905), 25 R. P. C. 387; user in advertisements (*Bechstein v. Barker & Barker* (1910), 27 R. P. C. 484; see also *Price's Patent Candle Co., Ltd. v. Jeyes' Sanitary Compounds Co., Ltd.* (1901), 19 R. P. C. 17, C. A.; *Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar, Ltd.* (1902), 20 R. P. C. 105, 120; [1903] 1 Ch. 211; *Briggs v. Dunn & Son* (1911), 28 R. P. C. 704; and compare *Montgomerie & Co., Ltd. v. Young Brothers* (1903), 20 R. P. C. 781 (advertisements plus sales in answer to demands held infringement)); user of a mark on matchboxes as advertisement of other goods, which in fact was an infringement of plaintiff's mark for matches (*Nitedals Tændstikfabrik v. Lehmann & Co., Ltd.* (1908), 25 R. P. C. 793); using receptacles properly bearing the trade mark of A. to hold B.'s goods (*Monro v. Hunter* (1904), 21 R. P. C. 296; *Major Brothers v. Franklin & Son* (1908), 25 R. P. C. 406; [1908] 1 K. B. 712; *Barr & Co. v. Mair and Dougall* (1904), 21 R. P. C. 665). This is now a criminal offence (Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 5; *Wood v. Burgess* (1889), 24 Q. B. D. 162; *Stone v. Burn* (1910), 103 L. T. 540; *Haddow v. Neilson Brothers* (1899), 2 Fraser (Justiciary), 19; *Thwaites v. M'Evilly* (1904), 21 R. P. C. 397, C. A.; [1904] 1 I. R. 310; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 566 *et seq.*, 711, note (*e*)). As to the insertion of a part bearing a trade mark into a machine, see *Re Harrison's Trade Mark, Harrison v. Woodroffe* (1889), 7 R. P. C. 25; *contra, Richards v. Williamson* (1874), 30 L. T. 746. An offer to sell in this country goods which in fact bear the trade mark, but which never come into this country is apparently an infringement (*Re Schmidt's Trade Mark, Jackson & Co. v. Napper* (1886), 4 R. P. C. 45, 59; 3 T. L. R. 238). Printing (at least knowingly) infringing labels is an infringement (*de Kuyper (John) & Son v. Baird (W. & G.), Ltd.* (1903), 20 R. P. C. 581; *Jameson (John) & Son, Ltd. v. Johnston (R. S.) & Co., Ltd.* (1901), 18 R. P. C. 259); see also Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2. An innocent importer of goods bearing spurious marks is an infringer, though there is no proof that he intends to sell (*Upmann v. Forester* (1883), 24 Ch. D. 231). As to the position of wharfingers, see *Moet v. Pickering* (1878), 8 Ch. D. 372, C. A.. In *Re Talbot's Trade Marks, Talbot v. Webley* (1886), 3 R. P. C. 276, use in a price list was held no infringement.

(*h*) *Paine & Co. v. Daniell & Sons' Breweries, Ltd.* (1893), 10 R. P. C. 217, C. A.; [1893] 2 Ch. 567 ("John Bull"). Of course, these facts may be material on the question of damages or as evidence that the marks are so alike as to make the defendant's acts amount to infringement.

(*i*) *Paine & Co. v. Daniell & Sons' Breweries, Ltd.*, *supra*; *Montgomerie & Co., Ltd. v. Young Brothers* (1903), 20 R. P. C. 781; *Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar, Ltd.*, *supra*; *Dawson v. Stewart* (1905), 22 R. P. C. 250, 256; see, however, *de Kuyper (John) & Son v. Baird (W. & G.), Ltd.* *supra*, per PORTER, M.R., at p. 588. As to damages against an innocent infringer, see p. 720, *post*.

taking of the whole trade mark (*k*). In substance the test is whether or not the mark used by the infringer is likely to be confused with that registered.

The rules of comparison resemble those by which the question whether a mark proposed to be registered resembles too closely an existing mark is tested (*l*), but it is necessary to establish a closer likeness in order to make out infringement than would justify refusal of registration. In the first case the burden of showing probability of deception is on the plaintiff, while in the second all reasonable possibility of deception has to be disproved by the applicant (*m*).

(*k*) *Rugby Portland Cement Co., Ltd. v. Rugby and Newbold Portland Cement Co., Ltd.* (1891), 8 R. P. C. 241, 246; *Lever Brothers, Ltd. v. Beddingfield* (1898), 16 R. P. C. 3, 10, C. A.; 80 L. T. 100; *Hodgson and Simpson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465, 476. Where a defendant takes a substantial part of a mark, the burden may be on him to show that the differences are sufficient to prevent confusion (*Orr Ewing & Co. v. Johnston & Co.* (1880), 13 Ch. D. 434, C. A.). Addition does not prevent infringement (*Sanitas Co., Ltd. v. Condry* (1887), 4 R. P. C. 530; 56 L. T. 62), but where the mark is not actually copied and the alleged infringement is but a small part of the defendant's mark, it may be held no infringement (*Lambert and Butler, Ltd. v. Goodbody (T. P. & R.)* (1902), 19 R. P. C. 377; compare also *Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar, Ltd.* (1902), 20 R. P. C. 105; [1903] 1 Ch. 211).

(*l*) *Re Bass, Ratcliff and Gretton, Ltd.'s Registered Trade Marks, Bass, Ratcliff and Gretton, Ltd. v. Davenport (John) & Sons' Brewery, Ltd.* (1901), 19 R. P. C. 129, 141; [1902] 2 Ch. 579; *Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar, Ltd., supra*, at p. 117; *Hennessy & Co. v. Keating* (1908), 25 R. P. C. 361, H. L.; 24 T. L. R. 534; *Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 811; *Upper Assam Tea Co. v. Herbert & Co.* (1889), 7 R. P. C. 183, C. A. The evidence of experts is admissible and proper, but the judge must decide for himself (*Hennessy & Co. v. Keating, supra*; see also *Mitchell v. Henry* (1880), 15 Ch. D. 181, 189, C. A.). The fact that the defendant's mark would cause the goods to be called by the same name as the plaintiff's is important (*Boord & Son v. Huddart* (1903), 21 R. P. C. 149; 89 L. T. 718 ("Cat and Barrel"); *Finlay v. Shamrock Co.* (1905), 22 R. P. C. 301; *Boord & Son v. Thom and Cameron, Ltd.* (1907), 24 R. P. C. 697, 721; [1907] S. C. 1326 ("Cat and Barrel"); *Anglo-Swiss Condensed Milk Co. v. Metcalf* (1886), 3 R. P. C. 28; 31 Ch. D. 454 ("Dairymaid"); *Orr Ewing & Co. v. Johnston & Co., supra* ("Two Elephants"); compare *Read Brothers v. Richardson & Co.* (1881), 45 L. T. 54, C. A. ("Dog's Head"); and see *Price's Patent Candle Co. v. Jeyes' Sanitary Compounds Co., Ltd.* (1901), 19 R. P. C. 17, 21, C. A.; *Upper Assam Tea Co. v. Herbert & Co., supra*; but this fact is not always sufficient in itself (*Hodgson and Simpson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465, 473; *Cowie Brothers & Co. v. Herbert* (1897), 14 R. P. C. 436; 24 R. (Ct. of Sess.) 353). The possibility of deception in markets other than English is considered (*Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd. supra*; *Orr Ewing & Co. v. Johnston & Co. supra*, at p. 451), though this will not be pressed to extremes (*Cowie Brothers & Co. v. Herbert, supra*, at p. 447; *Boord & Son v. Thom and Cameron, Ltd.* (1906), 23 R. P. C. 509, 524; reversed on another ground (1907), 24 R. P. C. 697, C. A.). As to the rules of comparison, as applied to registration, see pp. 700 *et seq.*, *ante*; see also pp. 755, 756, 764, 766, *post*.

(*m*) *Re Dunn's Trade Mark* (1890), 7 R. P. C. 311, H. L.; 15 App. Cas. 252.

SECT. 6.
Effects of
Registration.

Imitation.

Similarity of
get-up.

Whether the mark used by the defendant is an imitation of the plaintiff's mark is of course a pure question of fact, and therefore reference to former decisions is usually of little value (*n*). The one question to be decided is whether or not the registered mark has been imitated. If it has been, the fact that the get-up of the goods is otherwise entirely different is no defence (*o*), and if it has not been, similarity in other respects will not help the plaintiff. Nevertheless, in doubtful cases the court does consider whether, in addition to there being similarity in the mark, a similar get-up has also been adopted with a view to increasing the probability of confusion (*p*).

The court also has power, when deciding whether a trade mark has been infringed, to take into account the common practice of the trade as to the get-up of goods and as to the existence of other similar trade marks, so that in a case where part only of a mark is taken the court will consider how far that part is distinctive, and so follow the practice adopted in patents and designs cases (*q*).

(*n*) The following cases as to word marks may be of assistance. Word marks held to be infringements:—"Condi-Sanitas" and "Condi-Sanitant" of "Sanitas" (*Sanitas Co., Ltd. v. Condy* (1887), 4 R. P. C. 530, 532; 56 L. T. 651); "Stafford" of "Trafford," "Fort" of "Fortress" (*Smith and Wellstood v. Carron Co.* (1896), 13 R. P. C. 108); "Margarita" of "La Flor de Margarella" (*Benedictus v. Sullivan, Powell & Co* (1894), 12 R. P. C. 25); "Securine" of "Seccotine" (*McCaw, Stevenson and Orr, Ltd. v. Nickols & Co.* (1903), 21 R. P. C. 15); "J. B. D." in oval of "C. B. D." in oval (*Maréchal and Ruchon v. M'Colgan* (1901), 18 R. P. C. 262); "Hub" on an ace of spades of "Club" on an ace of clubs (*Munday v. Carey* (1905), 22 R. P. C. 273); "Bechstein Model" of "Bechstein" (*Bechstein v. Barker and Barker* (1910), 27 R. P. C. 484); "Apollinis" of "Apollinaris" (*Apollinaris Co. v. Herrfeldt and Campbell* (1887), 4 R. P. C. 478, 487, C. A.; 4 T. L. R. 9); "A B C" of "A B" (*Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181. Word marks held not to be infringements:—"Edward Barber" of "Era James Barber" (*Barber v. Manico* (1893), 10 R. P. C. 93, 96); The "G. & M. 2d." of "The Great Two D." (*Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, H. L.); "Robert Crawford" of "Daniel Crawford" (*Crawford & Son v. Bernard & Co.* (1894), 11 R. P. C. 580); "Master," "New Master," or "New Matron" of "Mistress" (*Smith and Wellstood v. Carron Co.* (1896), 13 R. P. C. 108); "Triticine" of "Triticumina" (*Meaby & Co., Ltd. v. Triticine, Ltd.* (1897), 15 R. P. C. 1, 7; 14 T. L. R. 42); "Glazine" of "Glazier" (*McCaw, Stevenson and Orr, Ltd. v. Lee Brothers* (1905), 23 R. P. C. 1); "Cocosoline" of "Cottolene" (*Fairbank Co. v. Cocos Butter Manufacturing Co.* (1903), 20 T. L. R. 53); "Colonial" of "Colonel" for golf balls (*St. Mungo Manufacturing Co. v. Viper and Recovering Co.* (1910), 27 R. P. C. 420, 427); "Vincalis" or "Carvino" of "Wincarnis" (*Coleman & Co., Ltd. v. Brown (John) & Co.* (1899), 16 R. P. C. 619, 623, C. A.; *Re Trade Mark "Carvino," Coleman & Co., Ltd. v. Smith (Stephen) & Co., Ltd.* (1911), 28 R. P. C. 645, 663; 27 T. L. R. 533; [1911] 2 Ch. 572, C. A.; varied, 29 R. P. C. 81); see also the cases cited at p. 702, *ante*, pp. 753, 764, *post*.

(*o*) *Upper Assam Tea Co. v. Herbert & Co.* (1890), 7 R. P. C. 183, C. A.

(*p*) Compare *Derby Photographic Dry Plate Co., Ltd. v. Pollard, Graham & Co.* (1886), 2 T. L. R. 276; *Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 811; see also *Du Cros (W. & G.), Ltd., v. Gold* (1912), 30 R. P. C. 117, 127; 29 T. L. R. 163.

(*q*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 43. As to the practice in patents and designs cases, see title PATENTS AND INVENTIONS, Vol. XXII., p. 215; and see p. 734, *post*. As to the practice before the Trade Marks

1283. *Bonâ fide* use of a person's own name or place of business, or of that of any of his predecessors in business, or the use by any person of a *bonâ fide* description of the character or quality of the goods, does not constitute infringement (*r*).

SECT. 6.
Effects of
Registration.

Personal
names.

SECT. 7.—*Correction of the Register and Alteration of
Registered Trade Marks.*

1284. The registrar may at the request of the registered proprietor, or some person entitled to act for him, correct any error or enter any change in the name and address of the proprietor, cancel the entry of a trade mark, or restrict the class of goods for which it is registered, or enter any disclaimer or any memorandum which does not extend the rights given by the existing registration (*s*), and may permit an addition to or alteration of a mark in any way not substantially affecting its identity (*t*).

Rights of
registered
proprietor.

Act, 1905 (5 Edw. 7, c. 15), see *Native Guano Co. v. Sewage Manure Co.* (1889), 8 R. P. C. 125, H. L.; 4 T. L. R. 372; *Hennessy & Co. v. Dompé* (1902), 19 R. P. C. 333 (on appeal, the defendants admitted infringement); *Hennessy & Co. v. Keating* (1908), 25 R. P. C. 361, H. L.; 24 T. L. R. 534; *Watt v. O'Hanlon* (1886), 4 R. P. C. 1 ("Old Innishowen").

(*r*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 44; *Teofani & Co., Ltd. v. Teofani* (1913), 30 R. P. C. 460; [1913] 1 Ch. 191. Apart from this provision, it has been laid down that a person may honestly use the descriptive term by which particular goods are known in the trade to describe such goods; it is only user as a trade mark which is restrained (*Re Leonard and Ellis's Trade-mark, Leonard and Ellis v. Wells* (1884), 26 Ch. D. 288, C. A., *per* Lord SELBORNE, L.C., at p. 296 ("Valvoline")); compare *Cheavin v. Walker* (1877), 5 Ch. D. 850, 862, C. A.; and see pp. 760, 761, *post*.

(*s*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 32. Application may also be made by the trustee in bankruptcy of the registered proprietor, or, when the registered proprietor is a company in liquidation, by the liquidator (Trade Marks Rules, 1906, r. 90).

(*t*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 34. Formerly the only power to permit alterations was in the court, and only extended to non-essential particulars (Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 92). The most frequent cases under the old practice were alterations in the name of a firm or an address, which were allowed even in the case of old marks (*Re Cockle (James) & Co.'s Trade Mark* (1903), 20 R. P. C. 353). As to a change of name or status in the case of a company or firm registered as proprietors, see title COMPANIES, Vol. V., pp. 86, 87. If a signature is an essential particular, the name of the limited company may be added (*Re Hammond and Stow, Ltd.'s Registered Trade Mark* (1905), 22 R. P. C. 299). In the case of old marks the court would only allow an alteration when absolutely necessary (*Re Clay (Henry) and Bock & Co.'s Trade Mark* (1892), 9 R. P. C. 449), and in such cases permission to omit words such as "patent" (*Re Adams' Trade Marks* (1892), 9 R. P. C. 174; 66 L. T. 610) or "trade mark" (*Re Phillips' Trade Marks* (1891), 8 R. P. C. 469; [1891] 3 Ch. 139) was refused. In the case of other marks the omission of such words was sometimes permitted (*Re Colman's Trade Marks* (1891), 8 R. P. C. 209; [1891] 2 Ch. 402). An alteration which proposed to add the words "incorporated by Royal Charter" was refused (*Re Carron Co.'s Application to alter a Trade Mark* (1910), 27 R. P. C. 412; 26 T. L. R. 458). An application to change words written in Russian characters was refused (*Re Savin's Trade Mark* (1895), 13 R. P. C. 21), but allowed where it was merely to correct a clerical error (*Re Ermen and*

SECT. 7.
Correction
of the
Register and
Alteration of
Registered
Trade
Marks.

Who may
move for
rectification :
persons
aggrieved ;
registrar.

1285. Any person who is aggrieved by the wrongful omission or insertion of any matter in the register, or by an error in the same, or by any entry wrongfully remaining on the register, may move the court for the rectification of the register, and the court may make an order for the alteration or expunging of any entry, including an order for the entering of a disclaimer, and may decide any question that is necessary or expedient for this purpose (*a*).

1286. In the case of fraud in registration or transmission the registrar himself may move (*b*). In other cases he is not a necessary party, though he must be served with notice of the application. He may either appear or submit a written statement giving particulars of any proceedings before him, or the grounds of any decision, or such other matters relevant to the issue within his knowledge as he may think fit; and such statement forms part of the evidence. If, however, the court so directs, he must appear (*c*).

Any order for the rectification of the register must be served on the registrar (*d*).

Who is a
"person
aggrieved."

1287. The expression "person aggrieved" has been widely interpreted by the courts. Any person who is in any way hampered in his trade by the presence of the marks, or who can show any real interest in having them removed, may apply (*e*), but

Roby's Trade Mark (1886), 4 R. P. C. 70). The order usually provides that the alteration may be made according to a certain exhibit; see *Re Cockle (James) & Co.'s Trade Mark* (1903), 20 R. P. C. 353; *Re Hammond and Stow, Ltd.'s Registered Trade Mark* (1905), 22 R. P. C. 299.

(*a*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 15, 35. The power to rectify includes cases where there is a wrongful entry as to ownership; see *Rey v. Lecouturier* (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262; *Re Johnson's (M. A.) Trade Marks* (1908), 26 R. P. C. 195. This is the only remedy for wrongful registration (*Reid v. Thomson & Co.* (1905), 22 R. P. C. 376; 13 Scots Law Times, 32). As to who is a person aggrieved, see the text, *infra*.

(*b*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 35 (3).

(*c*) *Ibid.*, s. 47. If the proprietor of the mark cannot be found and is not at his registered address, the application may proceed with the Comptroller as the only respondent (*Re Smollens' Trade Mark* (1912), 29 R. P. C. 158; 28 T. L. R. 196; *Re Ashton's Trade Mark* (1900), 48 W. R. 389).

(*d*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 35 (4).

(*e*) *Re Powell's Trade Mark* (1893), 11 R. P. C. 4, H. L.; [1894] A. C. 8; *Pink v. Sharwood (J. A.) & Co., Ltd. (No. 2), Re Ord (Sidney) & Co.'s Trade Mark* (1913), 135 L. T. Jo. 574. It is not necessary to show present injury; it is sufficient that the mark might prevent a probable extension of trade (*Re Apollinaris Co.'s Registered Trade Marks* (1890), 8 R. P. C. 137, 160, C. A.; [1891] 2 Ch. 186; *Re Powell's Trade Mark, supra*; *Re Talbot's Trade Mark* (1894), 11 R. P. C. 77, 83; 8 R. 149). The area of the applicant's trade need not overlap that of the respondent's (*Re La Société Anonyme des Verreries de l'Etoile's Trade Mark* (1893), 10 R. P. C. 436; 10 T. L. R. 35), nor is it in all cases necessary that he should trade or intend to trade in this country (*Re Rivière's Trade Mark* (1884), 26 Ch. D. 48, 53, C. A.). An applicant who had gone out of business, which was being carried on by his agents, was held to be aggrieved (*Re Harness' Trade Mark* (1899), 17 R. P. C. 49), as were the agents for sale in this country of a manufacturer having an opposing mark (*Re Vignier's Trade Mark* (1889), 6 R. P. C. 490; 61 L. T. 495). A defendant in a trade mark or passing-off action in which the statement of claim makes any reference to a registered mark may always apply (*Re Gianacchis' Trade Mark* (1889), 6 R. P. C. 467; 58 L. J. (CH.) 782; *Baker v. Rawson* (1890),

some possible injury must be shown (*f*), and the common informer, or a person having only a sentimental grievance, is excluded (*g*). A person may also apply on the ground that he should be entered as the proprietor of the mark, or that some other person is wrongly entered as such proprietor (*h*). A decision of the registrar refusing registration cannot be questioned by an application to rectify the register by inserting the mark (*i*).

SECT. 7.
Correction
of the
Register and
Alteration of
Registered
Trade
Marks.

Grounds for
rectification.

1288. Any of the grounds on which registration might have been resisted may be used to support an application to rectify. The principles on which the court acts in the case of an application to rectify the register on the ground that a mark is not a properly registrable mark are the same as in the case of an application to register, since a mark may not be removed if it could now properly be registered (*k*). The burden of proof, however, is changed, and it is for the applicant for rectification to show that the mark should not be on the register (*l*). In the case of old marks the court

8 R. P. C. 89, 98; 45 Ch. D. 519), even though he would be restrained at common law from using the mark (*Re Joule's Trade Marks, Thompson v. Montgomery* (1889), 6 R. P. C. 404, C. A.; 41 Ch. D. 35); so, too, may an applicant or intending applicant for a mark whose application might be hampered by the presence of another mark on the register (*Re Registered Trade Mark "Zonophone"* (1903), 20 R. P. C. 450). If the applicant is a person aggrieved, the fact that he personally has been fraudulent is no answer (*Re Hill's Trade Mark* (1893), 10 R. P. C. 113, 116). It may, however, affect his right to costs (*Re Hill's Trade Mark, supra*; see also *Re Trade Mark "Carvino," Coleman & Co., Ltd. v. Smith (Stephen) & Co., Ltd.* (1911), 28 R. P. C. 645, 663; 27 T. L. R. 533). The question whether the decision of a point in an action would estop the parties on a motion for rectification has never been decided, though raised in *Re Kenrick and Jefferson, Ltd.'s Three Trade Marks* (1910), 28 R. P. C. 45; but compare *Re Deeley's Patent* (1894), 12 R. P. C. 65; [1895] 1 Ch. 687. The injury shown must be a legal one (*Re Rivière's Trade-mark* (1884), 26 Ch. D. 48, 54, C. A.), and not merely a sentimental objection (*Re Ellis & Co.'s Trade Marks* (1904), 21 R. P. C. 617, 620). Usually the applicant must trade or intend to trade in the goods for which the mark is registered (*Re Crompton (A. & A.) & Co., Ltd.'s Trade Mark* (1902), 19 R. P. C. 265, 272; [1902] 1 Ch. 758), and the possible injury relied upon must not be too remote (*Re Wright, Crossley & Co.'s Trade Mark* (1898), 15 R. P. C. 377, 379, C. A.).

(*f*) *Re Powell's Trade Mark* (1893), 11 R. P. C. 4, H. L.; [1894] A. C. 8.

(*g*) *Re Apollinaris Co.'s Registered Trade Marks* (1890), 8 R. P. C. 137, 160, C. A.; [1891] 2 Ch. 186.

(*h*) See note (*a*), p. 686, *ante*.

(*i*) *Re Normal Co.'s Trade Mark* (1887), 4 R. P. C. 123, C. A.; 35 Ch. D. 231.

(*k*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 36. This does not mean that the validity of the registration is to be tested by assuming that the present Trade Marks Act, 1905 (5 Edw. 7, c. 15), was in force at such date of registration, but that the court has to consider whether, if the mark were removed, it could be ordered to be re-registered (*Re Gestetner's Trade Mark* (1907), 25 R. P. C. 156, C. A.; [1908] 1 Ch. 513). The fact that a mark has been registered in pursuance of a special order of the Board of Trade does not prevent its removal (*Thorne (Henry) & Co., Ltd. v. Sandow* (1912), 29 R. P. C. 440, 451; 106 L. T. 926; *Re Teofani & Co.'s Trade Mark* (1913), 30 R. P. C. 446, C. A.; 109 L. T. 114, following *Re Crosfield (Joseph) & Sons, Ltd.*, [1910] 1 Ch. 130, 132, C. A.).

(*l*) *Re Edginton's Trade Mark, Edginton (Benjamin), Ltd. v. Edginton*

SECT. 7.
Correction
of the
Register and
Alteration of
Registered
Trade
Marks.

Deceptive
marks.

requires strong proof that a statement made in the application for registration as to the mark having been used on a certain date is untrue (m).

1289. Another ground for rectification is that the mark is deceptive in that it contains deceptive matter. This may be a statement as to the goods (n) or some statement as to the mark itself which would mislead the public (o). In order, however, that

& Co. (1889), 6 R. P. C. 513, 518; 61 L. T. 323; *Re Chesebrough Manufacturing Co.'s Trade Mark* (1902), 19 R. P. C. 342, 353, C. A.; [1902] 2 Ch. 1; *Re Burroughs, Wellcome & Co.'s Trade Marks* (1904), 21 R. P. C. 217, C. A.; compare also *Re Crompton (A. & A.) & Co.'s, Ltd., Trade Mark* (1902), 19 R. P. C. 265, 271; [1902] 1 Ch. 758.

(m) *Re Chesebrough Manufacturing Co.'s Trade Mark, supra*; *Boord & Son v. Thom and Cameron, Ltd.* (1907), 24 R. P. C. 697; [1907] S. C. 1326. But where the applicant shows that the person claiming an exclusive right to an old mark sold, before 1875, goods on which the mark was not used as alleged, the burden is shifted (*Day v. Riley and Whittaker* (1900), 17 R. P. C. 517, 522; 48 W. R. 556).

(n) Where the mark contained the word "Glenthorne," and was registered at a time when the only whisky sold by the applicant was "Thorne's," it was ordered to be expunged when he had ceased to sell this whisky (*Re Pimms' Trade Mark, Thorne & Sons, Ltd. v. Pimms, Ltd.* (1909), 26 R. P. C. 221; but compare *Brock & Co.'s Crystal Palace Fireworks, Ltd. v. Pain (James) & Sons* (1911), 28 R. P. C. 697, C. A.; 105 L. T. 976). Where "Orlwoola" was registered for goods other than woollen, it was ordered to be expunged (*Re Trade Marks ("Orlwoola")* (1909), 26 R. P. C. 850, 860, 864, C. A.; [1910] 1 Ch. 130; compare *Re Edge's Trade Marks* (1891), 8 R. P. C. 207; and see *Re Hill's Trade Mark* (1893), 10 R. P. C. 113; and the cases cited in note (a), p. 689, *ante*. Probably, to constitute a ground for rectification, the misrepresentation must be by the mark itself, false statements about the goods made in other ways being insufficient; compare *Paterson & Sons v. Kit Coffee Co.* (1910), 27 R. P. C. 594, *per* Lord SALVESEN, at p. 601; *Re Lyle and Kinahan, Ltd.'s Application to Register a Trade Mark* (1907), 24 R. P. C. 249, C. A. The fact that it is used on goods that have a deceptive get-up in other respects is also insufficient (*Re Trade Mark "Carvino," Coleman & Co., Ltd. v. Smith (Stephen) & Co., Ltd.* (1911), 28 R. P. C. 645, 662; 27 T. L. R. 533; S. C., 29 R. P. C. 81, C. A.; [1911] 2 Ch. 572).

(o) Thus, placing the word "trade mark" on a label so as to induce the public to believe that one part only was the trade mark, and that the rest of the label was no part of it and could be taken, was held a sufficient ground for rectification in *Re Apollinaris Co., Ltd.'s Registered Trade Marks* (1890), 8 R. P. C. 137, 164, C. A.; [1891] 2 Ch. 186, 233; followed in *Re Wills' Trade Marks* (1893), 10 R. P. C. 269, 274; [1893] 2 Ch. 262). The application of these cases has, however, been greatly restricted by the decision in *Re Bass, Ratcliff and Gretton, Ltd.'s Registered Trade Marks* (1902), 19 R. P. C. 544, C. A.; [1902] 2 Ch. 579; see also *Benedictus v. Sullivan, Powell & Co.* (1894), 12 R. P. C. 25, 31. Apparently, the fact that the trade mark offends against provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is not a ground of objection (*Re Baker (Albert) & Co.* (1908), *Ltd.'s Application for a Trade Mark* (1908), 25 R. P. C. 513, 524; [1908] 2 Ch. 86). A mark having the words "Imitations of this water will be prosecuted" was held deceptive, because it referred to imitations whether fraudulent or not (*Re Apollinaris Co., Ltd.'s Registered Trade Marks, supra*, at p. 161). The omission of non-essential words from the mark as used does not render the statement that it is a trade mark deceptive (*Rowland v. Michell* (1896), 14 R. P. C. 37, C. A.; [1897] 1 Ch. 71).

an application on these grounds may succeed the probability of deception must be substantial (p).

1290. It is also a ground for rectification that the mark was registered for goods without any *bonâ fide* intention to use it in connexion with such goods, or that in fact there has been no such *bonâ fide* user for the five years preceding the application (q).

The proprietor may meet the motion for rectification by showing that the non-user arose from special circumstances in the trade and not from intention not to use or to abandon the trade mark (r). On such a motion the mark may be expunged or the registration limited to certain goods (s). The fact that the mark is used with a slight alteration does not give ground for rectification (t).

SECT. 7.
Correction
of the
Register and
Alteration of
Registered
Trade
Marks.
Non-user.

(p) *Re Bass, Ratcliff and Gretton's Registered Trade Marks*, (1902), 19 R. P. C. 544, C. A.; [1902] 2 Ch. 579.

(q) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 37; compare *Pink v. Sharwood (J. A.) & Co., Ltd.* (No. 2), *Re Ord (Sidney) & Co.'s Trade Mark* (1913), 135 L. T. Jo. 574 (abandonment of business).

(r) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 37. For cases where a mark was expunged on the ground that it was registered without a *bonâ fide* intention to use it, see *Re Ramsay's Trade Mark, Muratti, Sons & Co., Ltd. v. Murad, Ltd.* (1911), 28 R. P. C. 497; *Re Neuchatel Asphalte Co.'s Application* (1913), 30 R. P. C. 349; [1913] 2 Ch. 291. For examples of special circumstances showing that non-user did not imply abandonment, see *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398, 404; *Louise & Co., Ltd. v. Gainsborough* (1902), 20 R. P. C. 61, 68; 87 L. T. 591; *contra, Re Ralph's Trade-mark, Ralph v. Taylor* (1883), 25 Ch. D. 194, 199. For cases, see *Re Edward's Trade-mark, Edwards v. Dennis* (1885), 30 Ch. D. 454, 476, C. A. (mark restricted to certain goods); *Batt & Co. v. Dennett* (1899), 16 R. P. C. 411, H. L.; [1899] A. C. 428 (no *bonâ fide* intention to use for certain goods); *Re Valentine Extract Co., Ltd.'s Trade Marks* (1901), 18 R. P. C. 175 (non-user except for certain goods; deceptive as to these); *Freeman Brothers v. Sharpe Brothers & Co., Ltd.* (1899), 16 R. P. C. 205 (rectification refused); *Re Crompton (A. & A.) & Co., Ltd.'s Trade Mark* (1902), 19 R. P. C. 265; [1902] 1 Ch. 758; *Re Hart's Registered Trade Mark* (1902), 19 R. P. C. 569; [1902] 2 Ch. 621; *Re Suter, Hartmann and Rahtjen's Composition Co., Ltd.'s Trade Marks* (1901), 19 R. P. C. 42; *Re Anglo-Swiss Condensed Milk Co.'s Trade Marks, Anglo-Swiss Condensed Milk Co. v. Pearks, Gunston and Tee, Ltd.* (1904), 21 R. P. C. 261, C. A.; 20 T. L. R. 238; *Re Hare's Trade Mark* (1907), 24 R. P. C. 263; *Re Paine & Co., Ltd.'s Registered Trade Marks* (1908), 25 R. P. C. 329. In some cases the order limits the registration to certain goods (*Re Edwards' Trade-mark, Edwards v. Dennis, supra*; *Re Suter, Hartmann and Rahtjen's Composition Co., Ltd.'s Trade Marks, supra*). In others specific goods are excluded (*Re Hart's Registered Trade Mark, supra*; *Re Hare's Trade Mark, supra*; *Bowden Wire, Ltd. v. Bowden Brake Co., Ltd.* (1912), 30 R. P. C. 45; *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181).

(s) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 37. There are not many decisions showing the principles on which the court will limit the registration on the ground that the mark has only been used for certain goods in a class. It is clear that even the most extensive user can never cover all the goods in a class, and probably the court would be largely guided by considering whether the goods proposed to be excluded from the registration are so similar to those for which there has been user that no other person would be allowed to register the same mark for them; compare *Re Edwards' Trade-mark, Edwards v. Dennis, supra*; see also *Freeman Brothers v. Sharpe Brothers & Co., Ltd., supra*; *Re Hart's Registered Trade Mark, supra*; *Re Suter, Hartmann and Rahtjen's Composition Co., Ltd.'s Trade Marks, supra*; *Re Paine & Co., Ltd.'s Registered Trade Marks, supra*.

(t) *Freeman Brothers v. Sharpe Brothers & Co., Ltd., supra*.

SECT. 7.
Correction
of the
Register and
Alteration of
Registered
Trade
Marks.

Lapse of
time.

Party out of
jurisdiction.

1291. After the expiration of seven years from the 11th August, 1905 (a), or from the registration of a trade mark, whichever date is the later, the only grounds on which the original registration of a trade mark can be attacked are that the registration was obtained by fraud or that the mark contains matter which is calculated to deceive or is otherwise disentitled to protection, or is contrary to law or morality, or is a scandalous design (b). There is no limit on the time for application where the original registration is not attacked, as in cases of non-user or wrongful transmission.

1292. The English courts have jurisdiction in all cases, and, as the registrar is a sufficient respondent, all that need be done in a case where a party is out of the jurisdiction is to inform such person that the motion will come on, and let him appear if he wishes (c).

SECT. 8.—Assignment of Trade Marks.

Part of
goodwill.

1293. A registered trade mark cannot be assigned so as to be parted from the goodwill of the trade in the goods for which it is registered (d). Subject to certain exceptions (d) it passes on an

(a) The date of the passing of the Trade Marks Act, 1905 (5 Edw. 7, c. 15).

(b) *Ibid.*, s. 41; *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181. There was no limitation on the time at which an application could be made under the previous statutes (*Re Edwards' Trade-mark, Edwards v. Dennis* (1885), 30 Ch. D. 454, 476, C. A.), though the court was always unwilling to disturb an old mark; compare the cases cited in note (l), p. 715, *ante*. In *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398, the proprietor of an old (unregistered) mark had ceased to use it for some years and another person had registered it in good faith and used it largely for two years. The old mark was allowed to be registered, but rectification was refused. As to when a mark is disentitled to protection, see p. 689, *ante*.

(c) *La Compagnie Générale d'Eaux Minérales et de Bains de Mer Trade Marks* (1891), 8 R. P. C. 446, 450; [1891] 2 Ch. 451; *Re King (Frederick) & Co.'s Trade Mark* (1892), 9 R. P. C. 350, 366, C. A.; [1892] 2 Ch. 462; see also Trade Marks Rules, 1906, r. 9. The Irish courts have decided that they have not jurisdiction to order rectification (*Bayer v. Connell Brothers & Co.* (1897), 14 R. P. C. 275, 277; but see *Re King (Frederick) & Co.'s Trade Mark, supra*), but the Scotch courts claim this jurisdiction (*Cowie Brothers & Co. v. Herbert* (1897), 14 R. P. C. 436, 444; 24 R. (Ct. of Sess.) 361).

(d) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22; see also p. 756, *post*. Hence, if the goodwill ceases to exist owing to the trade in the goods being abandoned, the trade mark goes with it, and may be removed from the register (*Pink v. Sharwood (J. A.) & Co., Ltd.* (No. 2), *Re Ord (Sidney) & Co.'s Trade Mark* (1913), 135 L. T. Jo. 574). The right of the proprietor to assign the right to use the mark in any British possession or protectorate or foreign country, together with the goodwill of the business therein, is not affected (Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22). Where the sole agents for sale in this country of certain goods registered a mark in their own name at the request of and for the benefit of the foreign manufacturers, it was held that an assignment to such manufacturers was valid (*Re Wellcome's Trade Mark, Re Burroughs, Wellcome & Co.'s Trade Mark* (1886), 3 R. P. C. 76; 32 Ch. D. 213; see also *Re Greenlees' Trade Marks* (1892), 9 R. P. C. 93). So, too, where manufacturers registered a mark in their own name which had been designed by certain customers, and was only used for goods made for them, an assignment to the customers was held good (*Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, 143, 144, H. L.). Although the mark may be registered for all the goods in a

assignment of such goodwill (*e*) or with any devolution of the goodwill (*f*). In the case of a dissolution of partnership the partners may submit a scheme for the apportionment of the trade marks, which the registrar may permit subject to any modifications necessary in the public interest (*g*). Associated trade marks can only be assigned as a whole (*h*). Assignments and transmissions are to be entered on the register (*i*).

SECT. 8.
Assignment
of Trade
Marks.

SECT. 9.—Legal Proceedings.

1294. An action for the infringement of a trade mark must be brought in the High Court (*k*). It is unnecessary to give any notice to the defendant before action, since the cause of action does not depend on any fraudulent motive on his part, but is for the enforcement of a legal right (*l*). An entry in the register, which may be proved by a certified copy, is *prima facie* evidence of the validity of the original registration and of all subsequent assignments and transmissions (*m*). Most of the grounds upon which rectification may be sought are open by way of defence, since the proprietor's rights are dependent on the validity of the registration (*n*), so that it will generally be unnecessary for the defendant to move to rectify (*o*). The defendant may

Actions for
infringement.

class, an assignee apparently only gets an assignment for those goods in which there was actually goodwill (*Re Edwards' Trade-mark, Edwards v. Dennis* (1885), 30 Ch. D. 454, 470, C. A.). The assignment of a reversion of the goodwill may be sufficient (*Re Magnolia Metal Co.'s Trade Marks* (1897), 14 R. P. C. 621, 630, C. A.; [1897] 2 Ch. 371). As to an assignment being held bad as being in gross, see *Pinto v. Badman* (1891), 8 R. P. C. 181, 191, C. A.; 7 T. L. R. 317; see also *Johnson's (M. A.) Trade Marks* (1909), 26 R. P. C. 195. As to an assignment being held good, see *Hammond & Co. v. Malcolm Brunner & Co.* (1892), 9 R. P. C. 301; 8 T. L. R. 324. Apparently, there may be cases where a mark is unassignable because its use by an assignee would be deceptive; see *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523; see also note (*d*), p. 761, *post*.

(*e*) *Re Roger's Trade Mark* (1895), 12 R. P. C. 149, 159; 13 R. 90.

(*f*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22.

(*g*) *Ibid.*, s. 23.

(*h*) *Ibid.*, s. 27.

(*i*) *Ibid.*, s. 4. Such registration is not a condition precedent to the right to sue for infringement (*Ihlee v. Henshaw* (1886), 3 R. P. C. 15; 31 Ch. D. 323), or to assign (*Re Wellcome's Trade Mark, Re Burroughs, Wellcome & Co.'s Trade Mark* (1886), 3 R. P. C. 76; 32 Ch. D. 213). As to assignments of patents, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 184 *et seq.*

(*k*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 69; where the registration may be applied for in the Manchester Branch of Trade Marks Registry, the Palatine Court of Lancaster also has jurisdiction (*ibid.*, s. 71); see pp. 685, 707, *ante*. An action for infringement cannot be brought in the county court (*Bow v. Hart* (1905), 22 R. P. C. 222, C. A.; [1905] 1 K. B. 592); but possibly the new legal rights conferred by the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 39, may render this decision no longer applicable; compare note (*u*), p. 720, *post*; see also title COUNTY COURTS, Vol. VIII., pp. 431, 432; and note (*l*), p. 743, *post*.

(*l*) *Upmann v. Forester* (1883), 24 Ch. D. 231.

(*m*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 40, 50, 51.

(*n*) *Ibid.*, s. 39.

(*o*) The objection of non-user or a claim to be entered on the register as having a concurrent right must still be raised by motion; see *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181.

SECT. 9.
Legal Pro-
ceedings.

also rely on a concurrent right of user (*p*), or a user prior to that of the plaintiff (*q*), or on the fact that the mark is used deceptively by the plaintiff (*r*). The cause of action is not extinguished by the death of the proprietor of the trade mark (*s*).

Injunction
and damages.

1295. An infringement of a valid mark, whether committed innocently or not, generally gives the plaintiff the right to an injunction (*t*); but an infringer is apparently only liable to damages or an account of profits from the time when he was aware of the plaintiff's registration (*u*), and the fact that the mark is on

(*p*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 20, 21; *Boord & Son v. Thom and Cameron, Ltd.* (1907), 24 R. P. C. 697, 717; [1907] S. C. 1326; but, apparently, he should then apply for registration (*ibid.*).

(*q*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 41. It appears that such user must be earlier than the date of the plaintiff's registration (*William's, Ltd. v. Massey, Ltd.* (1911), 28 R. P. C. 512); compare *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398.

(*r*) Thus, where the plaintiff's mark referred to Havana cigars and it had been used on cigars not made in Havana, though of Havana tobacco, the action was dismissed (*Newman v. Pinto* (1887), 4 R. P. C. 508, 515, C. A.; 57 L. T. 31). Apparently, if the wrongful user has been discontinued, relief may be granted (*Benedictus v. Sullivan, Powell & Co.* (1894), 12 R. P. C. 25, 32). So, too, where the mark had on it "By Royal Letters Patent," and the patent had expired, the plaintiff failed (*Cheavin v. Walker* (1877), 5 Ch. D. 850, 862, C. A.); see also *Re Boake (A.), Roberts & Co., Ltd.'s Trade Marks, Boake (A.), Roberts & Co., Ltd. v. Wayland & Co.* (1909), 26 R. P. C. 251, *per* NEVILLE, J., at p. 257; *Hubback (Thomas) & Son, Ltd. v. Brown (William), Sons & Co.* (1900), 17 R. P. C. 638, 647, C. A. It is otherwise where "patent" has become part of the name of the article or the word is not used so as to give the idea that the patent still exists (*ibid.*; see also *Ransome v. Graham* (1882), 51 L. J. (CH.) 897; *Gridley v. Swinborne* (1888), 5 T. L. R. 71); see also pp. 774, 775, *post*.

(*s*) *Oakey & Son v. Dalton* (1887), 4 R. P. C. 313; 35 Ch. 700.

(*t*) *Edelstein v. Edelstein* (1863), 1 De G. J. & Sm. 185, 199; *Upmann v. Forester* (1883), 24 Ch. D. 231; *Slazenger v. Spalding (A. G.) and Brothers* (1909), 27 R. P. C. 20; [1910] 1 Ch. 257. Where, however, an isolated act of a servant, without his principal's knowledge or authority, is alone proved, an injunction will not be granted (*Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, H. L.; *Kodak, Ltd. v. Grenville* (1908), 124 L. T. Jo. 458). So, too, an act committed by inadvertence or in ignorance will not give ground for an injunction, if the defendant promptly admits the plaintiff's rights (*Upman v. Elkan* (1871), 7 Ch. App. 130); see also note (*h*), p. 772, *post*.

(*u*) This rule applied before the passing of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91) (*Edelstein v. Edelstein* (1863), 1 De G. J. & Sm. 185, 199), and was followed in *Ellen v. Slack* (1880), 24 Sol. Jo. 290 (Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91)), and in *Slazenger v. Spalding (A. G.) and Brothers, supra* (Trade Marks Act, 1905 (5 Edw. 7, c. 15), where, however, it does not appear that attention was drawn to the fact that the Trade Marks Act, 1905 (5 Edw. 7, c. 15), is the first to give a statutory right to a monopoly of the mark; see *Horsfield v. Walkden (John) & Co., Ltd.* (1910), 28 R. P. C. 175, 178. In taking an account of profits the plaintiff is entitled to see the names of the defendant's customers (*Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1896), 14 R. P. C. 1, C. A.; [1896] 2 Ch. 54). Where the mark is liable to deceive the ultimate purchaser, the account will not be restricted to cases where the retailer was deceived (*Lever v. Goodwin* (1887), 4 R. P. C. 492, 507, C. A.; 36 Ch. D. 1). As to the measure of damages, see *Alexander & Co. v. Henry & Co.* (1895), 12 R. P. C. 360; and see, generally, titles DAMAGES, Vol. X., pp. 331 *et seq.*; INJUNCTION, Vol. XVII., p. 259.

the register is not in itself notice (a). An order for the delivery up or destruction of the infringing articles or labels or erasure of the mark may also be made (b).

SECT. 9.
Legal Proceedings.

1296. In any legal proceeding in which the validity of a trade mark comes into question the court may certify to this effect, and if it so certifies, then, in any subsequent legal proceedings in which such validity comes into question, the proprietor, if successful, will have his costs as between solicitor and client, unless the court otherwise certifies (c). In all cases where the registrar appears his costs are in the discretion of the court, but he cannot be ordered to pay costs (d).

Certificate
as to validity.

SECT. 10.—Offences.

1297. It is a misdemeanour to make or cause to be made a false entry on the register or a document falsely purporting to be a copy of an entry in such register, or to produce or tender, or cause to be produced or tendered, in evidence any such writing, if the person knows the entry or writing to be false (e).

False entries.

It is an offence punishable by a fine not exceeding £5 to represent falsely a trade mark as registered. The wrongful use in connexion with a trade mark of the word "registered," or any words to the same effect, constitutes this offence (f).

User of marks.

(a) *Slazenger v. Spalding (A. G.) and Brothers* (1909), 27 R. P. C. 20, 24; [1910] 1 Ch. 257.

(b) See note (l), p. 773, *post*.

(c) Trade Marks Act, 1906 (5 Edw. 7, c. 15), s. 46. It should be noted that this provision differs from the earlier Act and from the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 35, in that it extends to other proceedings than actions, but is limited to cases where validity comes into question in both proceedings. A subsequent proceeding means one started after the certificate has been given (*Automatic Weighing Machine Co. v. International Hygienic Society* (1889), 6 R. P. C. 475, 480). There is no appeal against the grant of such certificate (*Haslam v. Hall* (1888), 5 R. P. C. 144, C. A.).

(d) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 48. The general rule is that the unsuccessful party pays the registrar's costs. In the case of an application to register which is unsuccessfully opposed by the registrar, the latter usually gets his costs in the first court, but not necessarily in the Court of Appeal (*Re California Fig Syrup Co.'s Application for the Registration of a Trade Mark* (1909), 26 R. P. C. 846, 864, C. A.; [1910] 1 Ch. 130); *Re Eastman Photographic Materials Co.'s Application for a Trade Mark* (1898), 15 R. P. C. 487, H. L.; [1898] A. C. 571; *Re Du Cros' (W. & G.), Ltd., Application for the Registration of a Trade Mark* (1911), 29 R. P. C. 65, 78, C. A.). In *Re Colman's (J. and J.) Application for a Trade Mark* (1894), 11 R. P. C. 129, 137; [1894] 2 Ch. 115, the successful appellants were not ordered to pay the registrar's costs; see also *Re Bagots, Hutton & Co., Ltd.'s Application for the Registration of a Trade Mark* (1912), 29 R. P. C. 702.

(e) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 66; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 743; Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), ss. 3 (3) (g), 4, 6.

(f) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 67. The fact that the mark is registered abroad, and that there are words on the goods showing that they are of foreign manufacture, is no defence (*Wright, Crossley & Co.*

SECT. 10.
Offences.
 —
 Royal Arms.

The wrongful use of the Royal Arms, or of any title or devices calculated to lead to the belief that the person is employed by or supplies goods to a member of the Royal Family, is punishable by a fine of £20 (*g*). An action for an injunction to restrain such use may also be brought by a person authorised to use such device or title or authorised by the Lord Chamberlain to bring the action (*h*).

Part II.—Compulsory Marks.

SECT. 1.—*In General.*

Statutory
 marks.

1298. There are certain statutes requiring the marking of particular articles. Among these are the following:—anchors (*i*), chain cables (*k*), foodstuffs, such as bread, margarine, coffee and chicory (*l*), gunbarrels (*m*), gunpowder (*n*), hops (*o*), Irish linen (*p*), plate (*q*), poisons (*r*), weights and measures (*s*).

There are also certain requirements imposed for revenue

v. Dobbin (William) & Co. (1897), 15 R. P. C. 21; *MacSymons Stores, Ltd. v. Shuttleworth* (1898), 15 R. P. C. 748).

(*g*) Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 106. This provision is still unrepealed.

(*h*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 68; *Royal Warrant Holders' Association v. Deane (Edward) and Beale, Ltd.* (1911), 28 R. P. C. 721; 105 L. T. 623; compare title INJUNCTION, Vol. XVII., pp. 258, 259. The right, if any, to use a trade mark containing such title or device is not affected by the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 68; see also p. 698, *ante*.

(*i*) See title TRADE AND TRADE UNIONS, pp. 544 *et seq.*, *ante*.

(*k*) See *ibid.*

(*l*) See title FOOD AND DRUGS, Vol. XV., pp. 44, 48, 55, 56, 63, 65. As to the branding of butter casks in Ireland, see Butter Trade (Ireland) Act, 1812 (52 Geo. 3, c. 134), s. 14.

(*m*) Gun Barrel Proof Act, 1868 (31 & 32 Vict. c. cxiii.), ss. 108 *et seq.*; see title TRADE AND TRADE UNIONS, pp. 546 *et seq.*, *ante*.

(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 32. Gunpowder sold in quantities greater than one pound is to be marked as such, the penalty being a fine not exceeding £2 and forfeiture of the goods (*ibid.*); see title EXPLOSIVES, Vol. XIV., p. 381.

(*o*) See title AGRICULTURE, Vol. I., pp. 291, 292. As to the adulteration of hops, see title FOOD AND DRUGS, Vol. XV., p. 69.

(*p*) Irish Handloom Weavers Act, 1909 (9 Edw. 7, c. 21). Irish handwoven linen, damask, cambric or diaper is to be marked with specified words; the omission or causing the omission of marking or the sale of goods falsely marked is an offence, the penalty for the first offence being a fine not exceeding £10, and for subsequent offences, a fine not exceeding £10 or imprisonment up to six months (*ibid.*). As to the stamping of Irish linen for exportation, see Linen (Trade Marks) Act, 1743 (17 Geo. 2, c. 30); Linen (Trade Marks) Act, 1744 (18 Geo. 2, c. 24). As to the stamping of linen sold or exposed for sale in open fair or market in Ireland, see Linen Manufacturers (Ireland) Act, 1835 (5 & 6 Will. 4, c. 27), s. 4.

(*q*) See pp. 723 *et seq.*, *post*.

(*r*) See title MEDICINE AND PHARMACY, Vol. XX., p. 384.

(*s*) See title WEIGHTS AND MEASURES.

purposes (a), or applicable to articles which are protected by letters patent (b) or which bear registered designs (c).

SECT. 1.
In General.

SECT. 2.—Gold and Silver Plate.

1299. From a very early date the standard and marking of gold and silver plate have been enforced by statute (d). The present state of the law is that gold plate may be either 9, 12, 15, 18 or 22 carat (e), and silver either 11 oz. 2 dwt. or 11 oz. 10 dwt. fine silver to the pound troy (f), and that all plate manufactured in this country must be marked with the appropriate marks. The method of and authorities for such marking are likewise settled by statute (g).

Marking of
gold and
silver plate.

(a) See title REVENUE, Vol. XXIV., pp. 608 (tobacco), 610 (vessels and utensils entered by a licensed excise trader), 621 (playing cards). As to the marking of articles of foreign manufacture, see Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 42, 153; Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 16; Merchandise Marks Act, 1911 (1 & 2 Geo. 5, c. 31); and title FOOD AND DRUGS, Vol. XV., pp. 55, 56.

(b) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 33. There is no compulsory marking in this case, but the omission to mark might afford a defence to a claim for damages.

(c) See p. 740, *post*.

(d) As to the history and present state of the law as to plate, see, further, Safford, Law of Merchandise Marks, pp. 204 *et seq.*

(e) Prior to 1575, gold ware had to be equal to "the touch of Paris" (19½ carat). By stat. (1575-6) 18 Eliz. c. 15, it had to be at least 22 carats (containing 22 parts of gold out of a mass of 24; see Murray, Oxford English Dictionary, *sub voce* Carat); by the Gold Plate (Standard) Act, 1798 (38 Geo. 3, c. 69), the 18 carat standard was also permitted, the marks for the two standards to be distinct. Lower standards not less than 8 carats might, by the Gold and Silver Wares Act, 1854 (17 & 18 Vict. c. 96), be fixed by Order in Council, and by an Order in Council dated 11th December, 1854, the 9, 12 and 15 carat standards were authorised (Stat. R. & O. Rev., Vol. X., Plate). The Gold and Silver Wares Act, 1854 (17 & 18 Vict. c. 96), applies former provisions as to marking, penalty for not marking etc., to plate of all these standards, and in addition provides penalties for marking plate of a lower standard as of a higher standard.

(f) Prior to 1575, silver plate was to be as fine as sterling. By stat. (1575-6) 18 Eliz. c. 15, the 11 oz. 2 dwt. standard was set up, and by stat. (1696-7) 8 & 9 Will. 3, c. 8, the standard was raised to 11 oz. 10 dwt. By the Plate Duty Act, 1719 (6 Geo. 1, c. 11), both these standards were authorised, different marks being prescribed.

(g) Stat. (1423) 2 Hen. 6, c. 17 (silver); stat. (1696-7) 8 & 9 Will. 3, c. 8 (silver); stat. (1700-1) 12 & 13 Will. 3, c. 4 (silver); stat. (1702) 1 Anne, c. 3 (silver); Plate Duty Act, 1719 (6 Geo. 1, c. 11) (silver); Plate (Offences) Act, 1738 (12 Geo. 2, c. 26), ss. 1, 5 (penalty of £10 for selling, exporting etc. gold and silver articles not up to standard or not marked), applied by Gold Plate (Standard) Act, 1798 (38 Geo. 3, c. 69) to 18 carat standard; Plate (Offences) Act, 1738 (12 Geo. 2, c. 26) (Newcastle marks); Plate Assay (Sheffield and Birmingham) Act, 1772 (13 Geo. 3, c. 52) (Sheffield and Birmingham marks); Gold and Silver Wares Act, 1854 (17 & 18 Vict. c. 96) (9, 12 and 15 carat standards). The marks are the maker's mark, the assay marks denoting the standard and the place where assay took place, and the year mark; see stat. (1696-7) 8 & 9 Will. 3, c. 8; stat. (1700-1) 12 & 13 Will. 3, c. 4. The King's head is no longer necessary, since the duty on plate has been

SECT. 2. The counterfeiting of these marks is a felony (*h*). These regulations apply generally to all gold and silver ware, but certain articles are Gold and Silver Plate. excepted (*i*).

Imported
plate.

Imported plate, not being battered (*a*), or plate that would not be exempt from marking if made in this country, must be marked on entry, and if it is not up to the proper standard will not be allowed to be brought into this country (*a*). An exception is made in the case of plate declared to be for private use and not for sale, but such plate must be assayed and marked before it is sold; if it is then found to be below standard it may be treated as foreign plate brought for assay on importation and sent out of the country (*b*).

Watch cases.

1300. Any person bringing watch cases for assay must make a declaration where they were made, and if the cases are foreign-made a distinguishing mark is put on them (*c*). A watch contained in a case

abolished; see stat. (1784) 24 Geo. 3, sess. 2, c. 53, s. 5 (now repealed); Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 10. A declaration must now be made as to where plate was manufactured (Hall-marking of Foreign Plate Act, 1904 (4 Edw. 7, c. 6)). As to the marking of foreign plate before that Act, see Customs (Amendment) Act, 1842 (5 & 6 Vict. c. 56), s. 6; Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59; Customs Tariff Act, 1876 (39 & 40 Vict. c. 35), s. 2. The marks of the various makers can be entered at any assay office, and their manufactures can be assayed at any office where such names are entered (Gold and Silver Wares Act, 1854 (17 & 18 Vict. c. 96), s. 2).

(*h*) Gold and Silver Wares Act, 1844 (7 & 8 Vict. c. 22), s. 2; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 758, 759; Forgery Act, 1913, (3 & 4 Geo. 5, c. 27), ss. 5 (4), 6, 8 (2) (a), 15, 16.

(*i*) The excepted goods are jewellers' works, namely, articles in which stones are set (other than mourning rings), jointed night earrings of gold or gold springs of lockets (Plate (Offences) Act, 1738 (12 Geo. 2, c. 26), s. 2), gold vessels etc. so richly chased that they cannot be assayed without injury, or gold articles (not weighing 10 dwt.) so small or thin that they cannot be marked, and certain other named articles (*ibid.*, s. 6). The provisions of *ibid.*, s. 6, with regard to silver ware were repealed by the Silver Plate Act, 1790 (30 Geo. 3, c. 31), s. 1, and fresh lists of exempted silver articles are set out by *ibid.*, ss. 3—5, including articles under 5 dwt. (with certain exceptions), tippings, swages or mounts under 10 dwt. (with certain exceptions), and certain other articles, including chains and lockets. Wedding rings must now be marked (Wedding Rings Act, 1855 (18 & 19 Vict. c. 60). An article liable to be stamped does not cease to be so liable because something is added; thus, a gold match-box must be stamped, although it has an enamel top (*Fabergé v. Goldsmiths' Co.*, [1911] 1 Ch. 286, 295), though, apparently, a mere gold foundation for enamel need not be (*ibid.*). Watches in watch bracelets must be marked (*ibid.*, at p. 297).

(*a*) Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59; Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 10. Watch cases imported from abroad before the 1st June, 1907, are exempted from these provisions (Assay of Imported Watch Cases (Existing Stocks Exemption) Act, 1907 (7 Edw. 7, c. 8), s. 1). By the Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 4, hand-chased inlaid bronze or filigree work of Oriental pattern is excepted. Foreign plate has a distinctive mark "F" put thereon (Customs Tariff Act, 1876 (39 & 40 Vict. c. 35), s. 2). As to the effect of these Acts, see *Goldsmiths' Co. v. Wyatt*, [1907] 1 K. B. 95, C. A.; *Fabergé v. Goldsmiths' Co.*, *supra*, at p. 294. Watch cases containing watches must be presented for assay (*Goldsmiths' Co. v. Wyatt*, *supra*).

(*b*) Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 10.

(*c*) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 8.

marked as made in a particular country is deemed to be made there also (*d*), unless the contrary is stated as provided by the statute (*e*).

SECT. 2.
Gold and
Silver Plate.
Imitation
silver.

1301. It is an offence to put letters or other marks likely to be confused with plate marks on articles resembling silver (*f*). A special exception is made in the case of persons carrying on business within 100 miles of Sheffield, who may mark such goods in certain specified ways (*g*).

Part III.—False Marks and False Trade Descriptions.

1302. The seller of any goods to which a trade mark, or mark, or trade description has been applied is deemed to warrant that such mark is genuine and not forged or falsely applied, or that such trade description is not a false trade description, unless the contrary is expressed in some writing signed by him or on his behalf and delivered at the time of the sale or contract to and accepted by the buyer (*h*).

Warranty of
genuineness.

The application of false marks or false trade descriptions to goods generally is punishable criminally (*i*). Special provision is made in regard to the false marking of buttons (*j*), cutlery (*k*), dyed goods (*l*),

Offences.

(*d*) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 7. As to when a watch is deemed not to be English, see *Williamson v. Tierney* (1900), 17 T. L. R. 174; (1901) 17 T. L. R. 424.

(*e*) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17.

(*f*) Plate Assay (Sheffield and Birmingham) Act, 1772 (13 Geo. 3, c. 52), s. 15 (relating to silver only); compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 759.

(*g*) Plate Assay (Sheffield) Act, 1784 (24 Geo. 3, sess. 2, c. 20).

(*h*) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17.

(*i*) As to offences connected with the application of false trade marks or false trade descriptions, see Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 566 *et seq.*; *Holmes v. Piper* (1913), 30 T. L. R. 28; see also pp. 698, 721, 722, *ante*. As to the meaning of a false trade description, see Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 3; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 567, note (*l*). As to certain cases in which the provisions as to false description do not apply, see Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 18; *Toler v. Bishop* (1895), 73 L. T. 403; *Budd v. Lucas*, [1891] 1 Q. B. 408. The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), does not exempt any person from any action or other proceeding which, but for the provisions of that Act, might be brought against him (*ibid.*, s. 19 (1)).

(*j*) Metal Button Act, 1796 (36 Geo. 3, c. 60). It is an offence to put or cause to be put any word or mark indicating quality on metal buttons, or any word or mark whatever on the under side of such buttons, unless the buttons are gilt, as provided, the penalty being £5 for a quantity less than one gross, and £1 for every gross after the first and forfeiture (*ibid.*, s. 2).

(*k*) Cutlery Trade Act, 1819 (59 Geo. 3, c. 7), s. 3. Only articles of cutlery forged or made by means of the hammer may be marked with a hammer, the penalty being £5 per dozen articles and forfeiture, a similar penalty being imposed for false marks of quality (*ibid.*, s. 4). For falsely marking articles "London" or "London Made" the penalty is £10 per dozen articles and forfeiture (*ibid.*, s. 5).

(*l*) Dyeing Trade (Frauds) Act, 1783 (23 Geo. 3, c. 15), s. 3. All articles "mathered" black according to the directions of the Act are to be marked

PART III.
False
Marks and
False Trade
Descrip-
tions.

linen (*m*), and fabrics stated to be non-inflammable (*n*),^{*} and to the obliteration or forgery of the marks used by Government departments (*o*).

Part IV.—Designs.

SECT. 1.—*Protection of Designs.*

Statutory
protection.

1303. The law as to the protection of designs is of purely statutory origin. Before 1883 there were two statutes of importance in force, the one dealing with purely artistic designs, the other with designs for the shape or configuration of articles of utility (*a*). Both of these statutes, with the amending enactments, were replaced in 1883 by the Patents, Designs and Trade Marks Act, 1883 (*b*), which, in its turn, was replaced in 1907 by the Patents and Designs Act, 1907 (*c*).

“Design.”

“Design” means any design, not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814 (*d*), applicable to any article, whether the design is applicable for the pattern, or for the shape and configuration, or for the

with a red rose and a blue rose; articles “wooded” black throughout are to be marked with a blue rose only, the penalty for improper use of marks being £4 per piece (Dyeing Trades (Frauds) Act, 1783 (23 Geo. 3, c. 15), s. 3).

(*m*) Linen (Trade Marks) Act, 1743 (17 Geo. 2, c. 30), ss. 1, 2; Linen (Trade Marks) Act, 1744 (18 Geo. 2, c. 24), s. 3. The penalty for erasure of marks or false marking of linen made in Ireland is £5 per piece (*ibid.*).

(*n*) Fabrics (Misdescription) Act, 1913 (3 & 4 Geo. 5, c. 17). It is an offence to sell or to have in possession for the purposes of sale any textile fabric or article made thereof described verbally or otherwise as non-inflammable unless it conforms with the standard to be prescribed by regulations, the penalty for a first offence being £10, and for each subsequent offence £50 (*ibid.*, s. 1). The burden is on the person found with the fabric to show that it is not for sale (*ibid.*, s. 4). If the defendant has bought from a person resident within the United Kingdom who has sold under a warranty, and has taken reasonable steps to ascertain the truth of and in fact believed the statements contained therein, he may lay an information against such person and is exempt from any fine (*ibid.*, s. 3).

(*o*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 513; Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), ss. 3 (2) (*e*), (3) (*e*), 4, 5 (4), 6, 8 (1) (*c*), 15, 16.

(*a*) Stat. (1842) 5 & 6 Vict. c. 100; stat. (1843) 6 & 7 Vict. c. 65.

(*b*) 46 & 47 Vict. c. 57.

(*c*) 7 Edw. 7, c. 29. In considering the effect of earlier decisions the following repealed Acts dealing wholly or partly with designs should be considered:—Stats. (1842) 5 & 6 Vict. c. 100; (1843) 6 & 7 Vict. c. 65; (1850) 13 & 14 Vict. c. 104; (1858) 21 & 22 Vict. c. 70; (1861) 24 & 25 Vict. c. 73; Copyright of Designs Act, 1875 (38 & 39 Vict. c. 93), all of which were repealed by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), which in turn was amended by the Patents, Designs and Trade Marks (Amendment) Act, 1885 (48 & 49 Vict. c. 63); Patents Act, 1886 (49 & 50 Vict. c. 37); and the Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), which Acts were repealed by the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 98.

(*d*) 54 Geo. 3, c. 56; repealed by the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46); as to the designs referred to, see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 206.

SECT. 1.
Protection
of Designs.

ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining or any other means whatever, manual, mechanical or chemical, separate or combined (*e*).

“Article” means, as respects designs, any article of manufacture (*f*), and any substance, artificial or natural, or partly artificial and partly natural (*g*):

“Copyright” means the exclusive right to apply a design to any article in any class in which the design is registered (*h*):

“Proprietor of a new and original design” (1) where the author (*i*) of the design, for good consideration (*k*), executes the work for some other person, means the person for whom the design is so executed (*l*); and (2) where any person acquires the design or the right to apply (*m*) the design to any article, either exclusively of any other person or otherwise (*n*), means in respect of and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired (*o*); and (3) in any other case means the author of the design (*p*); and where the property

“Article.”

“Copyright.”

“Proprietor
of a new and
original
design.”

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93. This definition differs from that in the Copyright Act, 1842 (5 & 6 Vict. c. 100), by the omission of the words “the ornamenting of” before “any article.” As to the meanings to be attached to shape, configuration etc., see note (*b*), p. 734, *post*.

(*f*) Samples bearing the design are articles of manufacture; see note (*i*), p. 740, *post*.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*h*) *Ibid*.

(*i*) The question who is the author is determined on the same principle as the question who is the first and true inventor in the case of patents; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 130 *et seq*. It is the person who substantially originated the idea of the new design, though he may have discussed it with others and they may have suggested small improvements (*Re Pearson's (Frederick) Designs, Pearson v. Morris Wilkinson & Co.* (1906), 23 R. P. C. 738, 743); but where the only new feature is suggested to the applicant by another person, the applicant is not the author (*Doble v. Spaendonck* (1910), 27 R. P. C. 440).

(*k*) The giving of an order for the article to which the design is applied is not sufficient to transfer the rights in the design (*Doble v. Spaendonck, supra*, at p. 450).

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*m*) A contract for the purchase of goods, even if it gives the sole right of purchase, is not enough, since it does not give the purchaser the right to apply the design (*Jewitt v. Eckhardt* (1878), 8 Ch. D. 404; *Re Guiterman's Registered Design* (1885), 55 L. J. (CH.) 309; *Woolley v. Broad* (1892), 9 R. P. C. 208; [1892] 1 Q. B. 806; see also *Doble v. Spaendonck, supra*; *Lazarus v. Charles* (1873), L. R. 16 Eq. 117). In *Jewitt v. Eckhardt, supra*, JESSEL, M.R., was of opinion that there could be no transmission of rights before registration, except, of course, where the work was executed by the author for some other person for good consideration, and that all assignments must be in writing; but this last point was partly based on words in the Copyright Act, 1842 (5 & 6 Vict. c. 100), not occurring in the Patents and Designs Act, 1907 (7 Edw. 7, c. 29). Compare title PATENTS AND INVENTIONS, Vol. XXII., pp. 183, 184.

(*n*) This would seem clearly to include a licensee; see, however, *Woolley v. Broad, supra*.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*p*) *Ibid*.

SECT. 1.
Protection
of Designs.

in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person (*q*).

SECT. 2.—*The Register of Designs.*

Purpose of
register.

1304. A register of designs is kept at the Patent Office (*r*), in which the names of proprietors, notices as to transmissions of interest, and licences are entered (*s*). Any person aggrieved by any error in the registration or by any wrongful entry therein or omission therefrom may apply to the court to rectify the register (*t*).

This power is especially important in the case of designs, and it is a common mode of challenging validity (*u*). The Comptroller (*a*) has also power to rectify any clerical error in the representation of a design or in any matter entered in the register (*b*).

Inspection of
register.

1305. For a period of five years from the registration of the design in the case of designs registered in the textile classes (*c*), and two years in other classes, a design is open to inspection only by the proprietor or by a person authorised in writing by him or the Comptroller or the court (*d*). If, however, the application for the registration of a design is refused on the ground of identity with a design already registered, the applicant is entitled to inspect the former registration (*e*). Means are also provided for a person to ascertain whether a particular design is registered and in respect of what goods (*f*).

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*r*) As to the Patent Office generally, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 152 *et seq.*

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 52; see also *ibid.*, ss. 66, 67, 70, 71; Designs Rules, 1908 (Stat. R. & O., 1907, p. 77), rr. 43—50, 52—69, 95—97. As to what entries should be made in the register and the procedure generally see title PATENTS AND INVENTIONS, Vol. XXII., pp. 179 *et seq.*; and pp. 735 *et seq.*, *post*.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 93.

(*u*) The expression "any person aggrieved" is widely interpreted (see pp. 714, 715, *ante*), and generally includes any person who is or probably might be injured or affected by the error, entry, or omission in question. A person who has registered the same design even in another class is such a person (*Re Read and Gresswell's Design* (1889), 6 R. P. C. 471; 42 Ch. D. 260). Where an agent had by mistake registered the design in his own name, rectification by the substitution of the principal's name was ordered (*Werner Motors, Ltd. v. Gamage (A. W.), Ltd.* (1903), 21 R. P. C. 137; *Re Grocott's Design* (1899), 17 R. P. C. 139). Rectification was also ordered where a company had changed its name (*Re Pneumatic Tyre Co.'s Registered Designs* (1894), 11 R. P. C. 636). The applicant must give particulars of the objections to the validity of the design. The respondent is not required to give the grounds on which he proposes to support the registration (*Re Bayer's Design* (1906), 23 R. P. C. 553, 557, C. A.). As to the procedure where the respondent is resident out of the jurisdiction, see *Re Cook and Bernheimer Co.'s Design* (1913), 30 R. P. C. 407.

(*a*) As to the position of the Comptroller, see title PATENTS AND INVENTIONS, Vol. XXII., p. 153, note (*f*).

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 70 (*c*); Designs Rules, 1908, rr. 51, 52.

(*c*) As to the textile classes, see p. 736, *post*.

(*d*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 56; Designs Rules, 1908, r. 69.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 56 (1).

(*f*) *Ibid.*, s. 57; Designs Rules, 1908, rr. 59, 60. The opinion of the

SECT. 3.—*Registrable Designs.*SECT. 3.
Registrable
Designs.“New” or
“original.”

1306. A design may be registered which is new or original (*g*), irrespective of whether the end sought by such novelty or originality be beauty or utility, or a combination of the two (*h*). There is no statutory definition of the terms “new” or “original” (*i*), and it is a question of fact in each case whether a design comes within these terms. There are, however, certain general rules to be deduced from the decisions of the courts which assist in arriving at a conclusion on this question.

It must be remembered that a design is not, properly speaking, for the article itself, but for something capable of being applied to such article (*k*). In the case of a design for shape this distinction is chiefly a matter of words (*l*), but in other cases it may be of importance, since questions of novelty and infringement have to be determined not merely by looking at the design as shown in the drawing lodged with the application, but also by considering how its appearance would be affected by alterations in the shape of the article to which it is applied (*m*).

Purpose of
design.

1307. The design must therefore be considered as applied to the articles for which it is registered, and valid registration may be obtained for the application of a design such as a picture to certain articles, although the picture itself is old (*n*). The use for one class of materials or articles of a design which has previously been

New applica-
tion of old
design.

Comptroller as to whether the existing registration covers the design submitted would not affect the result of an action for infringement.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 49 (1). It should be noted that in *ibid.*, s. 50 (see notes (*r*), (*s*), p. 733, *post*), the phrase is “new and original.”

(*h*) See note (*i*), p. 732, *post*.

(*i*) It is probably not possible to distinguish clearly between these terms, but it would seem that the first is the more comprehensive, and that a design may be “new” although it is not “original”; see *Sherwood and Cotton v. Decorative Art Tile Co.* (1887), 4 R. P. C. 207; *Re Rollason's Registered Design* (1897), 14 R. P. C. 909, C. A.; *Hutchison, Main & Co., Ltd. v. St. Mungo Manufacturing Co.* (1907), 24 R. P. C. 265. Of course, if this interpretation is accepted, it makes “original” mere surplusage. In *Re Morton's Design* (1899), 17 R. P. C. 117, FARWELL, J., at p. 121, doubted whether there is in fact any distinction.

(*k*) *Dover, Ltd. v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (1910), 27 R. P. C. 498, 503, C. A.; [1910] 2 Ch. 25; *Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd.* (1896), 13 R. P. C. 351, C. A., *per* LINDLEY, L.J., at p. 359; [1896] 2 Ch. 38; *Re Bayer's Design, Bayer v. Symington (R. & W. H.)* (1907), 25 R. P. C. 56, C. A.; *Norton v. Nicholls* (1859), 1 E. & E. 761.

(*l*) *Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd.*, *supra*.

(*m*) *Re Bayer's Design, Bayer v. Symington (R. & W. H.)*, *supra*. From the judgments in this case it appears that a design must be something capable of application to different articles, and that the method of such application should sufficiently appear from the drawing and description.

(*n*) *Saunders v. Wiel* (1892), 10 R. P. C. 29, C. A.; [1893] 1 Q. B. 470, overruling *Adams v. Clementson* (1879), 12 Ch. D. 714; *Mulloney v. Stevens* (1864), 10 L. T. 190; see also *Dover, Ltd. v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff*, *supra*, *per* BUCKLEY, L.J., at p. 504. “The novelty of the design consists in so contriving a copy or imitation of the

SECT. 3.
Registrable
Designs.

What registration protects.

used for another will, however, only be considered new or original if these materials or articles are of a different class (o), and not if they are analogous (p).

1308. Although a design may in some cases incidentally protect a mode of manufacture, yet registration cannot be granted for a mode of manufacture in itself (q). If what is registered, however, has the requisites of a novel and original design, it is no objection that it could also have been protected by letters patent (r), or that it is in fact protected by letters patent granted to the proprietor, provided that there has been no prior publication (s).

figure, which may itself be common to the world, in such a manner as to render it applicable to an article of manufacture" (*Saunders v. Wiel* (1892), 10 R. P. C. 29, C. A., per BOWEN, L.J., at p. 33; [1893] 1 Q. B. 470. It seems, however, from the judgments in this case that if the design is novel as applied to the articles for which it is registered and analogous articles, the court requires little, if any, ingenuity in the adaptation.

(o) *Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd.* (1896), 13 R. P. C. 351, C. A.; [1896] 2 Ch. 38. The word "class" here does not refer to the classes into which articles are divided under the Designs Rules, but to the nature of the articles etc. (*ibid.*; *Re Read and Gresswell's Design* (1889), 6 R. P. C. 471; 42 Ch. D. 260; *Re Bach's Design* (1889), 6 R. P. C. 376; 42 Ch. D. 661).

(p) The following are examples, actual or suggested, where materials or articles were not considered analogous and the design would therefore be capable of registration:—A design for a kitchen range fire-door having a moulding on the top, which, in assisting draught, fulfilled a function in no way analogous to anything in its former use, although similar mouldings on doors for cabinet and other purposes were old (*Walker, Hunter & Co. v. Falkirk Iron Co.* (1887), 4 R. P. C. 390; 14 R. (Ct. of Sess.) 1072; *Hecla Foundry Co. v. Walker, Hunter & Co.* (1889), 6 R. P. C. 554, H. L.; 14 App. Cas. 550); a coal scuttle and a bonnet (*Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd., supra*, per LINDLEY, L.J., at p. 359); a design formerly used for sword blades for a pattern on silk or book edges (*Dover, Ltd. v. Nürnberger Celluloidware Fabrik Gebrüder Wolff* (1910), 27 R. P. C. 498, C. A., per BUCKLEY, L.J., at p. 504; [1910] 2 Ch. 25). The following are examples, actual or suggested, where materials or articles were considered analogous, and the design, therefore, would not be registrable:—The application to bicycle handles of a pattern common to knife handles (*Dover, Ltd. v. Nürnberger Celluloidware Fabrik Gebrüder Wolff, supra*); the application to wall papers of a design used for tablecloths (*ibid.*, per BUCKLEY, L.J., at p. 504); a design for a lamp-shade in glass similar to a former one in linen (*Re Bach's Design, supra*; see also *Re Read and Gresswell's Design, supra*); a design for an electric lamp similar to a design for a gas lamp (*Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd., supra*); the use in perambulators of forms used in carriages (*Simmons v. Mathieson & Co., Ltd.* (1911), 28 R. P. C. 486, C. A.); the use for wrist bracelets of forms used for belts (*Pearson & Sons v. Harris (D. B.) & Sons, Ltd.* (1912), 29 R. P. C. 632).

(q) *Re Bayer's Design, Bayer v. Symington (R. & W. H.)* (1907), 25 R. P. C. 56, C. A. (corset with seams cut horizontally); *Moody v. Tree* (1892), 9 R. P. C. 333; 40 W. R. 558 (basket made by osiers being worked in singly with the butt ends outwards); *Cooper v. Symington* (1893), 10 R. P. C. 264 (method of fixing corset busks); see also *Pugh v. Riley Cycle Co., Ltd.* (1912), 29 R. P. C. 196; [1912] 1 Ch. 613; *Pearson & Sons v. Harris (D. B.) & Sons, Ltd., supra*.

(r) *Walker, Hunter & Co. v. Falkirk Iron Co.* (1887), 4 R. P. C. 390; 14 R. (Ct. of Sess.) 1072; *Rogers v. Driver* (1850), 16 Q. B. 102.

(s) *Werner Motors, Ltd. v. Gamage (A. W.), Ltd.* (1904), 21 R. P. C. 621, C. A.; [1904] 2 Ch. 580. As to prior publication, see p. 733, *post*.

A design cannot be considered as protecting a combination of movements of machinery used in its manufacture (*t*).

SECT. 3.
Registrable
Designs.

Combinations.

1309. A design may be new or original though the parts of which it is composed are old (*a*); but it must not be understood that any two matters can be combined together and registered as a new design. Although the requirements for a valid combination are not as strict as in the case of patents, there must, as a general rule, be some artistic or other advantage from the combination besides that possessed by the parts separately (*b*). Again, it seems that omission of certain parts might also constitute novelty, but not where such omission is a mere result of a new use of the article (*c*).

1310. The court, while bearing in mind that the law of designs exists for the purpose of protecting innovations which do not involve the invention necessary for the subject-matter of letters patent (*d*), yet rightly considers that there must be some check on the hampering of industries which would result if every unimportant alteration of shape or pattern could become the subject of a monopoly (*e*). The court, therefore, requires that a design should show some new effect clearly distinguishable by the eye from what has gone before (*f*), and that the change should be such that some degree of real mental activity has been needed for its production (*g*).

Improvements.

The criteria on which the court acts differ, however, according as the improvement has or has not artistic merit. A new and agreeable artistic effect often defies analysis of its causes and the

Artistic merit.

(*t*) *Re Plackett's Registered Design* (1891), 9 R. P. C. 436, 438.

(*a*) *Sherwood and Cotton v. Decorative Art Tile Co.* (1887), 4 R. P. C. 207; *Heinrichs v. Bastendorff* (1893), 10 R. P. C. 160; *Re Rollason's Registered Design* (1897), 14 R. P. C. 909, C. A.; 14 T. L. R. 71; *Harrison v. Taylor* (1859), 4 H. & N. 815, Ex. Ch., reversing S. C. (1858), 3 H. & N. 301; *R. v. Firmin* (1851), 15 J. P. 740.

(*b*) It seems doubtful if there can be a registration for a combination of separate articles even where they contribute to one object; compare *R. v. Bessell* (1851), 16 Q. B. 810. In the following cases combinations were held registrable:—*Heinrichs v. Bastendorff*, *supra* (writing table, the various parts of which were old); *Knowles (S.) & Co., Ltd. v. Bennett (John) & Sons* (1895), 12 R. P. C. 137; *Nevill v. Bennett (John) & Sons* (1898), 15 R. P. C. 412. In the following cases combinations were held not registrable:—*Hothersall v. Moore* (1891), 9 R. P. C. 27 (combination of old red border with yellow chamois leather centre); *Lazarus v. Charles* (1873), L. R. 16 Eq. 117 (combination of two old baskets to form double basket); *Mulloney v. Stevens* (1864), 10 L. T. 190 (three ribbons and a button, all considered old, combined into a badge; this, however, is a very doubtful case, and is overruled in part by *Saunders v. Wiel* (1892), 10 R. P. C. 29, C. A.; [1893] 1 Q. B. 470); see also *Gramophone Co., Ltd. v. Magazine Holder Co.* (1911), 28 R. P. C. 221, H. L.; 104 L. T. 259.

(*c*) *Re Clarke's Registered Design*, *Clarke v. Julius Saxe & Co., Ltd.* (1896), 13 R. P. C. 351, C. A., *per* LINDLEY, L.J., at p. 360; [1896] 2 Ch. 38.

(*d*) *Harrison v. Taylor*, *supra*.

(*e*) *Re Le May's Registered Design*, *Le May v. Welch* (1884), 28 Ch. D. 24, C. A.; *Lazarus v. Charles*, *supra*; *Smith v. Hope Brothers* (1889), 6 R. P. C. 200.

(*f*) See the cases cited in note (*e*), *supra*.

(*g*) *Dover, Ltd. v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (1910), 27 R. P. C. 498, C. A., *per* BUCKLEY, L.J., at p. 503; [1910] 2 Ch. 25.

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eye rightly appreciates it as something really different from what has gone before, without considering in what the distinction consists (*h*). When, however, the novelty of the design does not appeal to the sense of artistic pleasure (*i*), as in the case of a mere alteration of the shape of some article adopted for reasons of convenience, it is necessary to consider more closely in what the real difference consists, and in such a case the court requires some clearly marked and defined difference of the class that the eye can detect and remember (*k*).

Increased
utility.

The eye is the sole judge of the existence of a difference between a design and what has gone before (*l*), but in judging of the importance of that difference it would seem that other factors may properly be taken into account. Although increased utility is not a necessary ingredient of a novel design (*m*), it may be of assistance in showing that it is really new and distinct from what has gone before, since, had such variation in fact been obvious and needed no mental activity, the probability is that it would have been made before, and on account of its increased utility would have persisted (*n*).

(*h*) Compare *Re Rollason's Registered Design, Heath (Samuel) & Sons, Ltd. v. Rollason* (1898), 15 R. P. C. 441, H. L., per Lord HERSCHELL, at p. 447; 14 T. L. R. 478.

(*i*) Of course, the protection given by the law as to the registration of designs is not confined to those possessing artistic merit; see, for example, the designs in question in *Hecla Foundry Co. v. Walker, Hunter & Co.* (1889), 6 R. P. C. 554, H. L.; 15 App. Cas. 550; *Tyler & Sons v. Sharpe Brothers & Co.* (1893), 11 R. P. C. 35; *Leatheries, Ltd. v. Lycett Saddle and Motor Accessories Co., Ltd.* (1909), 26 R. P. C. 166. The dictum of Lord HALSBURY in *Gramophone Co., Ltd. v. Magazine Holder Co.* (1911), 28 R. P. C. 221, H. L., at p. 226; 104 L. T. 289, must be considered as confined to the class of designs there in question. The Patents and Designs Act, 1907 (7 Edw. 7, c. 29), covers the designs protected by the stat. (1843) 6 & 7 Vict. c. 65, which was intended solely for articles of utility; compare *Windover v. Smith* (1863), 32 Beav. 200, per ROMILLY, M.R., at p. 206.

(*k*) *Re Le May's Registered Design, Le May v. Welch* (1884), 28 Ch. D. 24, 33, C. A.; *Re Smith's Registered Design, Smith v. Hope Brothers* (1889), 6 R. P. C. 200.

(*l*) *Re Morton's Design* (1899), 17 R. P. C. 117; *Gillard v. Worrall* (1904), 22 R. P. C. 76; *Re Bayer's Design, Bayer v. Symington (R. & W. H.)* (1907), 25 R. P. C. 56, C. A.; *Harrison v. Taylor* (1859), 4 H. & N. 815, Ex. Ch.

(*m*) *Hecla Foundry Co. v. Walker, Hunter & Co.*, *supra*, per Lord WATSON, at p. 559; *Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd.* (1896), 13 R. P. C. 351, C. A., per LINDLEY, L.J., at p. 358; [1896] 2 Ch. 38; *Re Morton's Design, supra*.

(*n*) *Tyler & Sons v. Sharpe Brothers & Co. supra* (where a large sale was considered some evidence of substantial novelty); *Gillard v. Worrall* (1904), 22 R. P. C. 76. There are dicta opposed to this view (see the cases cited in note (*m*), *supra*), but, with the possible exception of *Re Clarke's Registered Design, Clarke v. Julius Saxe & Co., Ltd.*, *supra*, the remarks were directed rather to the non-essentiality of utility, or the point that the protection accorded to the design did not cover other designs attaining the same end, than to the exclusion of the considerations of utility on the question of substantial novelty; compare title PATENTS AND INVENTIONS, Vol. XXII., pp. 150 *et seq.*, where substantial utility is considered some evidence of novelty and subject-matter; and see *Heinrichs v. Bastendorff* (1893), 10 R. P. C. 160, where the conduct of

1311. A registrable design must not have been published in the United Kingdom prior to registration (o), unless it is protected under certain international arrangements (p). The general rules as to what constitutes publication of a design resemble those respecting publication in regard to letters patent (q). The registration of a design in one class or its application to goods of the class for which it is registered does not, however, affect the permissibility or validity of a subsequent registration by the same proprietor of such a design in another class (r). A disclosure to another person in confidence or the publication of a design in breach of good faith, or in the case of textile designs the acceptance of a first and confidential order for goods, does not invalidate subsequent registration (s).

SECT. 3.
Registrable
Designs.

Prior
publication.

SECT. 4.—Construction of Designs.

1312. Before deciding the question of either novelty or infringement, the court has to decide what in fact the registration seeks to protect. In many cases the registration is effected by merely leaving a sample or representation of the design together with a statement of the articles for which it is registered. The difficulty, however, arises, as in the case of specifications of letters patent, that in order to show his design the applicant has usually to show matters which are not part of the design. It is therefore provided that he may leave with his application and drawing a short statement of what he claims as the essential features of his design (t).

Statement of
essential
features.

the infringer in immediately copying the design from the plaintiff's catalogue into his own was held to show that he recognised its substantial novelty; *Walker, Hunter & Co. v. Falkirk Iron Co.* (1887), 4 R. P. C. 390, 14 R. (Ct. of Sess.) 1072; *Hecla Foundry Co. v. Walker, Hunter & Co.* (1889), 6 R. P. C. 554, H. L.; 14 App. Cas. 550.

(o) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 49 (1).

(p) See note (e), p. 736, *post*.

(q) See title PATENTS AND INVENTIONS, Vol. XXII., pp. 146 *et seq.* If even a single article has got into public use, it voids a subsequent registration (*Leatheries, Ltd. v. Lycett Saddle and Motor Accessories Co., Ltd.* (1909), 26 R. P. C. 166). It seems that registration of a design is not publication against a later design registered by the same proprietor, though the protection afforded by the later registration may be limited to the differences (*Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, 491, C. A.; [1896] 1 Ch. 142; compare title PATENTS AND INVENTIONS, Vol. XXII., pp. 147, 148). It is otherwise if the first registration was by another person (*Re Read and Gresswell's Design* (1889), 6 R. P. C. 471; 42 Ch. D. 260). The fact that protection has been obtained by letters patent does not affect a subsequent registration (*Werner Motors, Ltd. v. Gamage (A. W.), Ltd.* (1904), 21 R. P. C. 621, C. A.; [1904] 2 Ch. 580).

(r) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 50. The provision as to use is not confined to use by the proprietor.

(s) *Ibid.* Prior to the Act it was held that mere discussion with a probable customer did not void registration (*Heinrichs v. Bastendorff* (1893), 10 R. P. C. 160), but that where a traveller showed the design to customers and accepted an order, this voided subsequent registration (*Winfield & Son v. Snow Brothers* (1890), 8 R. P. C. 15; *Blank v. Footman, Pretty & Co.* (1888), 5 R. P. C. 653; 39 Ch. D. 678).

(t) Designs Rules, 1908, r. 19. The Comptroller may now require such

SECT. 4.
 Construc-
 tion of
 Designs.

Such a statement is often of the greatest value, since on the one hand it prevents the risk of the application being interpreted as for some feature which is old, and on the other it prevents the registration being confined to cases where non-essential details, only put in to show the real design properly, are also copied. This statement is analogous to the claim in letters patent, its real use being as a disclaimer of non-essential details (*a*). It very frequently takes the form of saying that the design is for shape or pattern or for both (*b*).

Principles
 guiding the
 court.

Whether the application is or is not accompanied by such a statement, the court, in order to interpret it, looks at it with the eye of a craftsman (*c*). Thus, in the absence of a specific statement to the contrary, an applicant is not assumed to claim as an essential detail something which is notoriously old (*d*). Nor is it assumed, unless stated, except in the case of some purely decorative designs (*e*), that he intends to confine himself to the particular shape or kind of common article on which his design is shown where the shape of such article has to be continually varied in practical use (*f*). Again, the limits of the variation which will not prevent an article from being an infringement are wider where the design is broadly new

a statement if he thinks fit; see p. 735, *post*. This statement should be looked at to resolve any doubts as to what is sought to be protected (*Walker, Hunter & Co. v. Falkirk Iron Co.* (1887), 4 R. P. C. 390, 395; 14 R. (Ct. of Sess.) 1072); so, too, where there is more than one drawing, any doubtful point in one may be decided by reference to another (*Varley v. Keighley Iron Works Society, Ltd.* (1896), 14 R. P. C. 169). In interpreting the drawing the nature of the article must be taken into account (*Re Rollason's Registered Design* (1897), 14 R. P. C. 909, C. A.; 14 T. L. R. 71).

(*a*) See title PATENTS AND INVENTIONS, Vol. XXII., pp. 161 *et seq*.

(*b*) Two identical designs may be registered, one for pattern, one for shape, *Re Pearson's (Frederick) Designs, Pearson v. Morris Wilkinson & Co.* (1906), 23 R. P. C. 738). Where a design is registered for pattern and for shape, all that is protected is the combination (*Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, C. A.; [1896] 1 Ch. 142; *Re Manchester's Design, Manchester v. Umfreville & Son* (1907), 24 R. P. C. 782). It is not, however, the object of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), or the rules thereunder to draw a sharp distinction between shape, configuration etc., or to compel the applicant to elect between them (*Re Rollason's Registered Design, Heath (Samuel) & Sons, Ltd. v. Rollason* (1898), 15 R. P. C. 441, H. L.; 14 T. L. R. 478); and see note (*e*), *infra*.

(*c*) *Varley v. Keighley Ironworks Society, Ltd.* (1896), 14 R. P. C. 169; *Re Rollason's Registered Design, Heath (Samuel) & Sons, Ltd. v. Rollason*, *supra*.

(*d*) This applies whether novelty is disputed or not (*Gramophone Co., Ltd. v. Magazine Holder Co.* (1911), 28 R. P. C. 221, H. L.; 104 L. T. 259; *Staples v. Warwick* (1906), 23 R. P. C. 609, C. A.; *Walker & Co. v. Scott (A. G.) & Co., Ltd.* (1892), 9 R. P. C. 482). The court is not bound by an admission as to the novelty and originality of the design (*Gramophone Co., Ltd. v. Magazine Holder Co.*, *supra*).

(*e*) See *Re Rollason's Registered Design, Heath (Samuel) & Sons, Ltd. v. Rollason* (1897), 14 R. P. C. 909, C. A., where the design was for a coffin plate, and LINDLEY, M.R., at p. 912, expressed the view that though the claim was for pattern only, the outline could not be left out of account, since it really formed part of the pattern.

(*f*) *Re Bayer's Design* (1906), 24 R. P. C. 65, C. A. A design is always to be considered as capable of being applied on a larger or smaller scale, if the

than where it is a mere detailed modification of some older well-known design (*g*). Subject to these rules, the registration is presumed to be for the design as a whole and not for any special feature (*h*).

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tion of
Designs.

It is probable that in addition to these rules, which are merely amplifications of the statement that the design is to be considered with the eye of a craftsman, an interpretation favourable to the validity of the design would be adopted in case of real doubt (*i*). In an infringement action the same construction must be put on the design for the purposes of determining the issues of novelty and infringement, and by analogy in rectification proceedings evidence of what the proprietor has claimed to cover by the registration has been admitted against him (*k*).

Favourable
to validity.

SECT. 5.—Registration and Office Procedure.

1313. Any person claiming to be the proprietor (*l*) of a new or original design may apply to the Comptroller (*m*) for its registration for a particular class or classes of articles (*n*). The application must be accompanied by the prescribed number of representations or specimens (*o*). The applicant may, and if required by the Comptroller must, indorse on the application a short statement of the novelty which he claims for his design (*p*). The application is considered by the Comptroller, and in general a search is made. The Comptroller may then accept the application or, if he objects,

Application
for registra-
tion.

proportions are kept the same (*Re Bayer's Design* (1906), 24 R. P. C. 65, C. A., per VAUGHAN WILLIAMS, L.J., at p. 72); see also *Re Manchester's Design, Manchester v. Umfreville & Son* (1907), 24 R. P. C. 782.

(*g*) *Simmons v. Mathieson & Co., Ltd.* (1911), 28 R. P. C. 486, C. A.; *Re Plackett's Registered Design* (1892), 9 R. P. C. 436; compare *Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, C. A.; [1896] 1 Ch. 142.

(*h*) *Holdsworth v. M'Crea* (1867), L. R. 2 H. L. 380; *Thom v. Syddall* (1872), 26 L. T. 15; *Dover, Ltd. v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (1910), 27 R. P. C. 498, C. A.; [1910] 2 Ch. 25; *Sackett and Barnes v. Clozenberg* (1909), 27 R. P. C. 104; see also *Barran v. Lomas* (1880), 28 W. R. 973. This rule that the design was primarily to be considered for the combination, and not for the separate parts, was not formerly clearly understood and adopted; see, for instance, *Norton v. Nicholls* (1859), 1 E. & E. 761, 765. A corresponding simplification of patent construction was brought about by the decision in *Harrison v. Anderston Foundry Co.* (1876), 1 App. Cas. 574, 577.

(*i*) See title PATENTS AND INVENTIONS, Vol. XXII., pp. 164, 165.

(*k*) *Re Plackett's Registered Design, supra*; *Re Bayer's Design, supra*. It seems difficult to justify the admission of this evidence, as construction is a matter of law.

(*l*) As to the definition of "proprietor," see p. 727, *ante*.

(*m*) As to the Comptroller, see title PATENTS AND INVENTIONS, Vol. XXII., p. 153, note (*f*).

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 49. A design may be registered in several classes, and after it has been registered in one class the same proprietor may register it in another. In case of doubt the Comptroller decides as to the classes (*ibid.*, ss. 49, 50).

(*o*) As to application, representations etc., see the Designs Rules, 1908, rr. 13—30.

(*p*) *Ibid.*, r. 19.

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furnish the applicant with a statement of the objections, and give him an opportunity of being heard (*q*). An appeal lies to the Board of Trade against an unfavourable decision of the Comptroller (*r*). The Comptroller may refuse to accept any design which is contrary to law or morality (*s*), and where the names or portraits of living persons appear on the design may require their consent, or in the case of persons recently dead the consent of their legal representatives, before proceeding with the application (*t*). Words, letters, or numerals not of the essence of the design are to be removed from the application (*a*). If the design is accepted, it is to be entered on the register with the name of the applicant (*b*). An application must generally be completed within one year, or it will be deemed to be abandoned, but the Comptroller has certain powers of extension (*c*). Applications for designs in the textile classes are made to the Manchester branch, and entered in the Manchester register as well as the London register (*d*). Applications for a design under the statutory provisions giving priority to applicants in certain foreign countries and British possessions are made in the same manner as ordinary applications (*e*).

Period of
protection.

1314. The period of protection is five years in the first instance, but the proprietor (*f*) has the right to protection for a further five years on payment of a fee. At the end of these ten years the Comptroller may, if he thinks fit, grant protection for a further five years (*g*).

Cancellation
of registra-
tion.

1315. The proprietor may at any time request the Comptroller to cancel the registration of the design (*h*). Any person may apply to

(*q*) Designs Rules, 1908, rr. 31—34. The hearing must be asked for within a month (*ibid.*, r. 32).

(*r*) *Ibid.*, rr. 33, 34, 89—94. The applicant may, within one month, ask for the Comptroller's reasons in writing (*ibid.*, r. 33). The appeal must be lodged within a month of the receipt of the reasons, or if they are not asked for, within a month of the decision (*ibid.*, r. 34).

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 75.

(*t*) Designs Rules, 1908, r. 30.

(*a*) *Ibid.*, r. 26.

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 52. Where the applicant has died before the completion of registration the name of the owner of the mark will be entered (Designs Rules, 1908, r. 36).

(*c*) *Ibid.*, r. 35. In such case the design is not published (Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 69 (2)).

(*d*) Designs Rules, 1908, rr. 80—88. The procedure is generally similar to that in the case of other applications, but where any dispute arises as to any design on the Manchester register, the parties may have it referred to an arbitrator to be appointed by the Manchester Chamber of Commerce (*ibid.*, r. 87).

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 91; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 229, 230. The application must be made within four months of the foreign or colonial application on which it is founded, but as there is no rule such as Patents Rules, 1908, r. 15, the application can be made within four months of any such foreign application; compare note (*q*), p. 708, *ante*.

(*f*) As to the definition of "proprietor," see p. 727, *ante*.

(*g*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 53; Designs Rules, 1908, rr. 37—42. There are no annual fees.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 70 (*b*).

the Comptroller to have the registration of any design cancelled on the ground that such design is used for manufacture exclusively or mainly outside the United Kingdom. The procedure and powers of the Comptroller are similar to those in the case of patents, but there is no appeal from his decision (*i*).

SECT. 5.
**Registration
and Office
Procedure.**

1316. The statutory provisions relating to the Patent Office (*j*) and its seal (*k*), register and other documents (*l*), reports of examiners (*m*), powers and duties of the Comptroller (*n*), evidence before the Comptroller (*o*), evidence of matters and documents by certificate or certified copies (*p*), sending applications (*q*), declarations by persons under disability (*r*), agents (*s*), powers of the Board of Trade (*t*) and Orders in Council (*a*), apply equally to both patents and designs. General provisions.

The greater part of the office procedure, including that referring to such matters as form and size, and leaving and service of documents (*b*), use of agents (*c*), entry of assignments on the register (*d*), exercise by the Comptroller of his discretionary powers (*e*), form and manner of taking statutory declarations and Office procedure.

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 58. As to the procedure etc., see the Designs Rules, 1908, rr. 70—75; compare the Patents Rules, 1908, rr. 78—81; and see title PATENTS AND INVENTIONS, Vol. XXII., pp. 208, 209. The proprietor of the design may give reasons for the non-working in this country (Designs Rules, 1908, r. 71).

(*j*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 62, 63; see title PATENTS AND INVENTIONS, Vol. XXII., p. 153.

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 64; see titles EVIDENCE, Vol. XIII., p. 496; PATENTS AND INVENTIONS, Vol. XXII., p. 181.

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 66, 67, 71, 72; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 179 *et seq.*

(*m*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 68; see title PATENTS AND INVENTIONS, Vol. XXII., p. 167.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 73—76; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 168, 169.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 77; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 168, 169.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 78, 79; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 169, 181.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 81.

(*r*) *Ibid.*, s. 83; see title PATENTS AND INVENTIONS, Vol. XXII., p. 129.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 84, 85; see title PATENTS AND INVENTIONS, Vol. XXII., p. 231.

(*t*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 86—89; see title PATENTS AND INVENTIONS, Vol. XXII., p. 230.

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 88.

(*b*) Designs Rules, 1908, rr. 7, 9; compare the Patents Rules, 1908, rr. 6, 7; see title PATENTS AND INVENTIONS, Vol. XXII., p. 153. As to address for service, see the Designs Rules, 1908, rr. 10, 11.

(*c*) Designs Rules, 1908, r. 12; compare the Patents Rules, 1908, r. 9; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 231, 232.

(*d*) Designs Rules, 1908, rr. 43—49; compare the Patents Rules, 1908, rr. 85—91; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 180, 181.

(*e*) Designs Rules, 1908, rr. 55—58; compare the Patents Rules, 1908, rr. 102—105; see title PATENTS AND INVENTIONS, Vol. XXII., p. 168.

SECT. 5.
Registration
and Office
Procedure.

affidavits, and dispensing with evidence (*f*), amendment of documents (*g*), enlargement of time for doing any act or taking any proceeding (*h*), office hours (*i*), excluded days (*k*), industrial exhibitions (*l*), is similar to that in the case of letters patent (*m*).

SECT. 6.—*Effects of Registration.*

Imitation
punishable.

1317. It is an offence to apply, for the purposes of sale, a registered design, or any fraudulent or obvious imitation of a registered design, to any article of the class for which it is registered, or cause to be applied, except with the licence or written consent of the registered proprietor, or to do anything with a view to enabling such design to be so applied (*n*). Knowledge of the existence of the registration is immaterial to the above offences (*o*). It is also an offence to publish or expose, or cause to be published or exposed, for sale any article knowing that the design or imitation has been applied without the consent of the proprietor of the design (*p*).

These provisions apply to articles either manufactured or sold within the realm (*q*) during the duration of the registration (*r*), and also to acts done within the realm with a view to the application of the design elsewhere (*s*).

(*f*) Designs Rules, 1908, rr. 62, 77—79; compare the Patents Rules, 1908, rr. 106, 107, 112; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 168, 169.

(*g*) Designs Rules, 1908, r. 63; compare the Patents Rules, 1908, r. 108; see title PATENTS AND INVENTIONS, Vol. XXII., p. 169.

(*h*) Designs Rules, 1908, r. 64; compare the Patents Rules, 1908, r. 109; see title PATENTS AND INVENTIONS, Vol. XXII., p. 169. As to extension of time for payment of fees, see the Designs Rules, 1908, r. 66.

(*i*) *Ibid.*, r. 61; compare the Patents Rules, 1908, r. 110; see title PATENTS AND INVENTIONS, Vol. XXII., p. 181.

(*k*) Designs Rules, 1908, r. 65; compare the Patents Rules, 1908, r. 111; see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 82.

(*l*) Designs Rules, 1908, r. 76; compare the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 59.

(*m*) As to certificates by the Comptroller, see the Designs Rules, 1908, r. 67.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (1) (a). As to the penalty, see pp. 741, 742, *post*.

(*o*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (1) (a). There is a partial exception where the proprietor has failed to comply with the requirements as to marking (*Boustead v. Dempster, Moore & Co., Ltd.* (1907), 25 R. P. C. 121, 124); as to marking, see pp. 740, 741, *post*.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (1) (b); as to the penalty, see pp. 741, 742, *post*. It is necessary in this case to show knowledge (*Smith v. Lewis Roberts & Co.* (1888), 5 R. P. C. 611; *Jan v. Grossman and Skeeves* (1895), 12 R. P. C. 537).

(*q*) *Knowles (S.) & Co., Ltd. v. Bennett (John) & Sons* (1895), 12 R. P. C. 137 (injunction granted restraining the sale abroad of infringing articles manufactured here).

(*r*) But see *Crossley v. Beverley* (1829), 1 Web. Pat. Cas. 119, where an injunction was granted restraining the sale after the expiration of a patent of articles made during its life. As to the period of registration, see p. 736, *ante*.

(*s*) *Haddon & Co. v. Bannerman & Son* (1912), 29 R. P. C. 611; [1912] 2

1318. Once it has been ascertained what is really protected by the registration (*t*), the further question as to whether the defendant has copied this is to be decided by the eye alone (*a*). The court has to decide only whether the alleged infringement has the same shape or pattern, and must eliminate the question of the identity of function (*b*), since another design may have parts fulfilling the same functions without being an infringement. Small differences in detail do not necessarily prevent infringement (*c*), but generally speaking, if under normal conditions of user the eye would not confuse the two designs, there is no infringement (*d*). It is not an actionable imitation merely to take the idea suggested by the design, unless it worked out in the way protected by the registration (*e*).

The use of the phrase "fraudulent or obvious" would suggest that a less degree of similarity will suffice if the defendant has been guilty of bad faith (*f*). It is not, however, sufficient to show bad

SECT. 6.
Effects of
Registra-
tion.
Infringement.

Mala fides.

Ch. 602, distinguishing *Potter & Co. v. Braco de Prata Printing Co., Ltd.* (1891), 8 R. P. C. 218.

(*t*) See pp. 733, 735, *ante*.

(*a*) "Whether . . . there be piracy or not is referred at once to an unerring judge, namely the eye, which takes the one figure and the other figure and ascertains whether they are or are not the same" (*Holdsworth v. M'Crea* (1867), L. R. 2 H. L. 380, *per* Lord WESTBURY, at p. 388; *Hecla Foundry Co. v. Walker, Hunter & Co.* (1889), 6 R. P. C. 554, H. L.; 14 App. Cas. 550; *Leatheries, Ltd. v. Lycett Saddle and Motor Accessories Co., Ltd.* (1909), 26 R. P. C. 166).

(*b*) *Leatheries, Ltd. v. Lycett Saddle and Motor Accessories Co., Ltd.*, *supra*; *Hecla Foundry Co. v. Walker, Hunter & Co.*, *supra*; *Pugh v. Riley Cycle Co., Ltd.* (1912), 29 R. P. C. 196; [1912] 1 Ch. 613; *Pearson & Sons v. Harris (D. B.) & Sons, Ltd.*, [1912] 29 R. P. C. 632.

(*c*) *Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, C. A.; [1896] 1 Ch. 142; see, however, *Gramophone Co., Ltd. v. Magazine Holder Co.* (1911), 28 R. P. C. 221, H. L.; 104 L. T. 259. As to a case where small differences were held sufficient to distinguish, see *Dover, Ltd. v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (1910), 27 R. P. C. 498, C. A.; [1910] 2 Ch. 25.

(*d*) *Hutchison, Main & Co., Ltd. v. St. Mungo Manufacturing Co.* (1907), 24 R. P. C. 265.

(*e*) *Holden v. Hodgkinson Brothers* (1904), 22 R. P. C. 102; *Birkin & Co. v. Pratt, Hurst & Co., Ltd.* (1895), 12 R. P. C. 371, 375; *Barran v. Lomas* (1880), 28 W. R. 973; see also *Sackett and Barnes v. Clozenberg* (1909), 27 R. P. C. 104.

(*f*) *Sherwood and Cotton v. Decorative Art Tile Co.* (1887), 4 R. P. C. 207, where an attempt was made to define the difference between "fraudulent" and "obvious." The former word implies deliberate copying (*Barran v. Lomas* (1880), 28 W. R. 973; but compare *Pugh v. Riley Cycle Co., Ltd.*, *supra*, at p. 202). In *Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.*, *supra*, it was held that where the defendants had given their designer the plaintiffs' article and told him to make an original design like it, this was strong evidence of an actionable imitation. In *Demartial & Co. v. Booth* (1892), 9 R. P. C. 499, it was held that the burden on the plaintiffs to prove the bad faith necessary to establish fraudulent imitation was not shifted by proof of the defendant having had the plaintiffs' article before he produced his own; *contra*, *Sherwood and Cotton v. Decorative Art Tile Co.*, *supra*; *Grafton v. Watson* (1884), 51 L. T. 141, C. A.; see also *Hutchison, Main & Co., Ltd. v. St. Mungo Manufacturing Co.*, *supra*, and note (*s*), p. 767, *post*.

SECT. 6.
Effects of
Registration.

faith, unless the defendant has imitated some feature which is protected by the registration (*g*).

SECT. 7.—*Duties of the Proprietor.*

Specimens.

1319. Before delivery on sale of any articles bearing the registered design the proprietor must furnish the Comptroller with the prescribed number of exact representations or specimens, if this has not been done previously. In the event of failure to do this the Comptroller may cancel the registration (*h*).

Marking of
articles.

The proprietor must also cause each article before delivery on sale to be marked in the prescribed way to show that it is registered (*i*). It is sufficient if each article sold by him is marked, although it may be of such a nature that it will be subsequently divided up for retail sale (*k*); but where the article consists of a set of other articles, although made in one piece, each of these must be marked (*l*). Where several pieces are necessary to make one complete article it is sufficient if the mark be put on one (*m*), but whether the complete article consists of one or several pieces, it is necessary that the mark be put on that part of the article for which the design is registered (*n*). If the proper mark is on the article, it

(*g*) *Sackett and Barnes v. Clozenberg* (1909), 27 R. P. C. 104; *Cooper v. Symington* (1893), 10 R. P. C. 264, 268.

(*h*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 54 (1) (a). As to these representations, see Designs Rules, 1908, rr. 20—29. Unless the Comptroller cancels the registration it does not appear that any other person can rely on the proprietor's failure in this respect as an objection to the registration, nor is there any means for compelling the Comptroller to exercise his powers.

(*i*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 54 (1) (b). The prescribed mark is the word "registered" or either of the abbreviations "Regd." or "Rd.," and (except in the case of lace or printed or woven designs) the number of the design (Designs Rules, 1908, r. 68). A small irregularity in the words used has been held not to constitute non-marking (*Heinrichs v. Bastendorff* (1893), 10 R. P. C. 160, 164 (use of "Regd." instead of "Rd." which was then the prescribed form)). This provision applies to a sale even in an unfinished condition (*Woolley v. Broad* (1892), 9 R. P. C. 429, 434, C. A.; [1892] 1 Q. B. 806), or a sale by a licensee of the proprietor, or by former proprietors (*Wedekind v. General Electric Co., Ltd.* (1897), 14 R. P. C. 190), even, apparently, if such sale be to the proprietor himself (*ibid.*). A sale made or concurred in by one of two joint proprietors is within the provision (*ibid.*). The requirements as to marking apply to sale abroad (*Sarazin v. Hamel* (No. 2) (1863), 32 Beav. 151); and to a sale of patterns bearing the design (*Heywood v. Potter* (1853), 1 E. & B. 439); but not to the sale of a book containing illustrations of the design (*Branchardiere v. Elvery* (1849), 4 Exch. 380).

(*k*) *Blank v. Footman, Pretty & Co.* (1888), 5 R. P. C. 653; 39 Ch. D. 678 (trimming sold in lengths of 144 yards, mark on wrapping of the article held sufficient).

(*l*) *Hothersall v. Moore* (1891), 9 R. P. C. 27 (dusters sold in squares of twelve).

(*m*) *Fielding v. Hawley* (1883), 48 L. T. 639 (butter dish); *Ingram and Kemp, Ltd. v. Edwards Brothers* (1904), 21 R. P. C. 463, 468 (lamp bracket having a separate cup on which the mark was placed).

(*n*) *Re Morton's Design* (1899), 17 R. P. C. 117, 122 (registered design for shank of cuff link, mark on plate held insufficient); *Lea and Perrins v. Price & Son* (1904), 22 R. P. C. 122, 128 (registered design for top of lamp, mark on ring at base held insufficient).

is no objection that there are other marks also, unless these were put on for fraudulent purposes (*o*). The Board of Trade may in certain cases modify or dispense with the requirements as to marking for special trades or industries (*p*). If it is shown that the regulations as to marking have not been complied with (*q*), then the plaintiff in an action for infringement is not entitled to recover either penalty or damages (*r*), unless he can show either that the proprietor (*s*) had taken all proper precautions to ensure the marking of articles (*a*), or that the infringer at the time of the acts complained of knew or had received notice that the design was registered (*b*).

SECT. 7.
Duties
of the
Proprietor.

SECT. 8.—*Legal Proceedings.*

1320. In the case of infringement the registered proprietor of a design may bring an action (1) to recover a penalty not exceeding £50 for each case of contravention and not exceeding £100 in all

Alternative
courses.

(*o*) *Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, C. A.; [1896] 1 Ch. 142.

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 54 (2).

(*q*) *Ibid.*, s. 54 (1) (*b*). A single breach of the provisions as to marking is sufficient to bring on the proprietor the disabilities imposed by this provision. Presumably this duty to mark cannot apply to sales before registration in the case of an application under the International Convention; see note (*e*), p. 736, *ante*.

(*r*) It should be noted that the cause of action or right to an injunction or delivery up is not affected. Nothing is said as to the right to an account of profits.

(*s*) "Proprietor" is defined as including an assignee (see p. 727, *ante*), but here seems to be used in a composite sense, since the meaning clearly is that the plaintiff must show that the proprietor at the time when the unmarked articles were sold took all proper precautions to ensure their marking. This view is supported by *Wedekind v. General Electric Co., Ltd.* (1897), 14 R. P. C. 190 (see note (*i*), p. 740, *ante*), but this case is not quite decisive, since a failure to comply with the regulations as to marking under the Act then in force immediately determined the copyright, and of course no subsequent assignment could revive it.

(*a*) Whether or not he has done so is a question of fact in each case (*Johnson v. Bailey* (1893), 11 R. P. C. 21). General instructions that articles should be marked may not be sufficient, unless there is some proper method of checking whether such instructions have been carried out (*ibid.*, where there was no such check, and the marks which were impressed on the moulds became worn so that some of the articles were not properly marked, and this was held sufficient to void the registration). Where a licence is granted, the proprietor should insert a clause binding the licensee to mark the articles (*Wedekind v. General Electric Co., Ltd.*, *supra*). But where the proprietor had provided the manufacturer with a proper die and the latter had in a few cases used another die, it was held that the proprietor had taken proper precautions (*Wittman v. Oppenheim* (1884), 27 Ch. D. 260). The same principle was applied where a workman had in error got one figure out of six wrong in the marking of a few articles (*Re Rollason's Registered Design, Heath (Samuel) & Sons, Ltd. v. Rollason* (1898), 15 R. P. C. 441, H. L.; 14 T. L. R. 478).

(*b*) What constitutes notice would be a question of fact. Probably if it could be shown that the infringer had actually seen articles which were properly marked, this would be sufficient; compare title PATENTS AND INVENTIONS, Vol. XXII., p. 211.

SECT. 8.
Legal Proceedings.

in respect of any one design (c), or (2) for an injunction and damages (d). He cannot, however, sue for both, but must elect in his statement of claim as to the remedy for which he proposes to ask (e).

The practice closely resembles that in patent actions (f), but where a penalty is sought interrogatories are not allowed (g).

(c) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (2). A less sum may be awarded than £50 (*Lee and Perrins v. Price & Son* (1904), 22 R. P. C. 122, 128; *Boustead v. Dempster, Moore & Co., Ltd.* (1907), 25 R. P. C. 121; *Oliver & Co. v. Thornley & Co.* (1896), 13 R. P. C. 490). On the other hand, in *Rivett v. Grimshaw* (1894), 11 R. P. C. 351, 354, the jury was directed to find for the plaintiff for two penalties of £50 each. A penalty can be recovered even where there has been no actual sale (*Oliver & Co. v. Thornley & Co., supra*).

(d) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (2). It should be noted that while the first remedy is confined to the registered proprietor, the second is open to any proprietor, which term is not necessarily confined to persons whose title is registered; see p. 727, *ante*. As the term "proprietor" clearly includes licensee, it would seem that a licensee could sue, though this was doubted in *Woolley v. Broad* (1892), 9 R. P. C. 208; [1892] 1 Q. B. 806. The cases in regard to patents are not pertinent on this point, as the right to bring an action for infringement of a design is solely statutory, while in the case of patents it is a common law right; see title PATENTS AND INVENTIONS, Vol. XXII., p. 128. As to the right of non-registered owners to sue, compare *ibid.*, p. 214. Nothing is said as to the right to an account of profits, but as this remedy is auxiliary to an injunction, it is probably open to the plaintiff to elect to take it. The proper form of injunction is against "infringing the design," not the "design or any part of it," since the registration only protects the whole (*Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 483, 496, C. A.; [1896] 1 Ch. 142); where the registration is for shape only or for pattern only, the injunction may be limited accordingly (*Re Manchester's Design, Manchester v. Umfreville & Son* (1907), 24 R. P. C. 782), though this would seem unnecessary. In *McRae v. Holdsworth* (1848), 2 De G. & Sm. 496, 499, an injunction was granted against making as well as against selling, but this would seem to be wrong, as it is not unlawful to make for private use. Where the novelty of the design is disputed, an interim injunction will not generally be granted (*Whitelock v. Automatic Phonograph Co.* (1908), 25 R. P. C. 615; compare title PATENTS AND INVENTIONS, Vol. XXII., p. 220). An order for the delivery up of the articles complained of can also be made even where a penalty is claimed (*Oliver & Co. v. Thornley & Co., supra*). An injunction may also be granted in an action for a penalty (*Cooper v. Whittingham* (1880), 15 Ch. D. 501). As to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*; as to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(e) *Astle (Titus), Ltd. v. Mansfield* (1905), 22 R. P. C. 356.

(f) See title PATENTS AND INVENTIONS, Vol. XXII., pp. 214 *et seq.* Thus, particulars of objections to validity are delivered, although there is no statutory provision or order to this effect, and where it is suggested that some other person than the proprietor was the author the name should be given (*Doble v. Spaendonck* (1910), 27 R. P. C. 440). In general, leave to amend these particulars is given on the same terms as in patent cases (*Morris, Wilson & Co. v. Coventry Machinists Co., Ltd.* (1891), 8 R. P. C. 353; [1891] 3 Ch. 418), though the judge has absolute discretion on this point (*Woolley v. Broad* (1892), 9 R. P. C. 429, C. A.; [1892] 2 Q. B. 317). A certificate of validity may be given, and this carries the usual consequences as to costs in any subsequent action (Patents and

1321. The ordinary defences are a denial of infringement, a plea of leave and licence, or an attack on the validity of the registration (*h*). It seems doubtful whether this last point can properly be raised by way of defence, and whether it should not rather be sought by means of a motion for rectification of the register, but the former course has often been adopted (*i*). A defendant may now also plead that a design is used for manufacture wholly or mainly abroad (*k*).

SECT. 8.
Legal Proceedings.
Defences.

1322. There seems no doubt that the county courts have jurisdiction to entertain an action for infringement of a design (*l*), though they cannot give a certificate of validity (*m*) or entertain a motion for rectification (*n*). The Palatine Court of Lancaster has the full powers of the High Court except as to rectification (*o*). The Scottish and Irish courts seem to have full powers, including those of rectification (*p*).

Courts having jurisdiction.

Designs Act, 1907 (7 Edw. 7, c. 29), s. 61); compare p. 721, *ante*; title PATENTS AND INVENTIONS, Vol. XXII., pp. 224, 225. The rules as to costs are also similar: where the plaintiff succeeds on the issue of novelty and the defendant on infringement, the costs may be apportioned (*Birkin & Co. v. Pratt, Hurst & Co., Ltd.* (1895), 12 R. P. C. 371, 375); where, however, the defendant succeeds on one issue without a definite decision on the other, he gets the whole costs (*Harper (J.) & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co., Ltd.* (1895), 12 R. P. C. 433, 438; [1895] 2 Ch. 593; see also *Cooper v. Symington* (1893), 10 R. P. C. 264, 268; *Pugh v. Riley Cycle Co., Ltd.* (1912), 29 R. P. C. 196, 206; [1912] 1 Ch. 613). The defendant in an infringement action or an applicant for rectification can generally obtain an order of the court for inspection of a design; compare *Re Bayer's Design* (1906), 23 R. P. C. 553, 557, C. A.

(*g*) *Saunders v. Wiel* (1892), 9 R. P. C. 459, C. A.; [1892] 2 Q. B. 321; *Astle (Titus), Ltd. v. Mansfield* (1905), 22 R. P. C. 356; compare title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., 41, 92 *et seq.*

(*h*) Generally on the ground of default of title, or lack of novelty or subject-matter, or that the applicant was not the author. In *Hothersall v. Moore* (1891), 9 R. P. C. 27, the objection that the design was registered in the wrong class was made and upheld, but the validity of such objection seems doubtful in view of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 49 (2), though these words also occurred in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 47 (5).

(*i*) *Doble v. Spaendonck* (1910), 27 R. P. C. 440, *per* SWINFEN EADY, J., at p. 446.

(*k*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 58; see title PATENTS AND INVENTIONS, Vol. XXII., p. 217.

(*l*) This was actually done in *Moody v. Tree* (1892), 9 R. P. C. 333; 40 W. R. 558. The reason why a patent action cannot be so tried is because a patent is a franchise (*R. v. Halifax County Court Judge* (1891), 8 R. P. C. 338, C. A.; [1891] 2 Q. B. 263; see titles COUNTY COURTS, Vol. VIII., pp. 431, 432; PATENTS AND INVENTIONS, Vol. XXII., p. 215, note (*n*)), and the reason why a trade mark action cannot be so tried is because at the passing of the early County Court Acts trade mark rights were purely equitable (*Bow v. Hart* (1905), 22 R. P. C. 222, C. A.; [1905] 1 K. B. 592); see, however, note (*k*), p. 719, *ante*. Neither of these considerations applies in the case of designs.

(*m*) Compare *Proctor v. Sutton Lodge Chemical Co.* (1888), 5 R. P. C. 184.

(*n*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 72, 92.

(*o*) Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 3; see title COURTS, Vol. IX., pp. 120 *et seq.*

(*p*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 94, 95.

SECT. 8.
Legal Pro-
ceedings.
Threats.

1323. There is a statutory right of action on account of groundless threats, as in the case of patents (*q*). There is also a common law right of action if the threats have been made in bad faith and damage has resulted (*r*).

SECT. 9.—*Assignments and Licences.*

No special
provisions.

1324. There are no special provisions as to assignments of or licences for registered designs, which apparently may be verbal or in writing (*s*), but to constitute a licence it is necessary that the right to apply the design should be given (*t*).

SECT. 10.—*Offences.*

Statutory
offences.

1325. Certain offences connected with the register are made misdemeanours (*a*). It is also an offence, punishable summarily by a fine not exceeding £5, for a person falsely to describe a design applied to an article sold by him as registered, and the sale of an article bearing the word "registered," or other words implying that the design is registered, constitutes such offence. It is also an offence, punishable similarly, to put or cause to be put on an article any such words after the registration has expired (*b*).

Part V.—Trade Names and Passing Off.

SECT. 1.—*In General.*

Common law
right.

1326. The only right the English law recognises in any name or mark other than a registered trade mark is the right of a person who uses such name or mark to prevent others using the same so as to deceive the public into thinking that the business carried on by such persons and the goods sold by them are his (*c*). In certain

(*q*) Patents and Designs Act, 1907 (7 Edw 7, c. 29), s. 61; see title PATENTS AND INVENTIONS, Vol. XXII., pp. 227, 228.

(*r*) *Barley v. Walford* (1846), 9 Q. B. 197; see title PATENTS AND INVENTIONS, Vol. XXII., p. 228, note (*p*).

(*s*) See, however, note (*m*), p. 727, *ante*, note (*s*), p. 728, *ante*. As to licences generally, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 190 *et seq.* The Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 60 (1), which deals with the offence of applying imitations of the design, makes an exception where these are applied "with the licence or written consent of the proprietor." The publication of a book of designs does not constitute a licence to use them (*Blanchardiere v. Elvery* (1849), 4 Exch. 380).

(*t*) *Re Guiterman's Registered Designs* (1885), 55 L. J. (CH.) 309.

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (1); see also Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), ss. 3 (3) (*g*), 4, 6; and titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 743; PATENTS AND INVENTIONS, Vol. XXII., p. 232.

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 89 (2)—(4); see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 567; PATENTS AND INVENTIONS, Vol. XXII., p. 232.

(*c*) See *Reddaway v. Banham* (1896), 13 R. P. C. 218, H. L.; [1896] A. C. 199; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896, 904; *Seixo v.*

cases, however, this may amount to a practical prohibition of others using the name or mark (*d*).

SECT. 1.
In General.

Where the
right arises.

1327. The cases of this class may be divided into those involving (1) the misuse of the trading name of a person or firm ; (2) the misuse of the trade name of goods ; and (3) the passing off of goods by means of get-up. In all these cases there is really but one question, namely, whether the defendant has knowingly (*e*) done that which would pass off other goods or another business as and for the goods or business of the plaintiff. In many cases the evidence can be conveniently divided into two separate heads, namely, the plaintiff's title to a name or get-up, and the defendant's infringement of that title ; but these are not really separate issues, but classes of facts bearing on the one issue given above (*f*). The absence of any hard and fast line between the two branches of the plaintiff's case renders most of the so-called rules referred to hereafter—either as to what is a distinctive name or mark, or as to what constitutes infringement—merely secondary criteria for the guidance of the courts, of use doubtless in the majority of cases, but liable to modification in view of special circumstances, the plaintiff's cause of action depending on the combined effect of the distinctiveness of the indicia on which he relies and the nature of the defendant's acts. There is, therefore, an important distinction between these cases and those relating to trade marks, although of course both sprang from the same source, since in the case of trade marks the question of the plaintiff's title to the mark has been stereotyped by legislation, and has, therefore, to be treated separately. Further, in the case of trade marks, the question of the defendant's knowledge does not arise except on the question of what relief should be granted (*g*).

1328. Although the law only intervenes to prevent such names or marks being used so as to deceive, it is not necessary to show an actual fraudulent motive for the user (*h*). If the defendant originally knew of the plaintiff's claim to the name or mark, or if, having adopted such name or mark without knowledge of the plaintiff's use thereof, he has subsequently had the plaintiff's claim brought to his notice, and still continues his former conduct or challenges the plaintiff's rights, he is considered thenceforth

Fraudulent
motive
unnecessary.

Provezende (1866), 1 Ch. App. 192 ; *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, C. A. ; *Farina v. Silverlock* (1856), 6 De G. M. & G. 214, 217 ; *Lever Brothers, Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (1912), 29 R. P. C. 225, 233, C. A. ; 106 L. T. 472 ; *Teofani & Co., Ltd. v. Teofani (A.)* (1912), 30 R. P. C. 76, 90, 460, C. A. ; 109 L. T. 114 ; *Brinsmead (John) & Sons, Ltd. v. Brinsmead (E. G. Stanley) and Waddington & Sons* (1913), 30 R. P. C. 493, C. A. ; 29 T. L. R. 706 ; *Pink v. Sharwood (J. A.) & Co., Ltd.* (No. 2), *Re Ord (Sidney) & Co.'s Trade Mark* (1913), 135 L. T. Jo. 574.

(*d*) See note (*c*), p. 749, note (*e*), p. 750, *post* ; *Powell v. Birmingham Vinegar Brewery Co.* (1897), 14 R. P. C. 720 ; [1897] A. C. 710 ; *Reddaway v. Stevenson* (1903), 20 R. P. C. 276.

(*e*) See the text, *infra*.

(*f*) *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.* (1900), 17 R. P. C. 477, H. L., *per* Lord HALSBURY, L.C., at p. 486.

(*g*) See p. 720, *ante*, p. 746, *post*.

(*h*) Compare title TORT, pp. 466 *et seq.*, *ante*.

SECT. 1.
In General.

Effect of
fraudulent
motive.

as intending the natural consequences of his acts, and if such natural consequence is to deceive, he will then be restrained from continuing to use such name or mark (*i*). It seems that no action will lie for the use of an unregistered name or mark in ignorance of the plaintiff's prior use (*j*).

Though the proof of fraudulent motive is not a necessary element of the plaintiff's case, yet if he establishes such fraudulent motive, the court considers it as strong proof that the defendant's acts are such as illegitimately to affect the plaintiff's trade (*k*), and,

(*i*) *Reddaway v. Banham* (1896), 13 R. P. C. 218, 223, H. L.; [1896] A. C. 199; *Millington v. Fox* (1838), 3 My. & Cr. 338, 352; "*Singer*" *Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376, 391, H. L.; *Hendriks v. Montagu* (1881), 17 Ch. D. 638, 645, 646, C. A.; *Somerville v. Schembri* (1887), 4 R. P. C. 179, P. C.; 12 App. Cas. 453; *Turton v. Turton* (1889), 42 Ch. D. 128, 141, C. A.; *Bodega Co., Ltd. v. Owens* (1889), 7 R. P. C. 31, 36; 23 L. R. Ir. 371; *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645, 654; [1897] 1 Ch. 893; *Cellular Clothing Co. v. Maxton and Murray* (1899), 16 R. P. C. 397, 404, H. L.; [1899] A. C. 326; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83; *Army and Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (1902), 19 R. P. C. 574, 576, C. A.; *Ouvah Ceylon Estates, Ltd. v. Uva Ceylon Rubber Estates, Ltd.* (1910), 27 R. P. C. 753, C. A.; 103 L. T. 416; *Birmingham Small Arms Co., Ltd. v. Webb & Co.* (1906), 24 R. P. C. 27, 31; *Yeatman v. Homberger & Co.* (1912), 29 R. P. C. 561; 107 L. T. 43. There are, on the other hand, certain *dicta* which seem to imply that actual fraud is necessary; see *Levy v. Walker* (1879), 10 Ch. D. 436, C. A., *per* JAMES, L.J., at p. 447; *Jamieson & Co. v. Jamieson* (1898), 15 R. P. C. 169, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 191; 14 T. L. R. 160. In *Reddaway & Co. v. Bentham Hemp Spinning Co.* (1892), 9 R. P. C. 503, C. A.; [1892] 2 Q. B. 639, LOPES, L.J., at p. 508, said that where there was actual fraudulent intention the plaintiff was entitled to at least nominal damages without proof of special damage.

(*j*) *Williams v. Osborne* (1865), 13 L. T. 498; *Valentine v. Valentine* (1892), 31 L. R. Ir. 488; *contra*, *Catterson & Sons, Ltd. v. Anglo-Foreign Manufacturing Co., Ltd.* (1910), 28 R. P. C. 74; see also *Humphries & Co. v. Taylor Drug Co.* (1888), 5 T. L. R. 41. It seems clear from such cases as *Millington v. Fox*, *supra*; *Burgess v. Hills* (1858), 26 Beav. 244; *Burgess v. Hatchly* (1858), 26 Beav. 249; *Upmann v. Elkan* (1871), 7 Ch. App. 130; and the *dicta* in *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 307, 310; *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508, 521, that, prior to the existence of provisions for registration, the courts recognised rights of property in certain trade marks; thus, an infringement would give ground for relief in equity, even if the infringer had not had notice of the plaintiff's rights. But the right of action for the infringement of unregistered marks was taken away by statute (Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), s. 1). A similar provision occurs in the later statutes, and in the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 42, while the right of action for passing off, for which wrongful intention as above defined is necessary, is unaffected (see *ibid.*, s. 45). The only case since 1875 which is opposed to this view is *Catterson & Sons, Ltd. v. Anglo-Foreign Manufacturing Co., Ltd.*, *supra*, following *Upmann v. Elkan*, *supra*, but the attention of the court does not seem to have been drawn to the change effected by the Trade Marks Act, 1905 (5 Edw. 7, c. 15); see note (*u*), p. 720, *ante*. In *Hatchard v. Mège* (1887), 18 Q. B. D. 771, it was held that a person selling wine under an unregistered brand had sufficient property in such brand to maintain an action for the slander of his title to such brand, and that such cause of action survived to his executrix.

(*k*) *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.; [1891]

where convinced that the defendant's motive was to deceive, will not be keen to find that he has failed to achieve his object (l).

SECT. 1.
In General.

1329. It is not necessary for the plaintiff to show that confusion has actually occurred in order to obtain an injunction (m), if the court is of opinion that there is a strong probability of confusion occurring in the normal course of trade (n); but the fact of such confusion having actually occurred is of course strong evidence of

How far
confusion
necessary.

A. C. 217; *Reddaway v. Banham* (1896), 13 R. P. C. 218, H. L.; [1896] A. C. 199; *Radde v. Norman* (1872), L. R. 14 Eq. 348; *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645, 654; [1897] 1 Ch. 893; *Bayer v. Baird* (1898), 15 R. P. C. 615, 634; 25 R. (Ct. of Sess.) 1142. As to what the court regards as a fraudulent motive, see *Brinsmead (John) & Co. v. Brinsmead (E. A. Stanley)* (1913), 30 R. P. C. 493, C. A.; 29 T. L. R. 706. But this is merely evidence, and the mere assumption, even for improper motives, of a name which is the same as the plaintiff's is not sufficient to give a cause of action, unless the plaintiff can show that the name is generally understood to denote his business or his goods (*Goodfellow v. Prince* (1887), 35 Ch. D. 9, 18, C. A.; *Macmillan v. Ehrman Brothers, Ltd.* (1904), 21 R. P. C. 647, C. A.; *Lever Brothers, Ltd. v. Beddingfield* (1898), 16 R. P. C. 3, C. A.; 80 L. T. 100). Where fraudulent motive is relied on, it should be clearly alleged (*Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.* (1912), 29 R. P. C. 465, 475, H. L.).

(l) *Perry & Co., Ltd. v. Hessin & Co.* (1912), 29 R. P. C. 509, 528, C. A.; *Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.*, *supra*, at p. 475; *Royal Insurance Co., Ltd. v. Midland Insurance Co., Ltd.* (1908), 26 R. P. C. 95, 97, C. A.; *Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R. P. C. 420, 427; *Lambert and Butler, Ltd. v. Goodbody* (1902), 19 R. P. C. 377, 381; 18 T. L. R. 394; *Pomeroy (Mrs.), Ltd. v. Scalé* (1906), 24 R. P. C. 177, 191; *Iron-Ox Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd.* (1907), 24 R. P. C. 425, 430; *Lloyd's v. Lloyd's (Southampton), Ltd.* (1912), 29 R. P. C. 433, 439, C. A.; 28 T. L. R. 338. But this intention should be pleaded (*Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.*, *supra*).

(m) *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219, 229, H. L.; *Reddaway & Co. v. Bentham Hemp Spinning Co.* (1892), 9 R. P. C. 503, C. A.; [1892] 2 Q. B. 639; *Jay v. Ladler* (1889), 6 R. P. C. 136, 140; 40 Ch. D. 649; compare title INJUNCTION, Vol. XVII., p. 259.

(n) *Hendriks v. Montagu* (1881), 17 Ch. D. 638, C. A., *per JAMES, L.J.*, at p. 646. The plaintiff need not put his case so high as to say that confusion must occur, a strong probability is sufficient (*Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, 680, C. A.; 83 L. T. 259; *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.* (1901), 18 R. P. C. 465, 466); but as to the necessity for the plaintiff making a strong case when he proceeds *quia timet*, see *Payton & Co., Ltd. v. Snelling, Lampard & Co., Ltd.* (1900), 17 R. P. C. 628, H. L.; *Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1906), 23 R. P. C. 621, 629; *Burberrys v. Cording (J. C.) & Co., Ltd.* (1909), 26 R. P. C. 693, 709; 100 L. T. 985; *Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.*, *supra*. The court also takes into account that the trade will probably not be carried on in the future with the same precautions or under precisely the same conditions as at the commencement (*Manchester Brewery Co., Ltd. v. North Cheshire and Manchester Brewery Co., Ltd.*, [1898] 1 Ch. 539, 545, 549, C. A.; *Ouvah Ceylon Estates, Ltd. v. Uva Ceylon Rubber Estates, Ltd.* (1910), 27 R. P. C. 753, C. A.; 103 L. T. 416; see also *Pinet et Cie. v. Maison Pinet, Ltd.* (1897), 14 R. P. C. 933, C. A.; 77 L. T. 322; *Pinet et Cie. v. Maison Louis Pinet, Ltd.*, *Pinet et Cie. v. Maison Pinet, Ltd.* (1897), 15 R. P. C. 65; [1898] 1 Ch. 179; but compare *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.* (1908), 26 R. P. C. 105; [1909] S. C. 318).

SECT. 1.
In General.

the probability of its recurrence in the future (*o*). On the other hand, where the defendant's trade is of some standing, the absence of any instance of actual confusion may be considered as evidence that interference is unnecessary (*p*).

Proprietary
right
protected.

1330. The court exercises its jurisdiction for the protection of property rather than of personal feelings, and does not in general interfere to protect a non-trader (*q*), or one who in fact is not trading under or using the name in question or some similar name (*r*).

(*o*) See *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co.* (1880), 50 L. J. (CH.) 253 (letters going wrong); *Brinsmead (John) & Co. v. Brinsmead (G. E. Stanley)* (1913), 39 R. P. C. 137, 146.

(*p*) *Reddaway & Co. v. Bentham Hemp Spinning Co.* (1892), 9 R. P. C. 503, C. A., *per* LINDLEY, L.J., at p. 507; *Edge & Sons, Ltd. v. Gallon & Son* (1900), 17 R. P. C. 557, 564, H. L.; *Rodgers v. Rodgers* (1874), 31 L. T. 285, 288, C. A.; *Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.* (1911), 28 R. P. C. 597, 606; *Nugget Polish Co., Ltd. v. Harboro Rubber Co.* (1911), 29 R. P. C. 133, 145; *Perry & Co., Ltd. v. Hessin & Co.* (1912), 29 R. P. C. 509, 530, C. A. See, however, *Liebig's Extract of Meat Co., Ltd. v. Chemists' Co-operative Society, Ltd.* (1896), 13 R. P. C. 635, 647; and note (*i*), p. 701, *ante*.

(*q*) *Clark v. Freeman* (1848), 11 Beav. 112; *Du Boulay v. Du Boulay* (1869), L. R. 2 P. C. 430; *Pink v. Sharwood (J. A.) & Co., Ltd.* (No. 2), *Re Ord (Sidney) & Co.'s Trade Mark* (1913), 135 L. T. Jo. 574; *Clarke v. Freeman*, *supra*, was criticised in *Re Rivière's Trade-mark* (1884), 26 Ch. D. 48, 53, C. A.; *Walter v. Ashton*, [1902] 2 Ch. 282, 293, and *Hirsch v. Hirsch (Oscar) & Co.* (1886), 2 T. L. R. 318; but the suggested right of the plaintiff to relief depends on the principles of libel or trade libel rather than on those of trade name protection. As to trade libel generally, see title TRADE AND TRADE UNIONS, pp. 671 *et seq.*, *ante*. As to the criminal law on the subject of trading names, see note (*c*), p. 749, *post*; see also Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 3 (3); and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 759, 760. The court will protect a foreign trader having any trade in this country (*Collins Co. v. Brown* (1857), 3 K. & J. 423; *La Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard-Levassor Motor Co., Ltd.* (1901), 18 R. P. C. 405; [1901] 2 Ch. 513; *Rey v. Lecouturier* (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262). It has been held that a sole agent for sale in this country cannot maintain an action for passing off (*Dental Manufacturing Co., Ltd. v. De Trey (C.) & Co., Ltd.* (1912), 29 R. P. C. 617; [1912] 3 K. B. 96, C. A.), though possibly some other form of action would be open to him (*ibid.*); see also *Richards v. Butcher* (1890), 7 R. P. C. 288; 62 L. T. 867; *Goodfellow v. Prince* (1887), 35 Ch. D. 9, 20, C. A.

(*r*) *Beazley v. Soares* (1882), 22 Ch. D. 660; but see *Birmingham Vinegar Co., Ltd. v. Liverpool Vinegar Co.* (1888), 4 T. L. R. 613. "Trade" in this connexion is to be understood in a very wide sense and as including those engaged in professional and literary occupations. Thus, the court will protect an author against a fraudulent use of his name (*Byron (Lord) v. Johnston* (1816), 2 Mer. 29), or *nom-de-plume* (*Landa v. Greenberg* (1908), 24 T. L. R. 441), or the proprietor of a newspaper (*Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 4 T. L. R. 419, C. A.; *Borthwick (Sir Algernon) v. Evening Post, Ltd.* (1888), 4 T. L. R. 236, C. A.; *Walter v. Emmott* (1885), 54 L. J. (CH.) 1059, C. A.; *Reed v. O'Meara* (1888), 21 L. R. Ir. 216); or the publisher of a book (*Mack v. Pettet* (1872), L. R. 14 Eq. 431; *Metzler v. Wood* (1878), 8 Ch. D. 606, 610, C. A.), against a colourable imitation of the title of the newspaper or book. In such cases it is necessary to show that the name is widely associated with the plaintiff's newspaper or book, and that the use by the defendant is of such a nature as will lead to persons buying his publication under the impression that it is the plaintiff's; see the cases cited *supra*; *Kelly v. Byles* (1880), 13 Ch. D. 682, 691, C. A.; *Dicks v. Yates* (1881), 18 Ch. D. 76, C. A.; *Cowen v*

In certain cases the court protects a body whose members use a term to denote that they belong to it, against other persons using the same term (s).

SECT. 1.
In General.
Holding out.

The court also protects a person, whether a trader or not, against his name being so used as to subject him to a real risk of being considered responsible for the business carried on, or of having actions brought against him in connexion therewith (a).

The rights in a trading name, trade name of goods or other distinguishing feature, in general pass with the goodwill of the business as a whole or the business in such goods, and cannot be so assigned as to be separated from such goodwill (b).

Assignability
of trade
names.

SECT. 2.—*Trading Names of Individuals, Firms, and Companies.*

1331. The court is very reluctant to interfere with a man's right to trade under any name he chooses, and especially with his right to trade under his own name, even though it be the same as that of a better known competitor. Further, the court recognises that in ordinary cases the public is well aware that there may be many traders of the same name, and does not consider that mere identity of name necessarily means identity of person (c).

Right to use a
trade name.

Hulton (1882), 46 L. T. 897, C. A.; *Schove v. Schmincké* (1886), 33 Ch. D. 546; *Outram (George) & Co., Ltd. v. London Evening Newspapers Co., Ltd.* (1911), 28 R. P. C. 308; 27 T. L. R. 231; *Ridgway Co. v. Amalgamated Press, Ltd.* (1911), 29 R. P. C. 130; 28 T. L. R. 149; *Stevens (William), Ltd. v. Cassel & Co., Ltd.* (1913), 30 R. P. C. 199; 29 T. L. R. 272.

(s) *Society of Accountants and Auditors v. Goodway and London Association of Accountants, Ltd.*, [1907] 1 Ch. 489 (where an injunction was also granted against a rival society which purported to give its members the right to use the term). It seems, however, that some case of actual or probable pecuniary loss must be made out (*ibid.*, at p. 502; *Society of Accountants in Edinburgh v. Corporation of Accountants, Ltd.* (1893), 20 R. (Ct. of Sess.) 750). In *Society of Architects v. Kendrick* (1910), 26 T. L. R. 433, these decisions seem to have been doubted, and it was held that their application ought not to be extended.

(a) *Walter v. Ashton*, [1902] 2 Ch. 282; *Hirsch v. Hirsch (Oscar) & Co.* (1886), 2 T. L. R. 318; *Cundey v. Lerwill and Pike* (1908), 24 T. L. R. 584, 586; and see note (p), p. 756, *post*.

(b) See p. 718, *ante*, pp. 756, 764, *post*; and compare title PARTNERSHIP, Vol. XXII., pp. 106, 107.

(c) There is no case in which a man has been absolutely prohibited from trading under his own name, and there are many decisions which would seem to imply that such an order would never be made; see, for instance, *Holloway v. Holloway* (1850), 13 Beav. 209; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896; *Turton v. Turton* (1889), 42 Ch. D. 128, C. A.; *Cash (J. & J.), Ltd. v. Cash* (1902), 19 R. P. C. 181, C. A.; 86 L. T. 211; *Warsop (B.) & Sons, Ltd. v. Warsop* (1904), 21 R. P. C. 481; *Brinsmead (John) & Sons, Ltd. v. Brinsmead (E. G. Stanley) and Waddingtons & Sons, Ltd.* (1913), 30 R. P. C. 493; 29 T. L. R. 706, C. A. On the other hand, the judgment in *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259, and especially the interlocutory observations *ibid.*, at p. 679, seem to show that there is no difference in principle created by the fact that the name used is the defendant's own, and that if the plaintiff could show that any use of the defendant's name would necessarily deceive, such an order would be made; see also *Reddaway v. Banham*, [1896] A. C. 199, *per* Lord HERSCHELL, at p. 210; *Nicholls v. Kimpton* (1887), 3 T. L. R. 674; *Jamieson & Co. v. Jamieson* (1898), 15 R. P. C. 169, 181, C. A.; 14 T. L. R. 160 (where, how-

SECT. 2.
Trading
Names of
Individuals,
Firms, and
Companies.

When trading
name
protected.

In some cases, however, the name of one particular individual or firm has such universal reputation in connexion with a particular class of goods that it becomes evident that if a second person enters the trade under a name which is the same or similar, confusion must arise unless special precautions are taken (*d*). In such cases the court interferes either to insist on the second individual taking proper measures to prevent such confusion arising (*e*), or, in certain

ever, the court seemed to think that something like fraud is essential for the plaintiff to succeed in such a case); *Teofani & Co., Ltd. v. Teofani* (1913), 30 R. P. C. 446, C. A.; 109 L.T. 114. The practice of the civil courts has not been affected by the fact that the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 3 (3), makes it a false trade description to use on goods a name or initials which are (i.) not a trade mark or part of a trade mark, and (ii.) identical with or a colourable imitation of the name or initials of a person carrying on business in connexion with such goods who has not authorised their use, and (iii.) those of a fictitious person, or some person not carrying on trade in those goods. In *Lipton v. R.* (1892), 32 L. R. Ir. 115, it was held that the last "and" in the above provision should be read "or," thus making it *prima facie* a criminal offence to use a name similar to the name of some other person in the trade, even though it be the user's own name, or to use a name of a person not actually connected with the trade, as, for instance, a name in connection with which the goodwill has been acquired, even though no other person in the trade is using a similar name. It seems improbable that any English court would adopt this construction. As to limited companies, see pp. 754, 755, *post*; as to choice of name in the case of a company generally, see title COMPANIES, Vol. V., pp. 84—86.

(*d*) The necessity of showing that the plaintiff's goods have acquired such repute that his name in connexion with them has acquired a "secondary meaning" has been very strongly laid down; see *Goodfellow v. Prince* (1887), 35 Ch. D. 9, 18, C. A.; *Jamieson & Co. v. Jamieson* (1898), 15 R. P. C. 169, 181, C. A.; 14 T. L. R. 160; *Attenborough v. Jay* (1898), 14 T. L. R. 439, C. A.; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259; *Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R. P. C. 420; *Dewar (John) & Sons, Ltd. v. Dewar (J. H.)* (1900), 17 R. P. C. 341, 358; *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.* (1901), 18 R. P. C. 465; *Findlater, Mackie, Todd & Co., Ltd. v. Newman (Henry) & Co.* (1902), 19 R. P. C. 235; *Re Trade Mark, "Macfarlane & Co.," Macmillan v. Ehrmann Brothers, Ltd.* (1904), 21 R. P. C. 357; *Lucas (Joseph), Ltd. v. Fabry Automobile Co., Ltd.* (1905), 23 R. P. C. 33; see also note (*o*), p. 777, *post*. Generally, where the name of a trader is the same as that of a better known competitor, it is incumbent on him to see there is no unnecessary resemblance in the get-up (*Brooks (J. H.) & Co., Ltd. v. Norfolk Cycle Co.* (1899), 16 R. P. C. 523, 525; *Williams (J. B.) Co. v. Williams (J. H.)* (1909), 26 R. P. C. 765, 773, C. A.; *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, 761, C. A.; *contra, Jamieson & Co. v. Jamieson, supra, per LINDLEY, L.J.*, at p. 180; 14 T. L. R. 160). The court will also interfere to protect the use of initials (*Millington v. Fox* (1838), 3 My. & Cr. 338; *Bayer (Charles) v. Baird (J. & L.)* (1898), 15 R. P. C. 615, 633; 25 R. (Ct. of Sess.) 1142 ("C. B."); *Kinahan v. Bolton* (1863), 15 I. Ch. R. 475 ("L. L."); *Du Cros (W. & G.) v. Gold* (1912), 29 T. L. R. 163; 30 R. P. C. 117 ("M. G.") imitating "W. & G."). It has been said that for the plaintiff to succeed in preventing his name being used for other goods, he should show that the user is locally universal, at least in England (*Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R. P. C. 420); but this would seem too wide in view of the above cases. In *Barber v. Manico* (1893), 10 R. P. C. 93, 101, the injunction was limited to Ireland, where the only user by the plaintiff had been; see also *Jameson v. Dublin Distillers' Co.*, [1900] 1 I. R. 43; and note (*n*), p. 763, *post*.

(*e*) Thus the court may insist on the use by the defendant of the full

cases, to restrain him from trading under a name which is the same as or closely resembles that of the well-known trader (*f*), or from using such trader's name as the trade name of his goods (*g*).

Where the plaintiff can show that the defendant's object is to produce confusion the court intervenes much more readily, and often grants the plaintiff wider relief than he would otherwise obtain (*h*). The evidence of such fraudulent intention may be derived from the manner of trading (*i*), or from the circumstances under which the name was adopted (*k*).

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intention.

christian name or, in the case of a firm, of the full names of the partners, or the defendant may be restrained from adding such words as "& Co." to his name (*Brinsmead (John) & Sons v. Brinsmead (T.) & Sons* (1895), not reported, but referred to in *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 45, 46; *James v. James* (1872), L. R. 13 Eq. 421, 427; *Holt v. Smith* (1888), 4 T. L. R. 329; *Townsend v. Jarman* (1900), 17 R. P. C. 649, 658; [1900] 2 Ch. 698; *Cash (J. & J.), Ltd. v. Cash* (1902), 19 R. P. C. 181, C. A.; 86 L. T. 211; *Van Oppen & Co., Ltd. v. Van Oppen (Leonard)* (1903), 20 R. P. C. 617; *Rigden v. Jones* (1905), 22 R. P. C. 417; *Rodgers (Joseph) & Sons, Ltd. v. Simpson* (1906), 23 R. P. C. 297; compare *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; *Yeatman v. Homberger & Co.* (1912), 29 R. P. C. 561; 107 L. T. 43; *Teofani & Co., Ltd. v. Teofani* (1912), 30 R. P. C. 446, 460, C. A.; 109 L. T. 114); but more generally the injunction is simply against carrying on business in such name, so as to deceive or without sufficiently distinguishing. For forms of such injunctions, see, *inter alia*, *Cash (J. & J.), Ltd. v. Cash*, *supra*; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, 688, C. A.; 83 L. T. 259. It is probable, however, that in some cases this might amount to an absolute prohibition, since it would be held that, if the well-known name were used, nothing could really distinguish the goods; see note (*h*), p. 772, *post*.

(*f*) *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, *supra*; *Pinet et Cie. v. Maison Louis Pinet, Ltd.*, *Pinet et Cie. v. Maison Pinet, Ltd.* (1897), 15 R. P. C. 65, 73; [1898] 1 Ch. 179.

(*g*) This form of relief may be granted, even where the court does not absolutely restrain trading under the name (*Cash (J. & J.), Ltd. v. Cash*, *supra*; *Rigden v. Jones*, *supra*; *Teofani & Co., Ltd. v. Teofani*, *supra*).

(*h*) *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.*, *supra*, at p. 684; and see the cases cited in note (*k*), p. 746, note (*l*), p. 747, *ante*. So, conversely, where the defendant can show a real reason for his choice of the name, as, for instance, where it is an old corporate name, the court is unwilling to interfere (*Saunders v. Sun Life Assurance Co. of Canada*, *supra*).

(*i*) As, for instance, where the defendant has "garnished" the use of the name (*Turton v. Turton* (1889), 42 Ch. D. 128, C. A., *per* Lord ESHER, M.R., at p. 134), as by the get-up of the goods (*Magnolia Metal Co. v. Atlas Metal Co.* (1897), 14 R. P. C. 389, 400, C. A.; [1897] 2 Ch. 371; compare *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.* (1900), 17 R. P. C. 477, H. L.; and see *Rodgers (Joseph) & Sons, Ltd. v. Rottgen* (1889), 5 T. L. R. 678; *Mappin and Webb, Ltd. v. Leapman* (1905), 22 R. P. C. 398; *Rodgers (Joseph) & Sons, Ltd. v. Simpson* (1906), 23 R. P. C. 297; *Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 813; see also the cases cited at p. 765, *post*), or by the representation that the seller was also the manufacturer (*Rigden v. Jones*, *supra*, at p. 424), or by the representation that the defendant also had a place of business in London, or by the get-up of trade documents and method of soliciting orders (*Van Oppen & Co., Ltd. v. Van Oppen Leonard* (1903), 20 R. P. C. 617), or by a change in the name of the article

(*k*) For note (*k*) see p. 752, *post*.

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Companies.Name of
locality.

1332. The court is unwilling to let a person or company get a monopoly of a local name so as to restrain other persons or companies from using the name of such locality as part of their trade

(*Warner v. Warner* (1889), 5 T. L. R. 359, C. A.; but see *Coleman & Co., Ltd. v. Smith (Stephen) & Co.* (1911), 29 R. P. C. 81, C. A.; [1911] 2 Ch. 572), or by the representation that the firm had been established 100 years (*Coulson (William) & Sons v. Coulson (James) & Sons* (1887), 3 T. L. R. 740; *Andrews (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93, 106; 29 T. L. R. 181; see also *Mallan v. Davis* (1886), 3 T. L. R. 221; *Nicholls v. Kimpton* (1887), 3 T. L. R. 674). The fact of the defendant having set up in the same locality was held not to assist the plaintiff in *National Cash Register Co., Ltd. v. Theeman* (1907), 24 R. P. C. 211, 216; *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.* (1907), 24 R. P. C. 654; [1907] 2 Ch. 312; *contra, Newman's Case* (undated), cited in *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560, 564; *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co.* (1880), 50 L. J. (CH.) 253; *Army and Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (1902), 19 R. P. C. 574, 576, C. A.; *Valentine v. Valentine* (1892), 31 L. R. 488; *Lloyd's v. Lloyd's, Southampton, Ltd.* (1912), 29 R. P. C. 433, 439, C. A.; 28 T. L. R. 338; see also *Lee v. Haley* (1869), 5 Ch. App. 155. As to get-up of a shop, see *Plotzker v. Lucas* (1907), 24 R. P. C. 551. As to addition of a laudatory title, see *Truefitt (H. P.), Ltd. v. Edny* (1903), 20 R. P. C. 321, 324; as to effect of a former misrepresentation, see *Spalding (A. G.) and Brothers v. Gamage (A. W.), Ltd.* (1913), 30 R. P. C. 388; 29 T. L. R. 541.

(*k*) As, where the person whose name is being used has no real interest in the business or no real goodwill to convey (*Croft v. Day* (1843), 7 Beav. 84; *Birmingham Vinegar Brewery Co. v. Liverpool Vinegar Co.* (1888), 4 T. L. R. 613; *Melachrino (M.) & Co. v. Melachrino Egyptian Cigarette Co.* (1887), 4 R. P. C. 215; *Rendle v. Rendle (J. Edgcombe) & Co., Ltd.* (1896), 63 L. T. 94; *Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co.* (1901), 18 R. P. C. 185, 188, C. A.; 17 T. L. R. 250, 354; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Otard, Dupuy & Co. v. Otard de Montebello Cognac Co., Ltd.* (1893), 10 T. L. R. 67; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259; *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop-Truffault Cycle and Tube Manufacturing Co., Ltd.* (1896), 12 T. L. R. 434; *Brinsmead (John) & Sons v. Brinsmead (T. E.) & Sons, Ltd.* (1896), 13 T. L. R. 3, C. A.; *Fine Cotton Spinners and Doublers' Association v. Harwood, Cash & Co., Ltd.* (1907), 24 R. P. C. 533; [1907] 2 Ch. 184; see also *Re Allan Ramsay's Trade Mark, Muratti (B.), Sons & Co., Ltd. v. Murad, Ltd.* (1911), 28 R. P. C. 497; *Kingston, Miller & Co., Ltd. v. Kingston (Thomas) & Co., Ltd.* (1912), 29 R. P. C. 289; [1912] 1 Ch. 575; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896, 905; *Teofani & Co., Ltd. v. Teofani (A.)* (1913), 30 R. P. C. 446, 459, C. A.), or where there has been a colourable purchase of goodwill merely to feed some apparent right to use the name (*Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, C. A.; *Barber v. Manico* (1893), 10 R. P. C. 93; *Morrall (Abel), Ltd. v. Hessin & Co.* (1903), 20 R. P. C. 429, C. A.; *Pinet et Cie. v. Maison Pinet, Ltd.* (1897), 14 R. P. C. 933, C. A.; 77 L. T. 322; *Holloway v. Olent* (1903), 20 R. P. C. 525; *Mappin and Webb, Ltd. v. Leapman* (1905), 22 R. P. C. 398; *Rodgers (Joseph) & Sons, Ltd. v. Hearnshaw* (1906), 23 R. P. C. 349). For a case where a purchase of a very small business was considered to have been genuine, and to entitle the purchaser to continue to use the name, see *Marshall v. Sidebotham* (1900), 18 R. P. C. 43; see also *Truefitt (H. P.), Ltd. v. Edney* (1903), 20 R. P. C. 321; but alterations in the style of the business or name of goods are looked on with suspicion (*Holt v. Smith* (1888), 4 T. L. R. 329; *National Folding Box and Paper Co. v. National Folding Box Co., Ltd.* (1894), 13 R. 60; *Jameson v. Dublin Distillers' Co.*, [1900] 1 I. R. 43).

name (*l*), though such user is restrained if the court is satisfied that confusion would occur (*m*), especially where there is no reason for the defendant using this name (*n*).

1333. Where the name under which the plaintiff trades is a descriptive one the court is always reluctant to interfere, even where the defendant has taken a name very closely resembling that of the plaintiff (*o*). Nevertheless, if the plaintiff can show that the name, though composed of descriptive elements, in fact distinguishes his firm or company, the court restrains the improper use of such name or of a name so closely resembling it as to be calculated to deceive (*p*). In particular, it is not, as a general rule,

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names.

(*l*) *Hopton Wood Stone Firms, Ltd. v. Gething* (1910), 27 R. P. C. 605; *Meikle v. Williamson* (1909), 26 R. P. C. 775; see pp. 757 *et seq.*, *post*.

(*m*) The following are cases of local names where the defendants have been restrained:—*North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83; *Ouvah Ceylon Estates, Ltd. v. Uva Ceylon Rubber Estates, Ltd.* (1910), 27 R. P. C. 753, C. A.; 103 L. T. 416; *Hopton Wood Stone Firms, Ltd. v. Gething* (1910), 27 R. P. C. 605, 625 (defendant trading as “Hopton Stone and Marble Quarrying Co., Ltd.”); *Hoby v. Grosvenor Library Co., Ltd.* (1880), 28 W. R. 386; see also *Lee v. Haley* (1869), 5 Ch. App. 155. An injunction was refused in *Meikle v. Williamson*, *supra* (plaintiff traded as “Kelvininside Chemical Co.”; defendant as “Kelvindale Chemical Co.”); compare *Cooper and M’Leod v. MacLachlan* (1901), 19 R. P. C. 27; 9 Scots Law Times, 41 (Castle Brewery); *Great Tower Street Tea Co. v. Smith* (1889), 6 R. P. C. 165; 5 T. L. R. 232.

(*n*) *Braham v. Beachim* (1878), 7 Ch. D. 548 (where the defendants were restrained from calling themselves the Radstock Colliery Proprietors until such time as they should become authorised to sell coal gotten from Radstock).

(*o*) *Aerators, Ltd. v. Tollit* (1902), 19 R. P. C. 418; [1902] 2 Ch. 319; see also the cases cited in note (*p*), *infra*.

(*p*) In the following cases the defendants were restrained:—*Lee v. Haley* (1869), 5 Ch. App. 155 (plaintiff traded as Guinea Coal Co., with office in Pall Mall; defendant set up there as Pall Mall Guinea Coal Co.); *Guardian Fire and Life Assurance Co. v. Guardian and General Assurance Co.* (1880), 50 L. J. (CH.) 253; *Hendriks v. Montagu* (1881), 17 Ch. D. 638, 645, C. A. (plaintiff trading as Universal Life Assurance Society; defendant as Universe Life Assurance Association, Ltd.); *Accident Insurance Co., Ltd. v. Accident, Disease, and General Insurance Corporation, Ltd.* (1884), 54 L. J. (CH.) 104; *National Folding Box and Paper Co. v. National Folding Box Co., Ltd.* (1894), 13 R. 60; *Army and Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of South Africa, Ltd.* (1902), 19 R. P. C. 574, C. A.; *Randall (H. E.), Ltd. v. British and American Shoe Co.* (1902), 19 R. P. C. 391; [1902] 2 Ch. 354 (plaintiff trading as the American Shoe Co.); *Toms and Moore v. Merchant Service Guild, Ltd.* (1908), 25 R. P. C. 474 (plaintiffs trading as Imperial Merchant Service Guild); *Standard Bank of South Africa, Ltd. v. Standard Bank, Ltd.* (1909), 26 R. P. C. 310; 25 T. L. R. 420; *Facsimile Letter Printing Co., Ltd. v. Facsimile Typewriting Co.* (1912), 29 R. P. C. 557. In the following cases the injunction was refused:—*London Insurance v. London and Westminster Insurance Corporation, Ltd.* (1863), 9 Jur. (N. S.) 843; *Colonial Life Assurance Co. v. Home and Colonial Assurance Co., Ltd.* (1864), 33 Beav. 548; *Merchant Banking Co. of London v. Merchants’ Joint Stock Bank* (1878), 9 Ch. D. 560 (different areas); *London and County Banking Co. v. Capital and Counties Bank* (1878), cited 9 Ch. D. 567; *Australian Mortgage Land and Finance Co. v. Australian and New Zealand Mortgage Co.*, [1880] W. N. 6, C. A.; *Great Tower Street Tea Co. v. Smith* (1889), 6 R. P. C. 165; 5 T. L. R. 232 (defendant trading as Tower Tea Co.);

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Fancy names.

Names of
companies.

allowable to take the whole of the trading name of an existing firm and merely make an addition thereto, especially if such addition would suggest the idea of amalgamation (*q*).

1334. Where the trade name belongs to none of the foregoing classes, but is what may be called a fancy name, the court, as a general rule, intervenes to prevent another person adopting the same trade name, if there is any real chance of confusion (*r*).

1335. There is a statutory provision preventing a company from being registered with a name so closely resembling that of a company already registered as to be liable to cause confusion (*s*). Apart from this provision, a limited company can be restrained from carrying on business under a name likely or calculated to deceive (*t*). An injunction may also be granted against the directors allowing the

Army and Navy Co-operative Society, Ltd. v. Army, Navy, and Civil Service Co-operative Society of India, Ltd. (1891), 8 R. P. C. 426; *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537 (plaintiff trading as Sun Life Assurance Society); *Aerators, Ltd. v. Tollit* (1902), 19 R. P. C. 418; [1902] 2 Ch. 319 (defendant trading as Automatic Aerator Patents, Ltd.); *National Cash Register Co., Ltd. v. Theeman* (1907), 24 R. P. C. 211 (defendant trading as Cash Register Co.); *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.* (1907), 24 R. P. C. 641; [1907] 2 Ch. 312; *Electromobile Co., Ltd. v. British Electromobile Co., Ltd.* (1907), 25 R. P. C. 149, C. A.; 97 L. T. 196; *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.* (1908), 26 R. P. C. 105; [1909] S. C. 318; *Randall (H. E.), Ltd. v. Bradley (E.) & Son* (1907), 24 R. P. C. 657 (plaintiff trading as American Shoe Co.; defendant as Anglo-American Shoe Co.); *Elliott v. Expansion of Trade, Ltd.* (1909), 27 R. P. C. 54; 54 Sol. Jo. 101 (plaintiff trading as Trade Extension Co.). In the following cases, where injunctions were granted, the plaintiff's trade name was wholly or in part the name of a patented article or system:—*Daimler Motor Co. (1904), Ltd. v. London Daimler Co., Ltd.* (1907), 24 R. P. C. 379, C. A.; *La Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard-Levassor Motor Co., Ltd.* (1901), 18 R. P. C. 405; [1901] 2 Ch. 513; compare pp. 760 *et seq.*, *post*. In the following case no injunction was granted:—*Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.* (1901), 18 R. P. C. 465 (defendants promoting Daimler Wagon Co., Ltd.).

(*q*) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83; *Ouvah Ceylon Estates, Ltd. v. Uva Ceylon Rubber Estates, Ltd.* (1910), 27 R. P. C. 753, C. A.; 103 L. T. 416.

(*r*) *Grant v. Levitt* (1901), 18 R. P. C. 361 (defendant traded under same name as plaintiff); *Turton v. Turton* (1889), 42 Ch. D. 128, C. A. In the following cases the defendants were restrained:—*Premier Cycle Co., Ltd. v. Premier Tube Co., Ltd.* (1896), 12 T. L. R. 481; *Eastman Photographic Materials Co., Ltd. v. John Griffiths Cycle Corporation, Ltd.* (1898), 15 R. P. C. 105 (plaintiff traded as Kodak Co., Ltd.; defendant as Kodak Cycle Co., Ltd.); *Grant v. Levitt*, *supra*; *International Plasmon, Ltd. v. Plasmonade, Ltd.* (1905), 22 R. P. C. 543; *Resartus Co. v. Sartor Resartus Co.* (1908), 25 R. P. C. 808.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8 (1). As to the rules for comparison of names under this provision, see *Aerators, Ltd. v. Tollitt*, *supra*, per FARWELL, J., at pp. 419, 420; see, further, title COMPANIES, Vol. V., pp. 84, 85.

(*t*) *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560, 563; and see note (*k*), p. 752, notes (*m*), (*p*), p. 753, *ante*. A new company has not the natural rights of an individual to start trade in his own name (*Fine Cotton Spinners and Doublers' Association v. Harwood, Cash & Co., Ltd.* (1907), 24 R. P. C. 533, 538; [1907] 2 Ch. 184; *Kingston, Miller & Co., Ltd. v. Kingston (Thomas) & Co., Ltd.* (1912), 29

company to continue to trade in such name, and, if the company has been formed with a fraudulent purpose, an action lies against the promoters (*a*). The fact that a company has been so formed for a fraudulent purpose may be a reason why it should be just and equitable to wind it up (*b*).

1336. In certain cases also the court restrains the use of a name for a place of business so like that of the plaintiff's as to be calculated to deceive (*c*). Where a place of business is sold, even without the goodwill, the right to use the name of that place usually passes to the purchaser (*d*), particularly if the name is carved on or affixed to the building (*e*).

1337. In deciding whether two trading names are so alike as to cause confusion, the court considers the impression likely to be conveyed by the names as a whole (*f*); but where a main and distinctive part of the plaintiff's name or the name of his goods is taken, little attention is paid to the other portions of the defendant's name (*g*). The fact that the names begin with a different word is

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—
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of business.

Comparison
of names.

R. P. C. 289; [1912] 1 Ch. 575; *Brinsmead (John) & Sons, Ltd. v. Brinsmead (E. G. Stanley) and Waddington & Sons* (1913), 30 R. P. C. 137, 156; see title COMPANIES, Vol. V., p. 85.

(*a*) *La Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard-Levassor Motor Co., Ltd.* (1901), 18 R. P. C. 405, 409; [1901] 2 Ch. 513. For other examples of such orders, see *Hendriks v. Montagu* (1881), 17 Ch. D. 638, 643, C. A.; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Brinsmead (John) & Sons v. Brinsmead (T. E.) & Sons, Ltd.* (1896), 13 T. L. R. 3, C. A.; *Pinet et Cie. v. Maison Louis Pinet, Ltd.*, *Pinet et Cie. v. Maison Pinet, Ltd.* (1897), 15 R. P. C. 65; [1898] 1 Ch. 179; *Eastman Photographic Materials Co., Ltd. v. John Griffiths Cycle Corporation, Ltd.* (1898), 15 R. P. C. 105; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259; *Lloyd's v. Lloyd's (Southampton), Ltd.* (1912), 29 R. P. C. 433, C. A.; 28 T. L. R. 338; *Lloyd's Bank v. Lloyd's Investment Trust Co., Ltd.* (1912), 29 R. P. C. 545; 28 T. L. R. 379; and see title COMPANIES, Vol. V., p. 85.

(*b*) *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; and see title COMPANIES, Vol. V., pp. 397, 398.

(*c*) *Boulnois v. Peake* (1868), 13 Ch. D. 513, n. ("Carriage Bazaar"); *Bodega Co. and Riviere v. Owens* (1889), 7 R. P. C. 31; 23 L. R. Ir. 371 ("Bodega"); *Boussod, Valadon & Co. v. Marchant* (1907), 25 R. P. C. 42, C. A. ("Goupil Gallery"); *contra, Civil Service Supply Association v. Dean* (1879), 13 Ch. D. 512. Where a bank had registered as a telegraphic address "Street, London," the court refused to interfere at the instance of a trader whose letters were frequently so addressed (*Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156).

(*d*) *Boussod, Valadon & Co. v. Marchant, supra*, at p. 52; *Nicholson & Co., Ltd. v. Buchanan* (1900), 19 R. P. C. 321; *Townsend v. Jarman* (1900), 17 R. P. C. 649, 663; [1900] 2 Ch. 698; *Findlater, Mackie, Todd & Co. v. Newman & Co.* (1902), 19 R. P. C. 235, 242; see also *Motley v. Downham* (1837), 3 My. & Cr. 1.

(*e*) *Boussod, Valadon & Co. v. Marchant, supra*; *Townsend v. Jarman, supra*.

(*f*) As to the type of purchaser to be considered on the question of whether the similarity is sufficient to deceive, see *Hendriks v. Montagu* (1881), 17 Ch. D. 638, C. A.; *Turton v. Turton* (1889), 42 Ch. D. 128, C. A.; *Electromobile Co., Ltd. v. British Electromobile Co., Ltd.* (1907), 25 R. P. C. 149, 153, C. A.; 24 T. L. R. 192; *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.* (1908), 26 R. P. C. 105, 109; [1909] S. C. 318.

(*g*) See the cases cited in notes (*m*), (*p*), p. 753, *ante*.

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not decisive on the question of similarity (*h*), though considerable weight is attached to this feature (*i*). The fact that the plaintiff company or firm is often called by some shorter title, which the name adopted by the defendant resembles, is also important (*k*), but, again, not decisive (*l*).

Further, less wide protection is afforded to a name of a descriptive nature, and the custom of the particular trade as to the use of similar names must also be considered (*m*).

Assignment of
trade names.

1338. The right to use a trading name cannot be assigned in gross or except in connexion with a real business (*n*). The purchaser of the goodwill of a business has in general the right to continue to use the trade name (*o*), subject to the limitation that he must not so use it as to expose any other person to liability (*p*); such a purchaser has also the right to restrain any other person from untruly representing that he carries on or is the successor to the business (*q*).

(*h*) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83.

(*i*) *Accident Insurance Co., Ltd. v. Accident, Disease, and General Insurance Corporation, Ltd.* (1884), 54 L. J. (CH.) 104, 105; *Hopton Wood Stone Firms, Ltd. v. Gething* (1910), 27 R. P. C. 605, 625; *Facsimile Letter Printing Co., Ltd. v. Facsimile Typewriting Co.* (1912), 29 R. P. C. 557, 559; see also *Schweitzer v. Atkins* (1868), 37 L. J. (CH.) 847.

(*k*) *Otard, Dupuy & Co. v. Otard de Montebello Cognac Co., Ltd.* (1893), 10 T. L. R. 67; *Standard Bank of South Africa, Ltd. v. Standard Bank, Ltd.* (1909), 26 R. P. C. 310; 25 T. L. R. 420; *Re Allan Ramsay's Trade Mark, Muratti (B.) & Sons, Ltd. v. Murad, Ltd.* (1911), 28 R. P. C. 497, 509; see also *Bumsted v. General Reversionary Co., Ltd.* (1888), 4 T. L. R. 621.

(*l*) *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.* (1901), 18 R. P. C. 465, 471; *Findlater, Mackie, Todd & Co. v. Newman & Co.* (1902), 19 R. P. C. 235; *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.* (1907), 26 R. P. C. 641, 652; [1907] 2 Ch. 312; *Royal Insurance Co. v. Midland Insurance Co., Ltd.* (1908), 26 R. P. C. 95, C. A.; see also *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156; *Cowen v. Hulton* (1882), 46 L. T. 897, C. A.

(*m*) See note (*p*), p. 753, *ante*, and especially the cases there cited as to insurance companies.

(*n*) *Barber v. Manico* (1893), 10 R. P. C. 93; *Thorneloe v. Hill* (1894), 11 R. P. C. 61; [1894] 1 Ch. 569; see also *Ullman & Co. v. Leuba* (1908), 25 R. P. C. 673, P. C.; [1908] A. C. 443; and note (*k*), p. 752, *ante*.

(*o*) *Levy v. Walker* (1879), 10 Ch. D. 436, C. A.; *Hall v. Barrows* (1863), 4 De G. J. & Sm. 150; *Churton v. Douglas* (1859), John. 174; *Thynne v. Shove* (1890), 45 Ch. D. 577. But for this purpose the assignment of goodwill should be express (*Scott v. Rowland* (1872), 26 L. T. 391; *Gray v. Smith* (1889), 43 Ch. D. 208, 220, C. A.; see also *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523; *Hall v. Barrows* (1864), 9 L. T. 561). As to the use of the partnership name by partners on dissolution of a partnership, see title PARTNERSHIP, Vol. XXII., p. 83; as to goodwill generally, see title TRADE AND TRADE UNIONS, pp. 590 *et seq.*, *ante*.

(*p*) See note (*a*), p. 749, *ante*.

(*q*) *Townsend v. Jarman* (1900), 17 R. P. C. 649; [1900] 2 Ch. 698, discussing and explaining *Montreal Lithographic Co. v. Sabiston*, [1899] A. C. 610. As to what amounts to such representation, see *Scott v. Scott* (1867), 16 L. T. 143; see also *Nicholson & Co., Ltd. v. Buchanan* (1900), 19 R. P. C. 321; *Rickerby v. Reay* (1903), 20 R. P. C. 380; see also note (*a*), p. 749, *ante*. The restraint extends to the vendor of the

A person can be restrained from untruly representing that he is an agent of another firm (*r*). He is, however, entitled to advertise that he has been with another person or firm, if such is the fact (*s*), but must take care not to do it in such a way as to lead to the impression that he is connected with, or is the successor to such person or firm (*t*).

Similarly, a person can be restrained from improperly using or disclosing a trade secret or other confidential information which he has acquired in the course of his employment or which has been divulged to him in breach of confidence by a servant or employee (*u*).

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Trade secret.

SECT. 3.—Trade Names of Goods.

1339. A manufacturer may in some cases have a monopoly in his own name as attached to his goods (*a*). Other personal names may in some cases be treated as fancy names (*b*).

Personal
names.

1340. The court, although unwilling that a manufacturer should get a monopoly of a local name (*c*), recognises that there is not

Local names.

goodwill of a business (*Churton v. Douglas* (1859), John. 174), and where the name under which the business was carried on was a fancy one, the vendor may be unable to use it at all (*Pomeroy (Mrs.), Ltd. v. Scalé* (1906), 24 R. P. C. 177, 188; 23 T. L. R. 170). This may even be the case if the name is a real one if the exclusive use has been assigned (*ibid.*, at pp. 188, 191; see also *Bury v. Bedford* (1863), 9 Jur. (N. S.) 956), but a very strong case would be needed to establish this (*Franke v. Chappell* (1887), 3 T. L. R. 524 (Richter concerts)); see title PARTNERSHIP, Vol. XXII., pp. 83, 106, 107.

(*r*) *Wheeler and Wilson Manufacturing Co. v. Shakespear* (1869), 39 L. J. (CH.) 36.

(*s*) *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523; *Williams v. Osborne* (1865), 13 L. T. 498; *Cundey v. Lerwill and Pike* (1908), 24 T. L. R. 584. Even an untrue assertion to this effect could not be restrained in the absence of special damage (*Cundey v. Lerwill and Pike*, *supra*, at p. 586). In *Rickett, Cockerell & Co., Ltd. v. Nevill* (1904), 21 R. P. C. 394, it was held that the widow of a man who truthfully described himself as "from Cockerell & Co." could continue to trade under the same style.

(*t*) As, for instance, if the name of his former firm is made too prominent (*Glenny v. Smith* (1865), 2 Drew. & Sm. 476; *Hookham v. Pottage* (1872), 8 Ch. App. 91, 95; *Cundey v. Lerwill and Pike*, *supra*; see also *Matthews v. Hodgson* (1886), 2 T. L. R. 899, C. A.; *Jefferson Dodd, Ltd. v. Dodd's Drug Stores, Ltd.* (1907), 25 R. P. C. 16).

(*u*) See, further, titles AGENCY, Vol. I., p. 184; COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 146, 147, 190, 193; INJUNCTION, Vol. XVII., pp. 254, 255; MASTER AND SERVANT, Vol. XX., pp. 126, 127.

(*a*) See pp. 750 *et seq.*, *ante*; and compare note (*q*), p. 694, *ante*.

(*b*) See note (*g*), p. 688, *ante*.

(*c*) This is particularly the case where the article sold is a natural product of the locality (*Rugby Portland Cement Co., Ltd. v. Rugby and Newbold Portland Cement Co., Ltd.* (1891), 9 R. P. C. 46, C. A.; *Bewlay & Co., Ltd. v. Hughes* (1898), 15 R. P. C. 290; *Grand Hotel Co. of Caledonia Springs, Ltd. v. Wilson* (1903), 21 R. P. C. 117, 134, P. C.; [1904] A. C. 103); although even in this case an injunction may be granted (*Seixo v. Provezende* (1865), 1 Ch. App. 192; see *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645; [1897] 1 Ch. 893; *Radde v. Norman* (1872), L. R. 14 Eq. 348). Where the article is not a natural product the plaintiff's task is easier, since there is less need for the defendant to adopt the name; see *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.;

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the same necessity for the defendant to use such a name as in the case of a purely descriptive word (*d*); hence, the burden on the plaintiff who seeks an injunction on the ground that such local name has come to indicate his goods only is less than on one who seeks to show such a secondary meaning in the case of a descriptive word (*e*). Such meaning can be acquired even if the plaintiff has been the only manufacturer of the articles in question in the district (*f*). The court relieves much more freely where the defendant is not in the locality, and so has no reason for

[1891] A. C. 217; *Huntley and Palmer v. Reading Biscuit Co., Ltd.* (1893), 10 R. P. C. 277; 9 T. L. R. 462; *Worcester Royal Porcelain Co. v. Locke & Co.* (1902), 19 R. P. C. 479, 488; 18 T. L. R. 712; *Brock (C. T.) & Co.'s Crystal Palace Fireworks, Ltd. v. Paine (James) & Sons* (1911), 28 R. P. C. 697, C. A. In some cases the courts treat a local name as a fancy name; see *Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897), 14 R. P. C. 720, H. L.; [1897] A. C. 710 ("Yorkshire Relish"); *Daniel and Arter v. Whitehouse and Britton* (1898), 15 R. P. C. 134; [1898] 1 Ch. 685 ("Brazilian Silver"). See also pp. 691, 694, note (*r*), *ante*.

(*d*) *Huntley and Palmer v. Reading Biscuit Co., Ltd.* (1893), 10 R. P. C. 277; 9 T. L. R. 462.

(*e*) See the cases cited in note (*c*), p. 757, *ante*; and see also *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Siebert v. Findlater* (1878), 7 Ch. D. 801; *Grezier and Doyle v. Autran* (1895), 13 R. P. C. 1, C. A.; *Rey v. Lecouturier* (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262. Where, however, it can be shown that the name originally had a descriptive meaning in the trade, it is very difficult to show that it has lost it (*Wolff & Son v. Nopitsch* (1900), 17 R. P. C. 321, 330; affirmed (1900), 18 R. P. C. 27, C. A.). In the following cases the plaintiff succeeded:—*McAndrew v. Bassett* (1864), 4 De G. J. & Sm. 380 ("Anatolia Liquorice"); *Seixo v. Provezende* (1865), 1 Ch. App. 192 ("Seixo"); *Wotherspoon v. Currie*, *supra* ("Glenfield Starch"); *Radde v. Norman* (1872), L. R. 14 Eq. 348 ("Leopoldshall"); *Apollinaris Co., Ltd. v. Norrish* (1875), 33 L. T. 242 ("Apollinaris"); *Siebert v. Findlater*, *supra* ("Angostura Bitters"); *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.; [1891] A. C. 217 ("Stone Ales"); *Huntley and Palmer v. Reading Biscuit Co., Ltd.*, *supra* ("Reading Biscuits"); *Grezier and Doyle v. Autran*, *supra*; *Rey v. Lecouturier*, *supra* ("Chartreuse"); *Rockingham Rail. Co., Ltd. and Jarrahdale Timber Co., Ltd. v. Allen* (1896), 13 T. L. R. 80, C. A. ("Jarrahdale Jarrah"); *Powell v. Birmingham Vinegar Brewery Co., Ltd.*, *supra* ("Yorkshire Relish"); *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645; [1897] 1 Ch. 893 ("Hunyadi"); *Daniel and Arter v. Whitehouse and Britton*, *supra*; *Bewlay & Co., Ltd. v. Hughes* (1898), 15 R. P. C. 290 ("Dindigul"); *Worcester Royal Porcelain Co. v. Locke & Co.* (1902), 19 R. P. C. 479, 488; 18 T. L. R. 712 ("Worcester China"); *Brock (C. T.) & Co.'s Crystal Palace Fireworks, Ltd. v. Paine (James) & Sons* (1911), 28 R. P. C. 697, C. A. ("Crystal Palace"); see also *Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1906), 23 R. P. C. 621 ("Lancashire"). In the following cases the plaintiff failed:—*Rugby Portland Cement Co., Ltd. v. Rugby and Newbold Portland Cement Co., Ltd.* (1891), 9 R. P. C. 46, C. A. ("Rugby Cement"); *Wolff & Son v. Nopitsch*, *supra* ("Spanish Graphite"); *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.* (1901), 18 R. P. C. 434, C. A. ("Whitstable Oysters"); *Grand Hotel Co. of Caledonia Springs, Ltd. v. Wilson* (1903), 21 R. P. C. 117, P. C.; [1904] A. C. 103 ("Caledonia Water"). As to the form of injunction, see note (*h*), p. 772, *post*; as to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*f*) *Wotherspoon v. Currie*, *supra*; *Siebert v. Findlater*, *supra*; *Montgomery v. Thompson*, *supra*.

the use of the name, or has gone there merely to be able to use the name (*g*). Generally speaking, the right to the use of a name denoting locality of origin passes with the land from which the product comes or on which the business is carried on (*h*).

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1341. Where the trade name is of a descriptive character (*i*), the burden is on the plaintiff to show that it has acquired a secondary meaning when applied as a designation of goods in a particular trade (*k*), so as to mean the plaintiff's goods and not merely goods of the class denoted by its primary signification (*l*). This is a question of fact (*m*), depending on the joint effect of the nature of the word in question (*n*) and the strength of the plaintiff's evidence (*o*).

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names.

(*g*) *Price's Patent Candle Co. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 813; compare *Seixo v. Provezende* (1865), 1 Ch. App. 192, where the court was influenced by the fact that though the defendant had a vineyard in the Seixo district, he was also selling under this name wine coming from another district; *Free Fishers and Dredgers of Whitstable v. Elliott* (1888), 4 T. L. R. 273, where an injunction was granted to restrain the defendants who had a concurrent right of user of a local name from using the name in connexion with oysters not coming from that district. But the mere fact that the defendant has no right to use the name does not relieve the plaintiff from the necessity of showing that it means his goods (*California Fig Syrup Co. v. Taylor's Drug Co., Ltd.* (1897), 14 R. P. C. 564, C. A.; 13 T. L. R. 438; *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Huntley and Palmer v. Reading Biscuit Co., Ltd.* (1893), 10 R. P. C. 277; 9 T. L. R. 462; compare title INJUNCTION, Vol. XVII., p. 259).

(*h*) *Van Zeller v. Mason, Cattley & Co.* (1907), 25 R. P. C. 37; but compare *Brock (C. T.) & Co.'s Crystal Palace Fireworks, Ltd. v. Paine (James) & Sons* (1911), 28 R. P. C. 697, C. A.

(*i*) The tendency of the court is to regard names of a laudatory nature as descriptive; see *Re Crosfield (Joseph) & Son, Ltd.'s Application to Register a Trade Mark ("Perfection")* (1909), 26 R. P. C. 837, C. A.; 101 L. T. 587 ("Perfection"): and the court is not acute to find a name non-descriptive because of some technical inaccuracy (*Parsons Brothers & Co. v. Gillespie & Co.* (1898), 15 R. P. C. 57, P. C.; [1898] A. C. 239 ("Flaked Oatmeal")).

(*k*) A word may have a distinctive signification when used as a name, though not when used otherwise (*McAndrew v. Bassett* (1864), 4 De G. J. & Sm. 380 ("Anatolia Liquorice"); *Havana Cigar and Tobacco Factories, Ltd. v. Tiffin* (1905), *Ltd.* (1909), 26 R. P. C. 473, C. A. ("Corona")).

(*l*) It has been said that the secondary meaning must have wholly displaced the primary meaning in the trade (*Cellular Clothing Co. v. Maxton and Murray* (1898), 15 R. P. C. 612; affirmed (1899), 16 R. P. C. 397, 405, H. L.; 1 Fraser (House of Lords), 29; *Hommel v. Bauer & Co.* (1904), 22 R. P. C. 43, 47, C. A.; 21 T. L. R. 80; *Weingarten Brothers v. Rosenthal, Same v. Sherwood & Co.* (1904), 21 R. P. C. 212, 215; *contra*, *Burberrys v. Cording (J. C.) & Co., Ltd.* (1909), 26 R. P. C. 693, 704; 100 L. T. 985; and the cases cited in note (*o*), p. 760, *post*).

(*m*) *Cellular Clothing Co. v. Maxton and Murray* (1899), 16 R. P. C. 397, H. L., *per* Lord HALSBURY, L.C., at p. 404; 1 Fraser (House of Lords), 29; see also *Reddaway v. Banham* (1896), 13 R. P. C. 218, 221, H. L.; [1896] A. C. 199, where the questions left to the jury by COLLINS, J., and approved by the House of Lords, are set out.

(*n*) Thus, the burden on the plaintiff is less where the word is not a natural word obviously and simply descriptive of the goods (*Faulder & Co.*,

(*o*) For note (*o*) see p. 760, *post*.

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1342. Another class of case in which there is often a contest whether a name means goods of a particular manufacture or goods of a particular kind is where a new description of goods is put upon the market and the public first get to know it by the name in question (*p*). Generally the contention that the name

Ltd. v. Rushton (O. & G.), Ltd. (1903), 20 R. P. C. 477, 494, C. A.; 19 T. L. R. 452; *Cellular Clothing Co. v. Maxton and Murray* (1899), 16 R. P. C. 397, H. L., *per* Lord DAVEY, at p. 409; 1 Fraser (House of Lords), 29.

(*o*) Where the only goods of the kind on the market have been those made by the plaintiff, the use of the word in connexion with these goods is consistent with either alternative, and is therefore inconclusive (*Cellular Clothing Co. v. Maxton and Murray*, *supra*, at p. 409; compare *Siebert v. Findlater* (1878), 7 Ch. D. 801, 813; *Kinnell (Charles P.) & Co., Ltd. v. Ballantine & Sons* (1909), 27 R. P. C. 185, 190). So, too, the evidence of witnesses who only know the article as made by one manufacturer is of little value (*Burberrys v. Cording (J. C.) & Co., Ltd.* (1909), 26 R. P. C. 693, 704; 100 L. T. 985). Where the plaintiff has himself always used the word with his name in the possessive case, this may be some evidence that he did not consider it as a distinctive word in itself (*Hommel v. Bauer & Co.* (1904), 22 R. P. C. 43, C. A.; *Wurm v. Webster and Girling* (1904), 21 R. P. C. 373; *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.* (1901), 18 R. P. C. 434, C. A.; see also note (*g*), p. 762, *post*). In the following cases the plaintiff succeeded where the names were *primâ facie* descriptive or laudatory:—*Braham v. Bustard* (1863), 1 Hem. & M. 447 (“Excelsior White Soft Soap”); *Eno v. Dunn & Co.* (1893), 10 R. P. C. 261 (“Fruit Salt”); *Reddaway v. Banham* (1896), 13 R. P. C. 218, H. L.; [1896] A. C. 199 (“Camel Hair”); *Liebig’s Extract of Meat Co., Ltd. v. Chemists’ Co-operative Society, Ltd.* (1896), 13 R. P. C. 736, C. A. (“Liebig Co.’s Extract of Meat,” “Liebig’s Extract of Meat” having been held to be non-distinctive); *Day v. Riley and Whittaker* (1900), 17 R. P. C. 517; 48 W. R. 556 (“Black Drink”); *Faulder & Co., Ltd. v. Rushton (O. & G.), Ltd.* (1903), 20 R. P. C. 477, 491, C. A.; 19 T. L. R. 452 (“Silverpan”); *Vacuum Oil Co., Ltd. v. Gooch and Tarrant* (1909), 27 R. P. C. 76 (“Vacuum Oil”); *Kinnell (Charles P.) & Co., Ltd. v. Ballantine & Sons*, *supra* (“Horseshoe Boilers”). In the following cases the plaintiff failed:—*Raggett v. Findlater* (1873), L. R. 17 Eq. 29 (“Nourishing Stout”); *Kelly v. Byles* (1880), 13 Ch. D. 682, 691, C. A. (“Post Office Directory”); *Schore v. Schmincké* (1886), 33 Ch. D. 546 (“Castle Album”); *Symington & Co. v. Footman, Pretty & Co.* (1887), 3 T. L. R. 488 (“Guaranteed Corsets”); *Native Guano Co. v. Sewage Manure Co.* (1889), 8 R. P. C. 133, H. L. (“Native Guano”); *Parsons Brothers & Co. v. Gillespie & Co.* (1898), 15 R. P. C. 57, P. C.; [1898] A. C. 239 (“Flaked Oatmeal”); *Cellular Clothing Co. v. Maxton and Murray*, *supra* (“Cellular”); *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.*, *supra* (“Imperial”); *Wurm v. Webster and Girling*, *supra* (“White Viennese Band”); *Ripley v. Griffiths* (1902), 19 R. P. C. 590 (“Oval Blue”); *Fels v. Christopher Thomas and Brothers, Ltd.* (1903), 21 R. P. C. 85, C. A. (“Naphtha Soap”); *Weingarten Brothers v. Rosenthal, Same v. Sherwood & Co.* (1904), 21 R. P. C. 212 (“Erect Form”); see also *Weingarten Brothers v. Bayer & Co.* (1905), 22 R. P. C. 341, H. L.; 21 T. L. R. 418; *Bile Bean Manufacturing Co. v. Davidson* (1906), 23 R. P. C. 725; 8 F. (Ct. of Sess.) 1181 (“Bile Beans”); *Burberrys v. Cording (J. C.) & Co., Ltd.*, *supra* (“Slip-on”); *Stevens (William), Ltd. v. Cassell & Co., Ltd.* (1913), 30 R. P. C. 199 (“Magazine of Fiction”).

(*p*) “*Singer*” *Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; *Braham v. Bustard*, *supra*; *Re Harrison’s Trade Mark, Harrison v. Woodroffe* (1889), 7 R. P. C. 25, 27 (“Albion”); *Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, 411, C. A. (“Osman”); see also *Hirst v. Denham* (1872), L. R. 14 Eq. 542, but this decision seems of very doubtful

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is non-distinctive has only been successful where the goods were either the subject of a patent (*q*) or design (*r*) or of a secret process (*s*). Where this is so, any person has, as a general rule, the right to use the name (*t*) to describe goods of this class after the patent has expired or the secret become known (*a*), provided that he does not do it in such a way as to deceive (*b*), but he is still bound in some cases to distinguish such goods from the goods of the original manufacturer (*c*). But while the secret is kept the court looks on this fact as an additional reason for restraining other persons from using the name, since not only are the rights of the manufacturer invaded by its misuse, but the public is deceived by not getting the article expected (*d*). In some cases even a personal name may become *publici juris* by acquiring the secondary

authority. Where the introducer of the new article calls it by a descriptive name, together with a fancy name, other persons are not entitled to take the combination (*Braham v. Bustard* (1863), 1 Hem. & M. 447). It tells strongly against the defendant's contention that the name is descriptive if the goods sold by him are not of the class it is said to denote (*Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, C. A.); or if he uses a modified form of the word (*Slazenger & Sons v. Feltham & Co.* (1889), 6 R. P. C. 531, 535, C. A.; 5 T. L. R. 364).

(*q*) *Linoleum Manufacturing Co. v. Nairn* (1878), 7 Ch. D. 834; see also the cases cited in note (*i*), p. 697, *ante*, note (*t*), *infra*. This rule does not apply in the case of articles which were only the subject of a foreign patent (*Re Cheseborough Manufacturing Co.'s Trade Mark, Re Pearson's Application to Register a Trade Mark* (1901), 18 R. P. C. 191, C. A. ("Vaseline")). As to patents generally, see title PATENTS AND INVENTIONS, Vol. XXII., pp. 125 *et seq.*

(*r*) *Winser & Co., Ltd. v. Armstrong & Co.* (1898), 16 R. P. C. 167; *Harrison v. Woodroffe* (1889), 7 R. P. C. 35; but compare *Hirst v. Denham* (1872), L. R. 14 Eq. 542.

(*s*) *Siebert v. Findlater* (1878), 7 Ch. D. 801, *per* FRY, J., at p. 813; and see the cases cited in note (*i*), p. 697, *ante*, note (*d*) *infra*.

(*t*) *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Linoleum Manufacturing Co. v. Nairn*, *supra*; *Wheeler and Wilson Manufacturing Co. v. Shakespear* (1869), 39 L. J. (CH.) 36; *Young v. Macrae* (1862), 9 Jur. (N. S.) 322; see also the cases cited in note (*i*), p. 697, *ante*, note (*q*), *supra*.

(*a*) *Siebert v. Findlater*, *supra*; *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, 755, C. A., considering and doubting *James v. James* (1872), L. R. 13 Eq. 421; *Magnolia Metal Co. v. Atlas Metal Co.* (1897), 14 R. P. C. 400, C. A.; [1897] 2 Ch. 371; *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.* (1900), 17 R. P. C. 477, H. L.; see also note (*i*), p. 697, *ante*.

(*b*) For cases where it has been held that the use was calculated to deceive, see *Singer Manufacturing Co. v. Spence (James) & Co.* (1893), 10 R. P. C. 297; *Singer Manufacturing Co. v. British Empire Manufacturing Co., Ltd.* (1903), 20 R. P. C. 313; see also *Sykes v. Sykes* (1824), 3 B. & C. 541. For cases where the use was held to be fair, see *Singer Manufacturing Co. v. Loog*, *supra*; *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.*, *supra*; *Armstrong Oiler Co., Ltd. v. Patent Axlebox and Foundry Co., Ltd.* (1910), 27 R. P. C. 362.

(*c*) *Magnolia Metal Co. v. Atlas Metal Co.*, *supra*.

(*d*) *Siebert v. Findlater*, *supra*; *Massam v. Thorley's Cattle Food Co.*, *supra*; *Grezier and Doyle v. Autran* (1895), 13 R. P. C. 1, C. A.; *Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897), 14 R. P. C. 720, H. L.; *Rey v. Lecouturier* (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262. No rights in such name can pass to a person not possessing the secret (*Rey v. Lecouturier*, *supra*; compare *Cotton v. Gillard* (1874), 44 L. J. (CH.) 90).

SECT. 3.
Trade
Names of
Goods.

Plaintiff's
user.

meaning of goods made in a particular way (*e*) or for a particular object (*f*).

1343. The plaintiff need not prove that the name has always been used alone (*g*), or, indeed, that it has been used by him as a name for his goods, if the public has used it as such (*h*); nor need he show that the user has been such that the public associates goods so sold with his name, as long as it is shown that the public understands the name to mean the goods made by some special manufacturer (*i*) or sold by some special merchant (*k*). Again, the name may have been used by him as a trade mark which has been expunged from the register (*l*), or as a part of a trade mark as to which he disclaimed

(*e*) *Liebig's Extract of Meat Co. v. Hanbury* (1867), 17 L. T. 298 ("Liebig's Extract"); see also the cases cited in note (b), p. 761, *ante*.

(*f*) *Gledhill (G. H.) & Sons, Ltd. v. British Perforated Toilet Paper Co.* (1911), 28 R. P. C. 714, C. A. ("Gledhill Rolls"); *Neostyle Manufacturing Co., Ltd. v. Ellams Duplicator Co.* (1904), 21 R. P. C. 569, C. A.; but even where a name has become *publici juris*, the use of such terms as "the original" in combination with the name will be restrained (*Cocks v. Chandler* (1871), L. R. 11 Eq. 446; compare *Liebig's Extract of Meat Co. v. Hanbury*, *supra*).

(*g*) *Ford v. Foster* (1872), 7 Ch. App. 611; *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508 ("Glenfield Starch"); *Montgomery v. Thompson* (1891), 8 R. P. C. 361, 364, H. L.; [1891] A. C. 217 ("Stone Ales"); *Worcester Royal Porcelain Co., Ltd. v. Locke & Co.* (1902), 19 R. P. C. 479, 489; 18 T. L. R. 712 ("Worcester China"); *Faulder & Co., Ltd. v. Rushton (O. & G.), Ltd.* (1903), 20 R. P. C. 477, 495, C. A.; 19 T. L. R. 452 ("Silverpan"); *Birmingham Small Arms Co., Ltd. v. Webb & Co.* (1906), 24 R. P. C. 27 ("B. S. A."); as to the different rule relating to user for the purpose of establishing an "old mark," see notes (l), (m), p. 693, *ante*. It has, however, been said that where the name is *primâ facie* a descriptive one, the fact that the plaintiff has always used it with his name in the possessive case is some evidence that it was used descriptively; see p. 760, *ante*. It has also been said that where the manufacturer puts a retailer's name on the goods, it goes against his case (*Wolff & Son v. Nopitsch* (1900), 17 R. P. C. 321, *per* COZENS-HARDY, J., at p. 330, relying on *Re Wood's Trade Mark*, *Wood v. Butler* (1886), 3 R. P. C. 81, C. A.; 32 Ch. D. 247); but in view of the well-recognised practice of retailers putting their name on goods (see *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.* (1901), 18 R. P. C. 434, C. A.; *Reddaway & Co., Ltd. v. Stevenson & Brother, Ltd.* (1902), 20 R. P. C. 276), this can hardly be considered as of general application.

(*h*) *Siegert v. Findlater* (1878), 7 Ch. D. 801 ("Angostura Bitters").

(*i*) *Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897), 14 R. P. C. 720, 730, H. L.; [1897] A. C. 710; *Wotherspoon v. Currie*, *supra*, at p. 514; *Lever v. Goodwin* (1887), 4 R. P. C. 492, 504, 506, C. A.; 36 Ch. D. 1; *Hammond & Co. v. Malcolm, Brunner & Co.* (1892), 9 R. P. C. 301; 8 T. L. R. 324.

(*k*) *Gamage (A. W.), Ltd. v. Randall (H. E.), Ltd.* (1899), 16 R. P. C. 185, 197, C. A., where Lord RUSSELL OF KILLOWEN, C.J., at p. 192, pointed out that the risk of deception is less when the mark belongs to a retailer, since people who wished for his goods would naturally go to his shop.

(*l*) *Montgomery v. Thompson*, *supra*; *Powell v. Birmingham Vinegar Brewery Co., Ltd.*, *supra*; *Faulder & Co., Ltd. v. Rushton (O. & G.), Ltd.*, *supra*; *Neostyle Manufacturing Co. v. Ellam's Duplicator Co.*, *supra*; *Day v. Riley and Whittaker* (1900), 17 R. P. C. 517; 48 W. R. 556. But in judging whether such a word has acquired a secondary meaning, it must not be forgotten that the plaintiff's monopoly of its use may have been due to his claim to a trade mark (*Re Trade Mark "Hæmatogen," Hommel v. Gebrüder Bauer & Co.* (1904), 21 R. P. C. 576, 587; 20 T. L. R. 585).

any special trade mark rights (*m*). The extent of the user which it is necessary for the plaintiff to show depends on the nature of the word and the other circumstances of the case (*n*).

1344. Where the name chosen for the goods is a fancy one the court will generally prevent others using it, provided that the plaintiff can show a sufficient user (*o*).

1345. Special importance may attach to a trade name where the article is one that is sold retail in a form where the buyer does not see the original package (*p*).

1346. Where a trader sells goods under a particular name the manufacturer who supplies them in general acquires no rights in the name (*q*). Where, however, the manufacturer sells goods through different traders in the same or different countries under the same name, the name belongs to the manufacturer (*r*). Such

SECT. 3.

Trade
Names of
Goods.

Fancy name.

Goods sold
by retail.

Right to name
as between
trader and
manufacturer.

(*m*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 15; *Bayer v. Baird* (1898), 15 R. P. C. 615, 634; 25 R. (Ct. of Sess.) 1142.

(*n*) In the case of a descriptive word it has been said that the user must extend all over England or Scotland, as the case may be, at least if a general injunction is sought (*Cellular Clothing Co. v. Maxton and Murray* (1899), 16 R. P. C. 397, 408, H. L.; 1 Fraser (House of Lords), 29 ("Cellular")). In *Kelly v. Byles* (1880), 13 Ch. D. 682, 691, C. A. ("Post Office Directory"), JAMES, L.J., put the case higher, and said it must extend over the three countries; see also *Re Crosfield (Joseph) & Son's Application to Register a Trade Mark ("Perfection")* (1909), 26 R. P. C. 837, C. A.; 101 L. T. 587 ("Perfection"). The same principle applies to the case of a personal name (*Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R. P. C. 420). Where, however, the name is of a fancy kind a considerable general user, together with some user in the defendant's district, is sufficient (*Faulder & Co., Ltd. v. Rushton (O. & G.), Ltd.* (1903), 20 R. P. C. 477, 491, C. A.; 19 T. L. R. 452 ("Silverpan")); see also *Paine & Co. v. Daniell & Sons' Breweries, Ltd.* (1893), 10 R. P. C. 71, 78; [1893] 2 Ch. 567 ("John Bull"); *Grant v. Levitt* (1901), 18 R. P. C. 361 ("Globe Furnishing Co."); *Bodega Co. and Riviere v. Owens* (1889), 7 R. P. C. 31; 23 L. R. 371). In *Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 813 ("London Candles"), an injunction was granted for a limited area on proof of secondary meaning in the area; see also note (*d*), p. 750, *ante*; and as to the effect of local adverse user, see p. 777, *post*. For further cases in which injunctions have been granted mainly on account of the parties being in the same locality, see *Lee v. Haley* (1869), 5 Ch. App. 155 ("Pall Mall Guinea Coal Co."); *Newman's Case* (undated), referred to in *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560, 564. In *Mallan v. Davis* (1886), 3 T. L. R. 221, the use of the words "Old Established Dentist" in a particular street was restrained. For cases where injunctions have been refused because the areas of trade were different, see *Merchant Banking Co. of London v. Merchants' Joint Stock Bank, supra*; *Bumsted v. General Reversionary Co., Ltd.* (1888), 4 T. L. R. 621.

(*o*) See note (*r*), p. 754, *ante*, note (*t*), p. 764, *post*.

(*p*) *Grezier and Doyle v. Autran* (1895), 13 R. P. C. 1, 7, C. A.; *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.; [1891] A. C. 217; *Re Pimms' Trade Mark, Thorne (R.) & Sons, Ltd. v. Pimms, Ltd.* (1909), 26 R. P. C. 221.

(*q*) *Defries (J.) & Sons, Ltd. v. Electric and Ordnance Accessories Co., Ltd.* (1906), 23 R. P. C. 341.

(*r*) *Re Itala Fabbrica di Automobili's Application to Register a Trade Mark* (1910), 27 R. P. C. 493; 54 Sol. Jo. 652. So, too, a manufacturer who sells to the public articles bearing a certain mark, made according to a patent,

SECT. 3.
Trade
Names of
Goods.

Comparison
of names,

a trade name is attached to the owner's goodwill in the class of goods for which it is used, and can only be assigned with such goodwill (s).

1347. The rules for the comparison of the trade name of goods, so far as they exist, are similar to those for the comparison of the trading names of firms (t). Regard must also be had to the way in which the name appears on the goods (a) and to the class of purchasers (b).

does not lose his right to the mark because his licence under the patent is withdrawn (*Freeman Brothers v. Sharpe Brothers & Co., Ltd.* (1899), 16 R. P. C. 205). So the name "Richter Concerts" was held not to belong to the agent who first advertised them (*Franke v. Chappell* (1887), 3 T. L. R. 524).

(s) *Cotton v. Gillard* (1874), 44 L. J. (CH.) 90; *Pinto v. Badman* (1891), 8 R. P. C. 181, 191, C. A.; 7 T. L. R. 317. On the dissolution of a partnership each partner has in general the right to use the trade name of goods sold by the firm (*Benbow v. Low, Low v. Benbow* (1881), 44 L. T. 875; *Hine v. Lart* (1846), 10 Jur. 106). As to the right to the partnership name, see title PARTNERSHIP, Vol. XXII., p. 83.

(t) See pp. 755, 756, *ante*. In the following cases the plaintiff succeeded (the plaintiff's trade name being given first, the defendant's, second):—*Stephens v. Peel* (1867), 16 L. T. 145 ("Stephen's Blue Black"; "Steelpens Blue Black"); *Schweitzer v. Atkins* (1868), 37 L. J. (CH.) 847 ("Cacaotine"; "Cocoatina"); *Apollinaris Co., Ltd. v. Norrish* (1875), 33 L. T. 242 ("Apollinaris"; "London Apollinaris"); *Slazenger & Sons v. Feltham & Co.* (2) (1889), 6 R. P. C. 531, 535, C. A.; 5 T. L. R. 364 ("Demon"; "Demotic"); *Eno v. Dunn & Co.* (1893), 10 R. P. C. 261 ("Eno's Fruit Salt"; "Dunn's Fruit Salt and Potash Tablets"); *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259 ("Valentine"; "Valtine"); *Reddaway (F.) & Co., Ltd. v. Frictionless Engine Packing Co., Ltd.* (1902), 19 R. P. C. 505 ("Camel Hair"; "Karmal"); *International Plasmon, Ltd. v. Plasmonade, Ltd.* (1905), 22 R. P. C. 543 ("Plasmon"; "Plasmonade," "Plasmonoid"); *Birmingham Small Arms Co., Ltd. v. Webb & Co.* (1906), 24 R. P. C. 27 ("B. S. A."; "B. A. S."); *Iron-Ox Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd.* (1907), 24 R. P. C. 425 ("Iron-Ox" Tablets; "Iron Oxide" Tablets); *Re Pimms' Trade Mark, Thorne (R.) & Sons, Ltd. v. Pimms, Ltd.* (1909), 26 R. P. C. 221 ("Thorne's Whisky"; "Glen Thorne"); *Muralo Co. v. Taylor & Co.* (1910), 27 R. P. C. 261 ("Muralo"; "Murrilo"). In the following cases the plaintiff failed:—*Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, 152, H. L. ("The Great Two D"; "G. & M. 2d"); *Goodwin v. Ivory Soap Co.* (1901), 18 R. P. C. 389, C. A. ("Ivy"; "Ivory"); *Cropper Minerva Machines Co., Ltd. v. Cropper, Charlton & Co., Ltd.* (1906), 23 R. P. C. 388 ("Cropper"; "Cropper-Charlton"); *Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1907), 24 R. P. C. 203, C. A. ("Lancashire"; "Lanco"); *Aquascutum v. Cohen and Wilks* (1909), 26 R. P. C. 651 ("Aquascutum"; "Aquatite"); see also note (o), p. 702, note (n), p. 712, note (n), p. 753, *ante*.

(a) *Slazenger & Sons v. Feltham & Co.* (2), *supra*; but compare *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523.

(b) *Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1906), 23 R. P. C. 621, 629; *Aquascutum v. Cohen and Wilks, supra*; see also the cases cited in note (p), p. 766, *post*. Importance may be attached to the size of type used for different parts of the name (*Metzler v. Wood* (1878), 8 Ch. D. 606, 610, C. A.), and to special script (*Weingarten Brothers v. Bayler (Charles) & Co.* (1905), 22 R. P. C. 341, H. L.; 92 L. T. 511; *Du Cros (W. & G.), Ltd. v. Gold* (1912), 30 R. P. C. 117; 29 T. L. R. 163).

SECT. 4.—*Passing off by Get-up or Mark.*

SECT. 4.

Passing Off
by Get-up
or Mark.Right of
action.

1348. The right to bring an action for passing off is founded on the same principles as those relating to actions for the misuse of trade names (*c*), and, in fact, actions for misuse of the trade names of goods are only particular instances of such actions. The most usual form of action is for the use of a distinctive mark or get-up of goods. As the various grounds on which the right of action is based are only different instances of the same cause of action, the plaintiff may rely on some or all of them, and there are many cases where the use of a trade name not in itself distinctive, together with imitation of get-up (*d*), or carelessness or fraud in supplying articles (*e*), or in the manner of trading (*f*), or the use of a label not in fact infringing the plaintiff's registered trade mark, have established a case of passing off (*g*).

1349. In considering the question of get-up regard must be had to the common practice of the trade, as there can be no monopoly in matters of get-up which are common to the trade (*h*); but this does not mean that matters which are common to the trade must be wholly disregarded, because the plaintiff may have a distinctive combination of matters which, separately, others have a right to

Practice of
trade.

(*c*) See pp. 744 *et seq.*, *ante*.

(*d*) *Lever v. Goodwin* (1887), 4 R. P. C. 492, 584, C. A.; 36 Ch. D. 1; *Townsend v. Jarman* (1900), 17 R. P. C. 649; [1900] 2 Ch. 698; *Weingarten Brothers v. Bayer (Charles) & Co.* (1905), 22 R. P. C. 341, H. L.; *Price's Patent Candle Co., Ltd. v. Ogston and Tennant, Ltd.* (1909), 26 R. P. C. 797, 812.

(*e*) *Havana Cigar and Tobacco Factories, Ltd. v. Tiffin* (1905), *Ltd.* (1909), 26 R. P. C. 473, C. A.

(*f*) As by copying the arrangement of the plaintiff's price lists (*Hart v. Colley* (1890), 44 Ch. D. 193), or the get-up of his vans and show cards (*Hodgson and Simpson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465; *Parker and Smith v. Satchwell & Co., Ltd.* (1900), 17 R. P. C. 713, C. A.); but a mere imitation of his method of advertising is not actionable (*Wertheimer v. Stewart, Cooper & Co.* (1906), 23 R. P. C. 481; see also *Midgley (S. T.) & Sons, Ltd. v. Morris and Cowdery* (1904), 21 R. P. C. 314; *Standard Ideal Co. v. Standard Sanitary Manufacturing Co.* (1910), 27 R. P. C. 789, P. C.; 103 L. T. 440; *De Long Hook and Eye Co. v. Newey Brothers, Ltd.* (1911), 29 R. P. C. 49, 59).

(*g*) *Alaska Packers' Association v. Crooks & Co.* (1899), 16 R. P. C. 503, C. A.; compare title MISREPRESENTATION AND FRAUD, Vol. XX., p. 676.

(*h*) *Packham & Co., Ltd. v. Sturgess & Co.* (1898), 15 R. P. C. 669, 672, C. A.; *Jamieson & Co. v. Jamieson* (1898), 15 R. P. C. 169, 180, C. A.; 14 T. L. R. 160; *Payton & Co., Ltd. v. Titus Ward & Co., Ltd.* (1899), 17 R. P. C. 58, C. A.; *Payton & Co. v. Snelling, Lampard & Co., Ltd.* (1900), 17 R. P. C. 628, H. L.; *Wolff & Son v. Nopitsch* (1900), 18 R. P. C. 27, 32, C. A.; *London General Omnibus Co. v. Lavell* (1900), 18 R. P. C. 73, 78, C. A.; [1901] 1 Ch. 135; *Imperial Tobacco Co. of Great Britain and Ireland, Ltd. v. Purnell & Co.* (1904), 21 R. P. C. 598, C. A.; *De Long Hook and Eye Co. v. Newey Brothers, Ltd.* (1911), 29 R. P. C. 49; *Coleman & Co., Ltd. v. Smith (Stephen) & Co.* (1911), 29 R. P. C. 81, C. A.; [1911] 2 Ch. 572; *Jones Brothers, Ltd. v. Anglo-American Optical Co.* (1912), 29 R. P. C. 361, C. A. If too many features of the two get-ups are alike, it may greatly increase the burden of proving that the other features are so different as to prevent confusion; compare *Du Cros (W. & G.) v. Gold* (1912), 30 R. P. C. 117; 29 T. L. R. 163.

SECT. 4.
Passing Off
by Get-up
or Mark.

Test to be
applied.

use (i). No monopoly can, in general, be established for features of shape or size adopted merely for the purpose of convenience or for some other motive of utility (k).

1350. In considering whether the resemblance of the get-up of the different goods is such as to cause deception, it must be remembered that the goods will not be seen side by side (l), and the proper test is whether the get-up of the defendant's goods would be likely to deceive a purchaser who is acquainted with the plaintiff's get-up (m), but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods (n), and that they will be shown fairly to him without distinguishing features being concealed (o). The court must also have regard to the class of purchasers by whom the goods would normally be bought (p)

(i) *London General Omnibus Co. v. Felton* (1896), 12 T. L. R. 213; *Jones v. Hallworth* (1897), 14 R. P. C. 225; *Frankau (Adolph) & Co., Ltd. v. Pflueger* (1910), 28 R. P. C. 130; but compare *Perry & Co., Ltd. v. Hessin & Co.* (1912), 29 R. P. C. 509, 530, C. A.

(k) *King & Co., Ltd. v. Gillard & Co., Ltd.* (1905), 22 R. P. C. 327, C. A.; *Williams (J. B.) Co. v. Bronnley (H.) & Co., Ltd.* (1909), 26 R. P. C. 765, 773, C. A.; *Jones Brothers, Ltd. v. Anglo-American Optical Co.* (1912), 29 R. P. C. 361, 364, 368, C. A.; *contra*, *Edge (William) & Sons, Ltd. v. Nicolls (William) & Sons, Ltd.* (1911), 28 R. P. C. 582, H. L.; [1911] A. C. 693 (where the plaintiffs were held entitled to the monopoly of a particular shape of stick inserted in the washing-blue sold by them, though the use of a stick had formed the subject of a patent taken out by them). The use of a particular form of bottle may, however, be restrained (*Day v. Riley and Whittaker* (1900), 17 R. P. C. 517, 521; 48 W. R. 556; see also *Rey v. Lecouturier* (1907), 25 R. P. C. 265, 283, 294, C. A.; [1908] 2 Ch. 715, affirmed (1910), 27 R. P. C. 268, H. L.; [1910] A. C. 262). The use of a particular form for cigars was restrained in *Elliott & Co., Ltd. v. Hodgson* (1902), 19 R. P. C. 519.

(l) *Wright, Crossley & Co. v. Blezard* (1910), 27 R. P. C. 299, 303; *Birmingham Small Arms Co., Ltd. v. Webb & Co.* (1906), 24 R. P. C. 27, 31; *Lever v. Goodwin* (1887), 4 R. P. C. 492, 504, C. A.; 36 Ch. D. 1; *Ascough v. Johnson & Co.* (1887), 3 T. L. R. 735, C. A.; *Packham & Co., Ltd. v. Sturgess & Co.* (1898), 15 R. P. C. 669, 672, C. A.

(m) *Payton & Co. v. Snelling, Lampard & Co., Ltd.* (1899), 17 R. P. C. 48, 57, C. A.; 16 T. L. R. 56; but see *Jones Brothers, Ltd. v. Anglo-American Optical Co.*, *supra*, at p. 367.

(n) *Schweppes, Ltd. v. Gibbens* (1905), 22 R. P. C. 601, 606, H. L.; *Payton & Co. v. Snelling, Lampard & Co., Ltd.*, *supra*; *Schwerdtfeger (E. A.) & Co., Actiengesellschaft v. Hart Publishing Co., Ltd.* (1912), 29 R. P. C. 236, 243; compare *Turton v. Turton* (1889), 42 Ch. D. 128, 135, C. A.; but see, *contra*, *Hendriks v. Montagu* (1881), 17 Ch. D. 638, 645, C. A. The appearance of the articles as a whole must be considered (*Coleman & Co., Ltd. v. Smith (Stephen) & Co.* (1911), 29 R. P. C. 81, 89, C. A.; [1911] 2 Ch. 572).

(o) *Lever Brothers, Ltd. v. Beddingfield* (1898), 16 R. P. C. 3, C. A.; 80 L. T. 100; *Payton & Co., Ltd. v. Snelling, Lampard & Co., Ltd.* (1900), 17 R. P. C. 628, H. L.; see also *Apollinaris Co., Ltd. v. Duckworth & Co.* (1906), 23 R. P. C. 540, 549, C. A.; 22 T. L. R. 744; *Brinsmead (John) & Co. v. Brinsmead (E. G. Stanley) and Waddington & Sons, Ltd.* (1913), 30 R. P. C. 493; 29 T. L. R. 706, C. A.

(p) *Wilkinson v. Griffiths Brothers & Co.* (1891), 8 R. P. C. 370; *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219; *Clark v. Sharp* (1898), 15 R. P. C. 141; *Perry & Co., Ltd. v. Hessin & Co.*, *supra*, at pp. 528, 530. So where the public does not buy the goods or see the mark, this is taken into account (*Jones Brothers, Ltd. v. Anglo-American Optical Co.* (1912), 29 R. P. C.

and the circumstances of the sale (*g*). Another question to be considered is whether the get-up of the defendant's goods is such as to suggest a name by which the plaintiff's goods are asked for and recommended (*r*). The court is also considerably influenced by any evidence showing that the defendant has deliberately imitated the plaintiff's labels and the like (*s*).

SECT. 4.
Passing Off
by Get-up
or Mark.

SECT. 5.—Legal Proceedings.

1351. In an action for infringement the question to be decided by the court is, whether the defendant or his servants have used the trade name, mark, or get-up of the plaintiff's goods, or an imitation thereof (*t*), in such a manner as to be calculated to induce the public (*a*)

Acts creating
liability.

361, 369, C. A.; *Schwerdtfeger (E. A.) & Co., Actiengesellschaft v. Hart Publishing Co., Ltd.* (1912), 29 R. P. C. 236, 243.

(*g*) Thus, where the goods are sold in small packets, little attention is paid to the cases in which these are sent out (*Edge v. Johnson* (1892), 9 R. P. C. 134, C. A.). So, too, in such cases as those dealing with the get-up of an omnibus, it must be remembered that the prospective passenger often only sees the omnibus in motion (*London General Omnibus Co. v. Felton* (1896), 12 T. L. R. 213; compare *Du Cros (W. & G.), Ltd. v. Gold* (1912), 30 R. P. C. 117; 29 T. L. R. 163).

(*r*) *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219 ("Two Elephants"); *Read Brothers v. Richardson & Co.* (1881), 45 L. T. 54, C. A. ("Dog's Head"); *Wilkinson v. Griffiths Brothers & Co.* (1891), 8 R. P. C. 370; *Hodgson and Simpson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465 ("Lion Soap"); *Andrew (John H.) & Co., Ltd. v. Kuehnrich* (1912), 30 R. P. C. 93; 29 T. L. R. 181; see also note (*l*), p. 701, *ante*. As to the limits of this principle, see *Hubbuck (Thomas) & Son, Ltd. v. Brown, Sons & Co.* (1900), 17 R. P. C. 638, C. A. ("Dos Leones"); *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd. v. Purnell & Co.* (1904), 21 R. P. C. 598, C. A.

(*s*) See pp. 746, 747, *ante*. The fact that the defendant has sent the plaintiff's label to his printer is *prima facie* a matter of suspicion (*Hammond & Co. v. Malcolm, Brunker & Co.* (1892), 9 R. P. C. 301; 8 T. L. R. 324; *Colman (J. & J.), Ltd. v. Farrow & Co.* (1897), 15 R. P. C. 198; *County Chemical Co., Ltd. v. Frankenburg* (1904), 21 R. P. C. 722; *King & Co., Ltd. v. Gillard & Co., Ltd.* (1905), 22 R. P. C. 327, C. A.; *Jewsbury and Brown v. Andrew and Atkinson* (1910), 28 R. P. C. 293, 301; compare *Harper & Co., Ltd. v. Wright and Butler Lamp Manufacturing Co.* (1895), 12 R. P. C. 483, 489, C. A.; [1896] 1 Ch. 142; but see *Jones Brothers, Ltd. v. Anglo-American Optical Co.* (1912), 29 R. P. C. 1, 13, and 361, C. A.).

(*t*) See pp. 711, 712, 755, 756, 764, 766, *ante*. It is not necessarily a defence that the name used by the defendant is descriptive of the goods, if it is calculated to deceive (*Reddaway v. Banham* (1896), 13 R. P. C. 218, H. L.; [1896] A. C. 199; *Sykes v. Sykes* (1824), 3 B. & C. 541; *Iron-Ox Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd.* (1907), 24 R. P. C. 425; *Grand Hotel Co. of Caledonia Springs, Ltd. v. Wilson* (1903), 21 R. P. C. 117, 134, P. C.; 73 L. J. (p. c.) 1; *Brook (C. T.) & Co.'s Crystal Palace Fireworks, Ltd. v. Paine (James) & Sons* (1911), 28 R. P. C. 697, 703, C. A.; but compare *Re Waterman's Trade Mark, Waterman v. Ayres* (1888), 39 Ch. D. 29, 35, C. A.).

(*a*) *Edelsten v. Edelsten* (1863), 1 De G. J. & Sm. 185, 200; *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Sykes v. Sykes*, *supra*; *Lever v. Goodwin* (1887), 4 R. P. C. 492, 504, 507, C. A.; 36 Ch. D. 1; *Siegert v. Findlater* (1878), 7 Ch. D. 801; *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.; [1891] A. C. 217; *Grezier and Doyle v. Autran* (1895), 13 R. P. C. 1, C. A.; *Reddaway v. Banham*, *supra*; *Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897), 14 R. P. C. 720, H. L.

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or the trade (b) to believe that the infringing goods are the goods of the plaintiff (c). The acts of infringement may be using the name, mark or get-up of the goods in such a way that the public is likely to be deceived thereby if the goods are sold in an ordinary fair manner (d), or describing the goods by that name, or selling the goods in answer to orders in which the trade name of the plaintiff's goods has been used (e), or using the name or mark in advertisements, or otherwise so as to produce the impression that the goods are the plaintiff's goods (f). An action lies either against the manufacturer (g) who sends out goods with a name or get-up liable to deceive, or the retailer who sells such goods (h). The defendant is further liable for any

(b) *Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, 411, C. A.; but compare *Star Cycle Co., Ltd. v. Frankenburs* (1907), 24 R. P. C. 405, C. A.; see also *Grand Hotel Co. of Caledonia Springs, Ltd. v. Wilson* (1903), 21 R. P. C. 117, 134, P. C.; [1904] A. C. 103; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15.

(c) *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508 (the plaintiff's starch was called "Glenfield Starch," and the defendant's "Royal Palace Starch," but "Glenfield," the name of the place where the defendant resided, was put prominently on the defendant's packet); *Franks v. Weaver* (1847), 10 Beav. 297; *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645; [1897] 1 Ch. 893. As to the use of defendant's own name, see Trade Marks Act, 1905 (7 Edw. 7, c. 15), s. 43; and p. 749, *ante*. The use of such a phrase as "for the Neostyle" to describe ink etc. is not an infringement of the rights in the name (*Neostyle Manufacturing Co., Ltd. v. Ellam's Duplicator Co.* (1903), 21 R. P. C. 185, C. A.; *Gledhill (G. H.) & Sons, Ltd. v. British Perforated Toilet Paper Co.* (1911), 28 R. P. C. 714, C. A.; see also *Apollinaris Co., Ltd. v. Duckworth & Co.* (1906), 23 R. P. C. 540, 549, C. A.; 22 T. L. R. 744 ("Apollinaris Salts")). It is not necessarily a defence that the defendant has also used his own name, especially if he is a retailer; see the cases cited in note (g), p. 762, *ante*; *Faulder & Co. v. Rushton (O. & G.), Ltd.* (1903), 20 R. P. C. 477, 495, C. A.; 19 T. L. R. 452; *Reddaway (F.) & Co., Ltd. v. Stevenson (Robert) and Brother, Ltd.* (1902), 20 R. P. C. 276, discussing and explaining *Reddaway (F.) & Co., Ltd. v. Ahlers* (1901), 19 R. P. C. 12, and *Reddaway (F.) & Co., Ltd. v. Frictionless Engine Packing Co., Ltd.* (1902), 19 R. P. C. 505; see also *Singer Manufacturing Co. v. Spence (James) & Co.* (1893), 10 R. P. C. 297; *Daniel and Arter v. Whitehouse and Britton* (1898), 15 R. P. C. 134, 139; [1898] 1 Ch. 685; *Reddaway & Co. v. Bentham Hemp Spinning Co.* (1892), 9 R. P. C. 503, 507, C. A.; [1892] 2 Q. B. 639. As to actions for infringement, see title INJUNCTION, Vol. XVII., pp. 255, 259.

(d) See pp. 700, 701, 711, 747, 763, 764, 766, *ante*. The use of an infringing name or mark on a separate part of an article may be actionable, though there is a mark on another part sufficient to distinguish (*Army and Navy Co-operative Society, Ltd. v. Army, Navy and Civil Service Co-operative Society of India, Ltd.* (1891), 8 R. P. C. 426). For cases arising from the defendant using old bottles etc. bearing the plaintiff's name, see *Hirst v. Denham* (1872), L. R. 14 Eq. 542; *Woolley & Son v. Morrison* (1904), 21 R. P. C. 349; *Thwaites & Co. v. M'Evilly* (1904), 21 R. P. C. 397, C. A.; [1904] 1 I. R. 310; and see note (g), p. 709, *ante*.

(e) *Burroughs, Wellcome & Co. v. Thompson and Capper* (1903), 21 R. P. C. 69; [1904] 1 Ch. 736; *Havana Cigar and Tobacco Factories, Ltd. v. Tiffin* (1905), *Ltd.* (1909), 26 R. P. C. 473, C. A.

(f) "*Singer*" *Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376, 380; *Singer Manufacturing Co. v. Spence (James) & Co.* (1893), 10 R. P. C. 297; *Briggs v. Dunn & Son* (1911), 28 R. P. C. 704.

(g) *Wotherspoon v. Currie*, *supra*.

(h) Where, however, the retailer has acted innocently and has not

misuse of a trade name or other act of passing off by his servants acting within the scope of their employment (i).

A defendant's acts are in general not considered as calculated to deceive unless he is selling goods of a class which the plaintiff sells or from the course of his trade might be supposed to be selling (k). Other points to be considered are the price and quality of the goods sold by the parties, since a considerable difference in these respects naturally diminishes the probability of confusion (l), and the respective localities in which the goods are sold (m), and any other circumstances tending to increase or diminish confusion (n).

Where the defendant is selling the goods of another manufacturer he is entitled to rely on any defence which such manufacturer might have put forward (o). Further, a defendant having genuine goods manufactured or sold by the plaintiff is entitled to sell those goods under the plaintiff's name or mark, and for that purpose to have labels printed and affixed to the goods (p), though an action lies

claimed any right to continue his acts, he would probably be protected; see note (i), p. 746, *ante*.

(i) *Grierson, Oldham & Co., Ltd. v. Birmingham Hotel and Restaurant Co., Ltd.* (1901), 18 R. P. C. 158; *Cusenier Fils Ainé et Cie. v. Gaiety Bars and Restaurant Co., Ltd.* (1902), 19 R. P. C. 357; *Havana Cigars and Tobacco Factories, Ltd. v. Tiffin* (1905), *Ltd.* (1909), 26 R. P. C. 473, C. A.; but see note (n), p. 773, *post*; and title TORT, pp. 484 *et seq.*, *ante*.

(k) For cases where it has been held that the goods were of such a nature as to be liable to cause confusion, see *Eno v. Dunn & Co.* (1893), 10 R. P. C. 261; 9 T. L. R. 376; *Pinet & Cie. v. Maison Pinet, Ltd.* (1897), 14 R. P. C. 933; 77 L. T. 322; *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop-Truffault Cycle and Tube Manufacturing Co., Ltd.* (1896), 12 T. L. R. 434; *Eastman Photographic Materials, Ltd. v. John Griffiths Cycle Corporation, Ltd.* (1898), 15 R. P. C. 105; *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Lubricant Co.* (1898), 16 R. P. C. 13; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1900), 17 R. P. C. 673, C. A.; 83 L. T. 259; see also *Warwick Tyre Co., Ltd. v. New Motor and General Rubber Co., Ltd.* (1909), 27 R. P. C. 161, 170; [1910] 1 Ch. 248. In the following cases the contrary was held:—*Coleman & Co., Ltd. v. Brown (John) & Co.* (1899), 16 R. P. C. 623, C. A.; *Lucas (Joseph), Ltd. v. Fabry Automobile Co., Ltd.* (1905), 23 R. P. C. 33; *Reddaway & Co., Ltd. v. Irwell and Eastern Rubber Co., Ltd.* (1906), 23 R. P. C. 621, 629; *Dunlop Pneumatic Tyre Co., Ltd. v. Dunlop Motor Co., Ltd.* (1907), 24 R. P. C. 572, H. L.; [1907] A. C. 430; *Turner's Motor Manufacturing Co., Ltd. v. Miesse Petrol Car Syndicate, Ltd.* (1907), 24 R. P. C. 531; *Nugget Polish Co., Ltd. v. Harboro Rubber Co.* (1911), 29 R. P. C. 133; see also *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156; *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.* (1908), 26 R. P. C. 105; [1909] S. C. 318.

(l) *Dick v. Yates* (1881), 18 Ch. D. 76, 87, C. A.; *Edge & Sons, Ltd. v. Gallon & Son* (1900), 17 R. P. C. 557, 565, H. L.; *St. Mungo Manufacturing Co. v. Viper and Recovering Co.* (1910), 27 R. P. C. 420, 430; *Brinsmead (John) & Sons, Ltd. v. Brinsmead (E. G. Stanley)* (1913), 30 R. P. C. 493, 505, C. A.; 29 T. L. R. 705.

(m) See p. 763, *ante*.

(n) As, for instance, the fact that the defendant was formerly in the plaintiff's service (*Hart v. Colley* (1890), 44 Ch. D. 193); or sells through the plaintiff's former agents (*Hodgson and Simpson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465, 473; *contra*, *National Cash Register Co., Ltd. v. Theeman* (1907), 24 R. P. C. 211).

(o) *Lucas (Joseph), Ltd. v. Fabry Automobile Co., Ltd.*, *supra*.

(p) *Farina v. Silverlock* (1863), 6 De G. M. & G. 214.

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for passing off an inferior class of goods made by the plaintiff as a superior class (*q*).

The fact that the name or mark used by the defendant has been registered by him does not generally afford him any additional ground of defence (*r*).

Evidence of
custom etc.

1352. It is for the court to decide whether the similarity of the name or get-up complained of to that employed by the plaintiff is such as to be calculated to deceive, and it is therefore not proper for witnesses to be asked whether in their opinion this is the case (*s*). Witnesses may, however, be properly called to show the custom of the trade as to the use of names or matters of get-up (*t*), the circumstances in which the articles are sold (*u*) and the method in which the plaintiff's name etc. is used (*a*), and any other matters necessary to instruct the court and enable it to arrive at a decision on

(*q*) *Teacher v. Levy* (1905), 23 R. P. C. 117; *Hunt, Roope, Teage & Co. v. Ehrmann Brothers* (1910), 27 R. P. C. 512, 521; [1910] 2 Ch. 198; *Spalding (A. G.) & Brothers v. Gamage* (1913), 29 T. L. R. 541; but the plaintiff must show the existence of two distinct classes (*ibid.*).

(*r*) *Van Zeller v. Mason, Cattley & Co.* (1907), 25 R. P. C. 37; *Re Pimms' Trade Mark, Thorne (R.) & Sons, Ltd. v. Pimms, Ltd.* (1909), 26 R. P. C. 221. In both these cases the mark had been registered with the plaintiff's consent at a time when the defendants were the plaintiff's agents; see also note (*n*), p. 716, *ante*.

(*s*) *Payton & Co. v. Snelling, Lampard & Co., Ltd.* (1900), 17 R. P. C. 628, 635, H. L.; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83, 85; *Goodwin v. Ivory Soap Co.* (1901), 18 R. P. C. 389, C. A.; *Re Addley Bourne's Registered Trade Marks, Addley Bourne v. Swan and Edgar* (1902), 20 R. P. C. 105, 118; [1903] 1 Ch. 211; *Cropper Minerva Machines Co., Ltd. v. Cropper, Charlton & Co., Ltd.* (1906), 23 R. P. C. 388, 395; *Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.* (1912), 29 R. P. C. 465, 476, H. L.; *Royal Warrant Holders' Association v. Deane and Beale, Ltd.* (1911), 28 R. P. C. 721, 726; 105 L. T. 623; *Perry & Co., Ltd. v. Hessin & Co.* (1912), 29 R. P. C. 509, 528, C. A.; 56 Sol. Jo. 572; *contra*, *Scottish Union and National Insurance Co. v. Scottish National Insurance Co., Ltd.* (1908), 26 R. P. C. 105, *per* Lord KINNEIR, at p. 109; [1909] S. C. 318; but a witness may be asked if he would be deceived (*Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.*, *supra*; *Royal Warrant Holders' Association v. Deane and Beale, Ltd.*, *supra*; *Perry & Co., Ltd. v. Hessin & Co.*, *supra*). The question of similarity is one on which a court of appeal will form its own opinion (*Edge & Sons, Ltd. v. Gallon & Son* (1900), 17 R. P. C. 557, 562, H. L.).

(*t*) See note (*q*), p. 712, note (*m*), p. 756, *ante*. As to references to trade papers for this purpose, see *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.* (1901), 18 R. P. C. 465; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15, 24. Interrogatories may be administered on this point (*Perry & Co., Ltd. v. Hessin & Co.* (1910), 28 R. P. C. 108; 56 Sol. Jo. 176).

(*u*) Including the class of purchasers (*Johnston v. Orr Ewing* (1882), 7 App. Cas. 219; *Wilkinson v. Griffith Brothers & Co.* (1891), 8 R. P. C. 370; and see pp. 764, 766, *ante*), the manner in which articles are asked for (*Imperial Tobacco Co. (of Great Britain and Ireland), Ltd. v. Purnell & Co.* (1904), 21 R. P. C. 598, C. A.), and the features to which customers attach importance (*Perry & Co., Ltd. v. Hessin & Co.* (1912), 29 R. P. C. 509, 533, C. A.; 56 Sol. Jo. 572).

(*a*) *Daimler Motor Car Co., Ltd. v. British Motor Traction Co., Ltd.*, *supra*; *Standard Bank of South Africa, Ltd. v. Standard Bank, Ltd.* (1909), 26 R. P. C. 310; 25 T. L. R. 420.

this point (b), and the court should decide in view of this evidence and not merely on an inspection of the objects (c).

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1353. Evidence may also be given as to cases of actual deception, where persons have traded with the defendant under the impression that they were trading with the plaintiffs, or have bought the infringing goods under the impression that they were the goods of the plaintiffs (d). If such instances relate to direct dealing with the defendants or their agents, they may of course constitute part of the cause of action, but even if they do not they are still available as evidence to show that the similarity is such as is likely to deceive (e). In the case of trade names evidence may also be given of persons having asked for goods by the plaintiff's trade name and been given infringing goods, whether in fact such persons were deceived or not.

Evidence of deception.

Where the plaintiff relies on "trap orders," or orders given for the plaintiff's goods by persons sent for that purpose to shops where it is expected that in response to an order for the plaintiff's goods the infringing goods will be supplied, the court, though recognising the necessity for this class of evidence, scrutinises it very closely, and insists that the evidence shall show that the order was given in a perfectly clear manner, so that the defendant or his employees fully realised what was being asked for (f).

Trap orders.

(b) As to evidence generally in passing-off cases, see *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83. In *Wilkinson v. Griffith Brothers & Co.* (1891), 18 R. P. C. 370, 372, the court admitted evidence of increase in the defendant's sales after the adoption of the label complained of, as showing that this had caused the goods to be bought as the plaintiff's goods.

(c) *London General Omnibus Co. v. Lavell* (1900), 18 R. P. C. 74, 79, C. A.; [1901] 1 Ch. 135. There may, however, be cases where no such evidence is necessary; see *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, *supra*.

(d) Where actual deception is alleged, particulars of the persons deceived must be given (*Humphries v. Taylor Drug Co.* (1888), 5 R. P. C. 687; 39 Ch. D. 693; *contra*, *Duke & Sons v. Wisden & Co.* (1897), 77 L. T. 67, C. A.). Where, however, the defendant seeks to show that the wrong goods were given inadvertently in these cases, other instances may be proved by the plaintiff to rebut this defence (*Parozone Co., Ltd. v. Johnston Gibson* (1904), 21 R. P. C. 317).

(e) *Brinsmead (John) & Sons, Ltd. v. Brinsmead (E. G. Stanley)* (1913), 30 R. P. C. 137, 146.

(f) It is preferable that the orders should be in writing (*Carr & Sons v. Crisp & Co., Ltd.* (1902), 19 R. P. C. 497, 500), though in some cases this is not possible. Unless the defendants have been informed that the plaintiffs propose to rely on particular sales within a reasonable time after they have occurred, they are unfairly handicapped, because a shop assistant cannot be expected to remember details of every sale effected (*Ripley v. Griffiths* (1902), 19 R. P. C. 590, 597; *Truefitt (H. P.), Ltd. v. Edney* (1903), 20 R. P. C. 321; *Burroughs, Wellcome & Co. v. Thompson and Capper* (1903), 21 R. P. C. 69, 84; [1904] 1 Ch. 736; *Lever Brothers, Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (1912), 29 R. P. C. 225, 235, C. A.). In *Ripley v. Griffiths*, *supra*, FARWELL, J., at p. 597, said that notice ought to be given as soon as the order is fulfilled. This would in general seem to be impracticable, as the plaintiff would be unable to get further instances from that shop, and the courts are not usually satisfied with a single instance. In *Knight (John) & Sons, Ltd. v. Crisp & Co., Ltd.* (1904), 21 R. P. C.

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The defendant, on the other hand, may give evidence of long user without confusion, as showing that the similarity is not such as is likely to lead to deception (*g*).

Relief
granted.

1354. The relief granted in these cases may include an injunction (*h*), damages (*i*), or an account of profits (*k*), and an order for delivery up of the infringing articles or labels or erasure of the

670, it was pointed out that for the reasons given in the above cases the evidence of the plaintiff's witness, if the court is of opinion that he intends to tell the truth, is to be preferred to that of the defendant's; but see *Lever Brothers, Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (1912), 29 R. P. C. 225, 231, C. A.; 28 T. L. R. 296.

(*g*) *Cropper Minerva Machines Co., Ltd. v. Cropper, Charlton & Co., Ltd.* (1906), 23 R. P. C. 388, 394; *Great Tower Street Tea Co. v. Smith* (1889), 6 R. P. C. 165; *Ash (Claudius), Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.* (1911), 28 R. P. C. 597, C. A.; see also note (*p*), p. 748, *ante*.

(*h*) The usual form of injunction in passing-off cases is against passing off goods not of the plaintiff's manufacture as and for the goods of the plaintiff, but in many cases the injunction has, either in substitution for or in addition to this, a prohibition against certain specific acts. In the case of a trade name which is of personal, local, or descriptive nature, the injunction is generally either against its use "so as to deceive" (*Siebert v. Findlater* (1878), 7 Ch. D. 810, 814 ("Angostura Bitters"); *Reddaway v. Banham* (1896), 13 R. P. C. 218, 221, H. L.; [1896] A. C. 199 ("Camel Hair")), or "without sufficiently distinguishing" (*Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897), 14 R. P. C. 720, H. L.; [1897] A. C. 710 ("Yorkshire Relish")); see also note (*c*), p. 749, *ante*. In *Seixo v. Provezende* (1865), 1 Ch. App. 192, 194 ("Seixo"), a combination of the two forms was adopted. Sometimes there may be a special prohibition against using a word "as the name" of an article (*Rey v. Lecouturier* (1910), 27 R. P. C. 268, 272, H. L.; [1910] A. C. 262 ("Chartreuse")); *Grezier and Doyle v. Autran* (1895), 13 R. P. C. 1, 12, C. A. ("Chartreuse"); *Havana Cigar and Tobacco Factories, Ltd. v. Tiffin* (1905), *Ltd.* (1909), 26 R. P. C. 473, C. A. ("Corona"); see also *Montgomery v. Thompson* (1891), 8 R. P. C. 361, H. L.; [1891] A. C. 217 ("Stone Ales")). The effect of the limited form of injunction, however, in many cases is practically to prohibit any use of the name; see *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Montgomery v. Thompson*, *supra*, at pp. 365, 366; *Powell v. Birmingham Vinegar Brewery Co., Ltd.*, *supra*; *Worcester Royal Porcelain Co., Ltd. v. Locke & Co.* (1902), 19 R. P. C. 479, 490; 18 T. L. R. 712; *Reddaway (F.) & Co., Ltd. v. Stevenson (Robert) and Brother, Ltd.* (1902), 20 R. P. C. 276. So, too, an injunction may be specially directed against certain features of get-up (*Johnston v. Orr Ewing* (1882), 7 App. Cas. 219). For another form of injunction, see *Knott v. Morgan* (1836), 2 Keen, 213. Sometimes an injunction may specially prohibit the supply of goods not of the plaintiff's manufacture in response to an order for goods by a certain name (*Kerfoot v. Cooper (R. A.), Ltd.* (1908), 25 R. P. C. 508). In *Siebert v. Findlater*, *supra*, the injunction was absolute against the use of the name "Angostura," till the discovery of the plaintiff's secret formula. In *Grezier and Doyle v. Autran*, *supra*, certain goods were exempted from the absolute portion of the injunction. Generally an injunction will not lay down a line of conduct for the defendant (*Kerfoot v. Cooper (R. A.), Ltd.*, *supra*). Even where the defendant offers an undertaking, the plaintiff is in general entitled to have an order made in open court, if the infringement was deliberate (*Gandy Belt Manufacturing Co., Ltd. v. Fleming, Birkley and Goodall, Ltd.* (1901), 18 R. P. C. 276; see also title INJUNCTION, Vol. XVII., pp. 225, 259).

(*i*) As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*; and compare pp. 720, 721, *ante*.

(*k*) It is generally in the discretion of the plaintiff which of these shall be taken (*Weingarten Brothers v. Bayer & Co.* (1905), 22 R. P. C. 341, 351,

infringing mark (*l*). The court does not grant an injunction on proof of isolated acts of a deceptive nature, unless they are of such a character as to point to a probability of continuance of the deception (*m*). This is especially the case where the acts were those of a servant done without the master's concurrence or against his orders (*n*).

1355. It may be useful here to refer shortly to certain actions on the border line of passing off. It is not, as a general rule, actionable to sell goods as similar to those of another person, though this may be actionable as a trade libel if malicious motive, untruth, and special damage can be shown (*o*). It is, however, actionable to represent falsely that goods are licensed under certain letters patent or, possibly, even that they are made according to such letters patent (*p*), though it is not actionable to represent that goods

Analogous
actions.

H. L. ; 92 L. T. 511 ; *Saxlehner v. Apollinaris Co.* (1897), 14 R. P. C. 645, 655 ; [1897] 1 Ch. 893, though in *Van Zeller v. Mason, Cattley & Co.* (1907), 25 R. P. C. 37, JOYCE, J., at p. 41, treated it as a matter for the discretion of the court. Generally speaking, neither damages, apart from special damage, nor an account of profits, will be given for acts committed in ignorance ; see note (*u*), p. 720, *ante*. The account of profits generally extends to cover all the infringing articles sold (*Edelsten v. Edelsten* (1863), 1 De G. J. & Sm. 185 ; *Saxlehner v. Apollinaris Co.*, *supra* ; *Lever v. Goodwin* (1887), 4 R. P. C. 492, 504, C. A. ; 36 Ch. D. 1), and is not to be limited to articles sold in England (*Weingarten Brothers v. Bayer & Co.* (1905), 22 R. P. C. 341, H. L. ; 92 L. T. 511) ; but damages may be limited to those cases where the sales were due to the practices complained of (*Singer Manufacturing Co. v. British Empire Manufacturing Co., Ltd.* (1903), 20 R. P. C. 313, 320 ; see also note (*u*), p. 720, *ante*). As to when an account will be ordered, see title INJUNCTION, Vol. XVII., pp. 201, 202, 222, 213.

(*l*) *Farina v. Silverlock* (1850), 4 K. & J. 650 ; *Edelsten v. Edelsten*, *supra*, at pp. 189, 196 ; *Slazenger & Sons v. Feltham & Co.* (1889), 6 R. P. C. 531, 535, 538, C. A. ; 5 T. L. R. 364 ; see also note (*a*), p. 774, *post*.

(*m*) *Leahy, Kelly and Leahy v. Glover* (1893), 10 R. P. C. 141, 153, H. L. ; *Welch v. Knott* (1857), 4 K. & J. 747 ; *Ainsworth v. Walmesley* (1866), L. R. 1 Eq. 518 ; *Rose v. Loftus* (1878), 47 L. J. (CH.) 576 ; *Woolley & Son v. Morrison* (1904), 21 R. P. C. 349 (use of plaintiff's bottles) ; *Burberrys v. Watkinson* (1906), 23 R. P. C. 141 (sale under misapprehension) ; *Bass, Ratcliff and Gretton, Ltd. v. Laidlaw* (1908), 26 R. P. C. 211 (mistake) ; *Armstrong Oiler Co., Ltd. v. Patent Axlebox and Foundry Co., Ltd.* (1910), 27 R. P. C. 362 (use of plaintiff's name plates) ; but see *Yeatman v. Homberger (L.) & Co.* (1912), 29 R. P. C. 561 ; 107 L. T. 43.

(*n*) *Leahy, Kelly and Leahy v. Glover*, *supra* ; *Rutter & Co. v. Smith* (1900), 18 R. P. C. 49 ; *Knight (John) & Sons, Ltd. v. Crisp & Co., Ltd.* (1902), 21 R. P. C. 670 ; *Montgomerie & Co., Ltd. v. Young Brothers* (1904), 21 R. P. C. 285 ; *Kodak, Ltd. v. Grenville* (1908), 25 R. P. C. 416 ; *Lever Brothers, Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (1912), 29 R. P. C. 225, C. A. ; 23 T. L. R. 294. As to the liability of a master for the acts of his servant, see title MASTER AND SERVANT, Vol. XX., pp. 61 *et seq.*

(*o*) *Magnolia Metal Co. v. Tandem Smelting Syndicate, Ltd.* (1898), 15 R. P. C. 701, 715, C. A. ; (1900), 17 R. P. C. 477, 485, H. L. ; compare *Canham v. Jones* (1813), 2 Ves. & B. 218. As to trade libel, see title TRADE AND TRADE UNIONS, pp. 671 *et seq.*, *ante*, and compare title LIBEL AND SLANDER, Vol. XVIII., pp. 607 *et seq.*

(*p*) *Pneumatic Rubber Stamp Co., Ltd. v. Lindner* (1898), 15 R. P. C. 525 ; but compare *Freeman Brothers v. Sharpe Brothers & Co., Ltd.* (1899), 16 R. P. C. 205.

SECT. 5.
Legal Proceedings.

are made according to a process in which the plaintiff has no existing patent rights (*q*). An action lies to prevent a printer making or selling infringing labels unless these are required for use on genuine goods (*r*).

SECT. 6.—*Special Defences.*

Acquiescence.

1356. If a trader allows another person who is acting in good faith to build up a reputation under a trade name or mark to which he has rights, he may lose his right to complain (*s*), and may even be debarred from himself using such name or mark (*t*). But even long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction (*a*).

Plaintiff's
trade
fraudulent.

1357. Neither law nor equity assists a wholly fraudulent trade, since both adopt the maxim *ex turpi causâ non oritur actio*, and if it is shown that the plaintiff's trade is of this nature he cannot succeed in any action for the use of his trade name or trade mark, or for passing off (*b*).

(*q*) *Native Guano Co. v. Sewage Manure Co.* (1889), 8 R. P. C. 125, 128, H. L.

(*r*) *Farina v. Silverlock* (1863), 6 De G. M. & G. 214; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 567, 759. Where a person has innocently put a mark on goods at the request of a customer and has been sued, he can claim indemnity against the customer (*Dixen v. Fawcus* (1861), 3 E. & E. 537).

(*s*) *Beazley v. Soares* (1882), 22 Ch. D. 660; *Londonderry (Marquis) v. Russell* (1887), 3 T. L. R. 360, C. A.; *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.* (1894), 11 R. P. C. 281, P. C.; [1896] A. C. 275; *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.* (1901), 18 R. P. C. 434, 443, C. A.; *Cropper Minerva Machines Co., Ltd. v. Cropper, Charlton & Co., Ltd.* (1906), 23 R. P. C. 388, 394; *Boussod, Valadon & Co. v. Marchant* (1907), 25 R. P. C. 42, 53, C. A.; see also *Brinsmead (John) & Co., Ltd. v. Brinsmead (E. G. Stanley)* (1913), 30 R. P. C. 493, 506, C. A.; 29 T. L. R. 706.

(*t*) *Boussod, Valadon & Co. v. Marchant, supra.*

(*a*) *Ford v. Foster* (1872), 7 Ch. App. 611; *Barlow and Jones v. Johnson (Jabez) & Co.* (1890), 7 R. P. C. 395, 411, C. A.; *Rowland v. Michell* (1896), 14 R. P. C. 37, C. A.; [1897] 1 Ch. 71; see also *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., supra.* Where the infringement has been committed by a person not worth suing, failure to sue may not amount to acquiescence (*Rowland v. Michell, supra*; *Cocks v. Chandler* (1871), L. R. 11 Eq. 446); acquiescence may, however, affect the right to special forms of relief, such as an account (*Ford v. Foster, supra*), or delivery up (*County Chemical Co., Ltd. v. Frankenburg* (1904), 21 R. P. C. 722). As to its effect on damages, see *Gledhill (G. H.) & Sons, Ltd. v. British Perforated Toilet Paper Co.* (1911), 28 R. P. C. 429, 451. In judging of acquiescence, regard must be had to the date when the facts came to the plaintiff's knowledge (*Barlow and Jones v. Johnson (Jabez) & Co., supra*; *Rowland v. Michell, supra*; *Hirst v. Denham* (1872), L. R. 14 Eq. 542; *Gledhill (G. H.) & Sons, Ltd. v. British Perforated Toilet Paper Co., supra*, at p. 451; see also *Lee v. Haley* (1869), 5 Ch. App. 155; and compare title INJUNCTION, Vol. XVIII., pp. 210, 211).

(*b*) *Lee v. Haley, supra*; *Bile Bean Manufacturing Co. v. Davidson* (1906), 23 R. P. C. 725; *Newman v. Pinto* (1887), 4 R. P. C. 508, C. A.; 57 L. T. 31; and the case referred to in *Ford v. Foster, supra*, at p. 631; but compare *California Fig Syrup Co. v. Taylor's Drug Co., Ltd.* (1897), 14 R. P. C. 341, 347; 13 T. L. R. 438; see also pp. 699, 716, *ante*; and compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.*

1358. There is a further class of cases in which it has been argued that the plaintiff is not entitled to succeed because of misrepresentations made by him. The result of these cases seems to be that the court does not give specific protection to a name or mark containing representations that are false (*c*), but allows a common law action to be brought for the fraud of passing off, if the misrepresentations are not of such a nature as to disentitle the plaintiff to succeed on the ground that his trade is fraudulent (*d*). There has been some doubt expressed whether in such a case the plaintiff could obtain an injunction (*e*), but probably, once he had succeeded, the court would grant an injunction to avoid the necessity of bringing a series of actions against the defendant for what it has already decided to be a wrongful act (*f*). It is no defence that the plaintiff has failed to fulfil certain statutory requirements (*g*).

SECT. 6.

Special
Defences.Misrepresentations by
plaintiff.

(*c*) See *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523; *Ford v. Foster* (1872), 7 Ch. App. 611, 630; *Cropper Minerva Machines Co., Ltd. v. Cropper, Charlton & Co., Ltd.* (1906), 23 R. P. C. 388, 394. A representation that an article is patented is such a misrepresentation if there has never been such a patent (*Flavel v. Harrison* (1853), 10 Hare, 467), or where the patent has expired (*Cheavin v. Walker* (1877), 5 Ch. D. 850, 862, C. A., overruling *Edelsten v. Vick* (1853), 11 Hare, 78, already doubted in *Leather Cloth Co. v. American Leather Cloth Co.*, *supra*, per Lord KINGSDOWN, at p. 543, and *Leather Cloth Co., Ltd. v. Hirschfeld* (1863), 1 New Rep. 551; see also *Re Boake (A.), Roberts & Co., Ltd.'s Trade Marks, Boake (A.), Roberts & Co., Ltd. v. Wayland & Co.* (1908), 26 R. P. C. 257). Where, however, the word "patent" has become part of the name of the article, this rule would not apply (*Marshall v. Ross* (1869), L. R. 8 Eq. 661; see also *Gridley v. Swinborne* (1888), 5 T. L. R. 71; *Cochrane v. MacNish & Son* (1896), 13 R. P. C. 100, P. C.; [1896] A. C. 225). The same rule applies to a representation that a design (*Winser & Co., Ltd. v. Armstrong & Co.* (1898), 16 R. P. C. 167, 172), or trade mark (*Lewis's v. Goodbody* (1892), 67 L. T. 194), is registered, but the use of the words "Trade Mark" is not necessarily such a representation (*Sen Sen Co. v. Britten* (1899), 16 R. P. C. 137; [1899] 1 Ch. 692). Representations made after action brought do not affect the plaintiff's right (*Siebert v. Findlater* (1878), 7 Ch. D. 801, 811).

(*d*) *Ford v. Foster*, *supra*; *Sykes v. Sykes* (1824), 3 B. & C. 541; see also *Jamieson & Co. v. Jamieson* (1898), 15 R. P. C. 169, C. A., per VAUGHAN WILLIAMS, L.J., at p. 191; 14 T. L. R. 160; *Wolff & Son v. Nopitsch* (1900), 18 R. P. C. 27, C. A., per Lord ALVERSTONE, C.J., at p. 32. For other cases where misrepresentations have been held not to affect the plaintiff's rights, see *Plotzker v. Lucas* (1907), 24 R. P. C. 551, 562; *Pomeroy (Mrs.), Ltd. v. Scalé* (1906), 24 R. P. C. 177, 192; 23 T. L. R. 170. As to misrepresentation generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 613 *et seq.*

(*e*) *Jamieson & Co. v. Jamieson*, *supra*. As to injunction generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*f*) See *Ford v. Foster*, *supra*. The old equity practice was not necessarily to refuse an injunction in such cases, but to refuse it until the plaintiff had established his title at law (*Pidding v. How* (1837), 8 Sim. 477; *Perry v. Truefitt* (1842), 6 Beav. 66; *Flavel v. Harrison* (1853), 10 Hare, 467, 473). Such misrepresentation may, however, affect the plaintiff's right to other forms of relief, such as an account (*Ford v. Foster*, *supra*).

(*g*) *Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co.* (1901), 18 R. P. C. 185, C. A.; 17 T. L. R. 354; *Randall (H. E.), Ltd. v. British and American Shoe Co.* (1902), 19 R. P. C. 393, 402; [1902] 2 Ch. 354; *Re Baker (Albert) & Co.* (1898), *Ltd.'s Application for a Trade Mark* (1908), 25 R. P. C. 524; [1908] 2 Ch. 86.

SECT. 6.
Special
Defences.

Misrepresentations by
defendant.

1359. Misrepresentations by the defendant as to his goods or firm, even if they are not of such a nature as to give the plaintiff a cause of action, have in many cases led to the defendant being deprived of costs (*h*); but this is not a proper course where the misrepresentations have reference to a collateral matter and have nothing to do with the plaintiff's case (*i*). No action lies for falsely representing that the defendant's goods have obtained prize medals (*k*), though this is now a criminal offence with regard to certain medals (*l*), or, apparently, for appropriation of testimonials of the plaintiff's goods, unless it would lead to passing off (*m*).

(*h*) *Estcourt v. Estcourt Hop Essence Co.* (1875), 10 Ch. App. 276; *Newman v. Pinto* (1887), 4 R. P. C. 508, C. A.; 57 L. T. 31; *Thorneloe v. Hill* (1894), 11 R. P. C. 61, 72; [1894] 1 Ch. 569; *Lever Brothers, Ltd. v. Beddingfield* (1898), 16 R. P. C. 3, C. A.; 80 L. T. 100; *Valentine Meat Juice Co. v. Valentine Extract Co., Ltd.* (1899), 17 R. P. C. 1, 13; 48 W. R. 127; *Winser & Co., Ltd. v. Armstrong & Co.* (1898), 16 R. P. C. 167, 172; *Warsop (B.) & Sons, Ltd. v. Warsop* (1902), 21 R. P. C. 481.

(*i*) *King & Co., Ltd. v. Gillard & Co., Ltd.* (1905), 22 R. P. C. 327, C. A.; [1905] 2 Ch. 7. Probably this rule would not apply to such cases as *Estcourt v. Estcourt Hop Essence Co.*, *supra*; *Newman v. Pinto*, *supra*, in each of which the plaintiff had a cause of action, but failed because of fraud of which the defendant was equally guilty; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 726, 727.

(*k*) *Batty v. Hill* (1863), 1 Hem. & M. 264; see also *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.* (1894), 11 R. P. C. 281, P. C.; [1894] A. C. 275; but compare *King & Co., Ltd. v. Gillard & Co., Ltd.*, *supra*.

(*l*) Exhibition Medals Act, 1863 (26 & 27 Vict. c. 119), by which a trader who falsely represents that he has obtained a medal or certificate from the Commissioners for the Exhibition of 1851, and the Commissioners for the Exhibition of 1862, or either of such bodies of Commissioners (see *ibid.*, s. 3) in respect of any article or process for which the Commissioners awarded a medal or certificate, or falsely represents, knowing it to be false, that any other trader has obtained such a medal or certificate, or that any article sold or exposed for sale has been made by, or by any process invented by, a person who has won such a medal or certificate for such article or process, incurs a fine not exceeding for the first offence £5, and for each subsequent offence a fine of £20. Offences after the first may, instead, be punished by imprisonment (*ibid.*, s. 1). Offences may be prosecuted summarily (*ibid.*, s. 4), and in any proceedings there is no need to prove damages arising from the false representations (*ibid.*, s. 2); nor is it necessary to set out a copy of any medal or certificate (*ibid.*). There is a saving for a period not exceeding six months of all rights and remedies to which any person is entitled at law or in equity (*ibid.*, s. 5). As to evidence in civil proceedings, see *ibid.*, s. 5; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 400, note (s). As to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*m*) *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, C. A., following *Batty v. Hill*, *supra*, and distinguishing *Franks v. Weaver* (1847), 10 Beav. 297. It should be noted that the decision in *Tallerman v. Dowsing Radiant Heat Co.*, *supra*, was only that the point was not clear enough for interlocutory relief, and that on appeal the defendants practically submitted to judgment; see also *Frankau (Adolph) & Co., Ltd. v. Pflueger* (1910), 28 R. P. C. 130; *Accumulator Industries, Ltd. v. Vandervell & Co.* (1912), 29 R. P. C. 391. A representation that the defendant has executed work in fact done by the plaintiff may be restrained (*Henderson & Son v. Munro & Co.* (1905), 7 F. (Ct. of Sess.) 636); compare title MISREPRESENTATION AND FRAUD, Vol. XX., p. 676.

1360. If the defendant can show general user by other firms of the name or mark sued on, this defeats the plaintiff's claim to a right of monopoly in such name or mark (*n*). Apart from such general user the defendant can sometimes show a user by himself or his predecessors in business, perhaps merely local, but *bonâ fide* and of sufficient duration to negative the idea of deception (*o*). Such individual rights of user do not, however, necessarily prevent the plaintiff from succeeding against third parties (*p*).

SECT. 6.
Special
Defences.
—
General user.

(*n*) *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.* (1894), 11 R. P. C. 281, P. C.; [1894] A. C. 275; and see pp. 759, 765, *ante*.

(*o*) *Edge & Sons, Ltd. v. Gallon & Son* (1900), 17 R. P. C. 557, H. L.; *Chivers (S.) & Sons v. Chivers (S.) & Co., Ltd.* (1900), 17 R. P. C. 420; *Goodwin v. Ivory Soap Co.* (1900), 17 R. P. C. 689, 695. In *Daniel and Arter v. Whitehouse and Britton* (1898), 15 R. P. C. 134; [1898] 1 Ch. 685, it was held that where the defendant had had such a concurrent right of user of a trade name, but this trade had died away, he was not entitled to revive it; *contra*, *Mouson & Co. v. Boehm* (1884), 26 Ch. D. 398. In *Phillips (Godfrey) & Sons v. Ogden (Thomas) & Co., Ltd.* (1895), 12 R. P. C. 325, it was held that such a concurrent right of user in a trade name for tobacco gave a similar right of user for cigarettes made from such tobacco; see also p. 713, *ante*. As to fraudulent user, see note (*a*), p. 774, *ante*.

(*p*) *Dent v. Turpin, Tucker v. Turpin* (1861), 2 John. & H. 139; *Free-fishers and Dredgers of Whitstable v. Elliott* (1888), 4 T. L. R. 273; *Paine & Co. v. Daniell & Sons' Breweries, Ltd.* (1893), 10 R. P. C. 217, C. A.; [1893] 2 Ch. 567; *Worcester Royal Porcelain Co. v. Locke & Co.* (1902), 19 R. P. C. 479, 489; 18 T. L. R. 712; *Star Cycle Co., Ltd. v. Frankenburgs* (1907), 24 R. P. C. 414, C. A. The "three mark rule" (see note (*e*), p. 699, *ante*), also shows clearly that the courts recognise that two or more persons may have a right to a name or mark against outsiders; see also Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 20, 21. As to the limitations of this doctrine, however, see *Attenborough v. Jay* (1898), 14 T. L. R. 365; *Batty v. Hill* (1863), 1 Hem. & M. 264, 270.

TRADE SECRETS.

See AGENCY; COPYRIGHT AND LITERARY PROPERTY; INJUNCTION;
MASTER AND SERVANT.

TRADE UNIONS.

See TRADE AND TRADE UNIONS.

TRAFFIC.

See CARRIERS; HIGHWAYS, STREETS, AND BRIDGES; RAILWAYS AND CANALS; SHIPPING AND NAVIGATION; STREET AND AERIAL TRAFFIC.

TRAMWAYS AND LIGHT RAILWAYS.

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Part I.—Tramways.

SECT. 1.—*Methods of Promoting Tramways.*

SECT. 1.

1361. The construction of tramways (a) may be promoted by (1) a Provisional Order (b) under the Tramways Act, 1870 (c); or (2) a private Act of Parliament (d).

Methods of Promoting Tramways.

Two methods available.

SECT. 2.—*Provisional Orders.*

SUB-SECT. 1.—*Application by Local Authorities or Private Persons.*

1362. A Provisional Order under the Tramways Act, 1870 (e), for the construction of a tramway in any district may be obtained through the Board of Trade, either by the local authority (f), or

Who may be promoters.

(a) Tramways do not appear to have been specifically defined by statute. It may, however, be noted that the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 5 (1), defines a "tramway" as authorised to be constructed "wholly along public roads or streets without any deviation," and a "tram-road" as "any tramroad or tramway which is not a tramway as hereinbefore defined," and as including tramways and light railways constructed under the Tramways (Ireland) Acts, 1860—1891 (23 & 24 Vict. c. 152; 24 & 25 Vict. c. 102; 34 & 35 Vict. c. 114; 39 & 40 Vict. c. 65; 44 & 45 Vict. c. 17; 46 & 47 Vict. c. 43; 52 & 53 Vict. c. 66; 54 & 55 Vict. c. 42), and the Railways (Ireland) Act, 1890 (53 & 54 Vict. c. 52). "Tramway" is included within the term "railways" in the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), s. 2, and in the Regulation of Railways Acts, 1868 (31 & 32 Vict. c. 119), s. 2, and 1871 (34 & 35 Vict. c. 78), s. 2. But, in public legislation, the word "railway" does not include "tramway" unless it is expressly made to do so by the terms of the Act; see title RAILWAYS AND CANALS, Vol. XXIII., pp. 619 *et seq.*; *Tottenham Urban Council v. Metropolitan Electric Tramways, Ltd.*, [1913] A. C. 702; and, therefore, land occupied by a tramway is not entitled to be rated as a railway under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (1) (b) (*ibid.*, following *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority*, [1892] 1 Q. B. 357); see title RATES AND RATING, Vol. XXIV., pp. 85, 86. A tramway constructed without the authority of Parliament is a public nuisance (*R. v. Train* (1862), 2 B. & S. 640; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588, C. A.; compare *R. v. Morris* (1830), 1 B. & Ad. 441; *R. v. Charlesworth* (1851), 16 Q. B. 1012).

(b) As to Provisional Orders, see the text, *infra*.

(c) 33 & 34 Vict. c. 78.

(d) As to the procedure for obtaining a private Act of Parliament, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.* Many lines on public roads worked by electrical powers and in other respects similar to electric tramways have been promoted under the Light Railways Act, 1896 (59 & 60 Vict. c. 48), as light railways to which the general enactments relating to railways (including rating) also apply (*Wakefield and District Light Railway v. Wakefield Corporation*, [1907] 2 K. B. 256, C. A.; affirmed *sub nom. Wakefield Corporation v. Wakefield and District Light Railway*, [1908] A. C. 293); see Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 12; and pp. 819 *et seq.*, *post*); such undertakings have secured irrevocably the status and privileges of light railways (*Tottenham Urban District Council v. Metropolitan Electric Tramways, Ltd.*, *supra*, per Lord MOULTON, at p. 719).

(e) 33 & 34 Vict. c. 78, s. 4.

(f) The local authority is, in the City of London, the Mayor and Corporation, in the County of London outside the City the London County Council, and elsewhere the urban or rural district council, as the case may be, or occasionally the parish council (*ibid.*, s. 3, Sched. A, Part I.;

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by any person, persons, corporation or company with the consent of the local authority; or, where the district is or forms part of a highway district under the Highways Acts (*g*), with the consent of the road authority (*h*). In each case the local authority, person, persons, corporation or company specified in the Order are deemed the promoters of the tramway (*i*).

SUB-SECT. 2.—*Consents Required.*

Special
meeting
of local
authority.

1363. No local authority may apply for a Provisional Order until a resolution approving of the intention to apply has been concurred in and passed at a special meeting at which two-thirds of the members are present and vote, and of which a month's previous notice has been given in the manner prescribed by the local authority (*k*).

Private
promoters.

1364. Persons, corporations or companies must obtain the consent of the local authority or, in the case of a highway district, of the road authority, before making an application (*l*); and in districts where the road authority is distinct from the local authority, and where it is necessary to seek power to break up any road, the consents of both authorities are required (*m*).

Refusal of
consent.

1365. Where it is proposed to construct a tramway in two or more districts, and the consent of any local or rural authority having jurisdiction in them is refused, the Board of Trade may, nevertheless, authorise the construction, if it is satisfied, after inquiry, that two-thirds of the length of the tramway is proposed to be laid in a district or districts the local and rural authorities of which consent to its construction, and the Board must, in such

Local Government Acts, 1888 (51 & 52 Vict. c. 41), s. 40 (8), and 1894 (56 & 57 Vict. c. 73), ss. 6 (1), 21 (1). As to the Mayor and Corporation of the City of London, see title METROPOLIS, Vol. XX., pp. 422 *et seq.*; as to the London County Council, see *ibid.*, pp. 418 *et seq.*; as to urban and rural district councils, see title LOCAL GOVERNMENT, Vol. XIX., pp. 263 *et seq.*, 329 *et seq.*; as to parish councils, see *ibid.*, pp. 240 *et seq.*

(*g*) As to the Highway Acts, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 24.

(*h*) "District" means the area within the jurisdiction of the local or road authority (Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 3); "road authority" means the authority of the districts specified in *ibid.*, Sched. A, Part I. (*ibid.*, s. 3). By the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4, the metropolitan borough councils have become the road authorities of the Metropolis; compare title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*

(*i*) "Promoters" is defined by the Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 4 (2), 24, as "any person, persons, corporation, company or local authority authorised by special Act to construct a tramway"; the term also, apparently, comprises the permitted assignees of such persons (see *ibid.*, ss. 43, 44 (sale and purchase of tramways)), but does not include lessees or licensees (*Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A., per LINDLEY, L.J., at p. 51; *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456, 469, 472).

(*k*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 4, Sched. A, Part III.; see also title PARLIAMENT, Vol. XXI., p. 731.

(*l*) Tramways Act, 1870 (33 & 34 Vict. c. 71), s. 4, Sched. A, Part III.; see also title PARLIAMENT, Vol. XXI., p. 731. As to highway districts and road authorities, see note (*h*), *supra*.

(*m*) Tramways Act, 1870 (33 & 34 Vict. c. 71), s. 4, Sched. A, Part III.; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*

case, make a special report stating the grounds on which the Order has been made (*n*).

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Dissent of
occupiers.

1366. Every tramway in a town (*o*) must be, as nearly as may be, constructed and maintained in the middle of the road and, if one-third of the owners or occupiers of houses, shops or warehouses abutting thereon have expressed their dissent as prescribed by the Board of Trade (*p*), no tramway may be authorised by Order to be laid in such a manner that for 30 feet or upwards there is a less space than 9 feet 6 inches intervening between the outside of the footpath on either side of the road and the nearest rail of the tramway (*q*).

SUB-SECT. 3.—*Procedure on Application.*

1367. Promoters intending to apply for a Provisional Order must:—

Conditions as
to notice and
deposit.

(1) Notify their intention by an advertisement, headed with a short title descriptive of the undertaking, to be published in the October and November (or in one of those months) preceding their application (*r*);

(2) Serve notice of such intention, on or before the 15th December following, in accordance with the Standing Orders of both Houses of Parliament for the time being in force with respect to Bills for the construction of tramways (*s*);

(*n*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 5; see *ibid.*, ss. 7, 63, regulating inquiries before a referee appointed by the Board of Trade; see also title PARLIAMENT, Vol. XXI., p. 730, note (*e*).

(*o*) There is no definition of "town" in the Tramways Act, 1870 (33 & 34 Vict. c. 78); but compare the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 11, 15; *London and South Western Rail. Co. (Directors etc.) v. Blackmore* (1870), L. R. 4 H. L. 610, where the term is defined by Lord HATHERLEY, L.C., at p. 615; and title RAILWAYS AND CANALS, Vol. XXIII., p. 650, note (*t*).

(*p*) "Prescribed" means "prescribed by the Board of Trade Rules" (Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 3).

(*q*) *Ibid.*, s. 9; compare *ibid.*, ss. 25, 34 (gauge and overhang), which should be read in conjunction with *ibid.*, s. 9; see also Board of Trade Rules, rr. iii.—v., xv. (4) (Stat. R. & O. Rev., Vol. XIII., Tramway, England and Scotland, p. 1); *Edinburgh Street Tramways Co. v. Black* (1873), L. R. 2 H. L. (Sc.) 336. As to notice to frontagers, see Standing Orders of the House of Commons (Private Business), No. 135; see title PARLIAMENT, Vol. XXI., p. 731. A connected line not shown on the plans and constructed less than 9 feet 6 inches from the outside of the footpath has been ordered to be removed by the promoters (*Wilkinson and Marshall v. Newcastle-upon-Tyne Corporation* (1902), 18 T. L. R. 332).

(*r*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6 (1). As to the contents of the prescribed advertisement, see *ibid.*, Sched. B, Parts I. and II. The insertion must be made once at least in each of two successive weeks in the same newspaper published in the district affected by the proposed undertaking, and where the proposed works will be made. If there is no such newspaper, the advertisement must be inserted in one published in the county in which the district is situated, or, failing this, in one published in some adjoining county. It must also be published in the *London Gazette* (*ibid.*, Sched. B, Part I. (3)).

(*s*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6 (1); Standing Orders of the House of Lords (Private Business), 1911, Nos. 13, 13a; see also Standing Orders of the House of Commons (Private Business), 1913, Nos. 13, 13a; Board of Trade Rules, rr. vi.—ix.; and compare Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 14.

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(3) Deposit on or before the 30th November, in the respective offices of the clerks of the county and parish councils and of the local authorities of every district proposed to be traversed by the undertaking, a copy of the aforesaid advertisement, together with a plan and section of the proposed works prepared in accordance with the regulations of the Board of Trade (*t*);

(4) Deposit on or before the 23rd December at the office of the Board of Trade a memorial signed by the promoters praying for a Provisional Order, and a printed draft of such Order as proposed by them, with an estimate of the expenses of the proposed works signed by persons by whom it is made (*u*); and

(5) Deposit at the office specified in the advertisement a sufficient number of the printed copies above mentioned to be supplied to all persons applying for them for not more than 1s. a copy (*w*).

SUB-SECT. 4.—*Consideration of Application by Board of Trade.*

Duties of
Board of
Trade.

1368. The application for a Provisional Order must be considered by the Board of Trade, and the Board may, if it thinks fit, direct an inquiry (*x*) in the district to which the application relates, or otherwise inquire as to the propriety of proceeding upon the application. The Board must also consider such objections to the Order as may be laid before it on or before such date as the Board may prescribe, and determine whether the promoters may or may not proceed with the application (*y*); and where it appears expedient to the

(*t*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6 (2), Sched. B, Part II.; Board of Trade Rules, rr. x.—xiii.

(*u*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6 (2), Sched. B, Part III.

(*w*) *Ibid.*, s. 6 (2), Sched. B, Part II. (2); Board of Trade Rules, r. xv. By the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 6 (3), all maps, plans, and documents to be deposited for the purposes of any Provisional Order may be deposited with the persons and in the manner directed by the Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), as modified by the Local Government Act, 1888 (51 & 52 Vict. c. 41), and the Local Government Act, 1894 (56 & 57 Vict. c. 73); see titles LOCAL GOVERNMENT, Vol. XIX., pp. 254, 627; PARLIAMENT, Vol. XXI., pp. 733, 734.

(*x*) The inquiry must be held in public before a referee appointed by the Board of Trade, ten days' notice at least being given to the parties on whose representation the inquiry is directed: witnesses may be compelled to attend and give evidence on oath, provided that the reasonable charges of their attendance are paid or tendered, and provided also that they are not required to travel more than ten miles from home; after the inquiry the referee reports to the Board of Trade, and copies of his report are available for all parties to the inquiry (Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 63). *Quære* whether the court has jurisdiction to restrain an inquiry; see *Re Pontypridd and Rhondda Valleys Tramways Co., Ltd.* (1889), 58 L. J. (CH.) 536.

(*y*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 7. As to laying objections, see Board of Trade Rules, rr. viii., ix., xvi.; Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 14, empowering persons to oppose the Bill embodying the Order. The following persons, to whom notice must be given, have a *locus standi* under the Board of Trade Rules, rr. vi., vii., ix.—frontagers, with respect to the intervention of space between a footpath and a tramway; landowners; gas and water companies; gas, telephone, railway, and other companies affected by the discharge of electricity; local authorities; parties directly interested, such as owners or lessees of tramways over which it is sought to acquire compulsory mining powers or which it is proposed to purchase compulsorily; and railways, where tramways

Board that the application should be granted—with or without additions or modifications or subject or not to restrictions or conditions—the Board may settle and make a Provisional Order accordingly (*a*).

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SUB-SECT. 5.—*Form and Contents of Order.*

1369. Every Provisional Order so made must empower the promoters therein specified to make the tramway upon the gauge (*b*) and in the manner described, and contain such provisions as the Board of Trade, having regard to the nature of the application and the facts and circumstances of each case, may think fit to submit to Parliament for confirmation (*c*). No Order may, however, empower the promoters or any other persons to acquire land otherwise than by agreement, or to acquire any lands, even by agreement, except to the extent limited by the Order, or to construct a tramway elsewhere than along or across a public road or upon land taken by agreement (*d*).

Provisions as
to gauge etc.

SUB-SECT. 6.—*Deposit and Advertisement of Order.*

1370. On the delivery to the promoters of a Provisional Order, they are required forthwith to publish it by the insertion of an advertisement in the local newspaper in which the original advertisement of the intended application was published (*e*), or if such newspaper be no longer published, in some other newspaper in the district; and by depositing printed copies for inspection at the offices of clerks of the county councils (*f*), and also at the office named in the advertisement for the sale of such copies to persons applying for them at not more than 1s. (*g*).

Advertisement
in local
newspaper.

SUB-SECT. 7.—*Costs.*

1371. The costs in respect of the preparation and making of the Provisional Order must be paid by the promoters, who may be required by the Board of Trade to give security therefor before proceeding with the Order (*h*).

Costs payable
by promoters.

worked by mechanical power cause competition; see, further, title PARLIAMENT, Vol. XXII., pp. 479, 480. As to the costs of opposition in the case of borough councils etc., see title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*

(*a*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 8; as to the requirements with regard to a draft Provisional Order, see Board of Trade Rules, r. xvi.

(*b*) As to the gauge where none is prescribed by the special Act, see Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 25; and p. 788, *post*.

(*c*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 8.

(*d*) *Ibid.*, s. 8; compare *ibid.*, s. 15. As to rights of way under an agreement between a landlord to give land for a tramway to a tramway company, see *Sinclair v. Cathness Flagstone Quarrying Co.* (1881), 6 App. Cas. 340, H. L.

(*e*) As to the original advertisement, see p. 783, *ante*.

(*f*) Compare note (*w*), p. 784, *ante*.

(*g*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 13, Sched. B, Part IV. (3); and see Board of Trade Rules, r. xix.; as to alterations of deposited plan etc., see *ibid.*, r. xviii. The Order must, presumably, be published at full length.

(*h*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 11; as to the powers

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Orders.

Deposit of
security.

SUB-SECT. 8.—*Deposit Fund.*

1372. Before the delivery of the Provisional Order, the promoters, unless they are a local authority, must deposit in such bank, within such time, and in such manner, and subject to such conditions with respect to interest, repayment and forfeiture as the Board of Trade may prescribe, a prescribed (*i*) sum, amounting to not less than 4 per cent. on the amount of the estimated expense of the tramway, or any security prescribed by the Board having a value not less than such sum of money (*j*).

SUB-SECT. 9.—*Confirmation by Parliament.*

Procedure.

1373. The Board of Trade must, as soon as it conveniently can after the expiration of seven days from the completion, to its satisfaction, of the publication of any Provisional Order, which has been published not later than the 25th April in any year, provide for the introduction into either House of Parliament of a Bill for an Act to confirm such Order as set out in the Schedule to the Bill, and no Order under the Tramways Act, 1870 (*k*), shall have any operation until confirmed, with or without amendment, by Act of Parliament (*l*). If a petition be presented against any Provisional Order comprised in any Bill which is pending in either House, the Bill, so far as it relates to the Order petitioned against, may be referred to a select committee, and the petitioner may appear and oppose as in the case of a special Act (*m*). An Act of Parliament confirming a Provisional

of a local authority with regard to expenses, see p. 806, *post*. The costs of applications to the Board of Trade for Provisional Orders under the Tramways Act, 1870 (33 & 34 Vict. c. 78), are to be taxed on the Chancery and not the parliamentary scale (*Re Morley* (1875), L. R. 20 Eq. 17). As to parliamentary costs, see title PARLIAMENT, Vol. XXI., p. 745; as to High Court costs, see title SOLICITORS, Vol. XXVI.

(*i*) For the definition of "prescribed," see note (*p*), p. 783, *ante*.

(*j*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 12; Board of Trade Rules, rr. xx.—xxiv.; Standing Orders of the House of Commons (Private Business), 1913, No. 57. By the Board of Trade Rules, r. xx., the promoters, if not a local authority and not already possessed of a tramway open for public traffic, must deposit not less than 5 per cent., but, by *ibid.*, r. xxi., this deposit is not payable where the promoters own a tramway which has paid dividends on its ordinary share capital during the previous year. As to the respective rights of the promoters and creditors in case of non-completion of the line, see *Re Lowestoft, Yarmouth, and Southwold Tramways Co.* (1877), 6 Ch. D. 484; *Re Birmingham and Lichfield Junction Rail. Co.* (1885), 28 Ch. D. 652; compare Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), as to which see title PARLIAMENT, Vol. XXI., p. 735, note (*w*). The parliamentary deposit made by a company that has failed to construct the tramway within the time limited and has been ordered to be wound up is not a fund out of which the liquidator is entitled to be paid his general costs of the winding-up, or his remuneration (*Re Colchester Tramways Co.*, [1893] 1 Ch. 309; *Re Tynemouth Borough Tramway Co.* (1875), 33 L. T. 8). As to the application and return of deposits, see pp. 811 *et seq.*, *post*.

(*k*) 33 & 34 Vict. c. 78.

(*l*) *Ibid.*, s. 14; compare *ibid.*, s. 23, defining "special Act."

(*m*) *Ibid.*, s. 14. As to petitions against a Bill on the ground of competi-

Order under the Tramways Act, 1870 (*n*), is to be deemed a public general Act (*o*).

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SUB-SECT. 10.—*Amending Orders.*

1374. The Board of Trade may revoke, amend, extend or vary a Provisional Order by a further Order, made and confirmed in the same way, upon the application of any promoters, which must be made in the same manner and subject to the same conditions as that for the original Order (*p*).

Procedure.

SUB-SECT. 11.—*Non-completion and Suspension of Works.*

1375. If the promoters fail to complete and open a tramway for public traffic within two years from the date of the Provisional Order, or if the works are not substantially commenced within one year from such date or such shorter time as may be prescribed, or are suspended after their commencement without such reason as the Board of Trade regards as warranting such suspension, the powers of construction and erection given by the Order cease to be exercisable, except as to so much of the tramway as is then completed, unless the time be prolonged by the special direction of the Board (*q*). The Board may allow the exercise of such powers as to so much of the tramway as is then completed, but failing permission from the Board they will cease to be exercisable (*r*), and so much of the tramway as has been completed is deemed to be a tramway to which the provisions of the Tramways Act, 1870 (*s*), relating to discontinuance apply (*t*), and may be dealt with accordingly. A notice published by the Board in the *London Gazette* that a tramway has not been completed and opened for public traffic, or that the works have not been substantially completed or have been suspended without sufficient reason, is conclusive evidence of such non-completion, non-commencement, or suspension (*u*).

Period for
completion.

tion, see Standing Orders of the House of Commons (Private Business), 1913, No. 129; and compare note (*y*), p. 784, *ante*.

(*n*) 33 & 34 Vict. c. 78.

(*o*) *Ibid.*, s. 14; compare title EVIDENCE, Vol. XIII., p. 525.

(*p*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 16.

(*q*) *Ibid.*, s. 18. Where the promoters had purchased leasehold land for offices and a generating station, and entered into binding contracts for the supply of electric cars and the supply and installation of dynamos and electric machinery, but had done no physical work on the tramway and its accessories, it was held that the works had not been substantially commenced (*A.-G. v. Bournemouth Corporation*, [1902] 2 Ch. 714, C. A., overruling *Re Dudley and Kingswinford Tramways* (1893), 69 L. T. 711). As to the prolongation of time for the commencement or completion of works, see the Board of Trade Rules with respect thereto (Stat. R. & O. Rev., Vol. XIII., Tramway, England and Scotland, p. 1).

(*r*) But a private person cannot compel the promoters to carry out their statutory powers (*York and North Midland Rail. Co. v. R.* (1853), 1 E. & B. 858, Ex. Ch.; *R. v. Great Western Rail. Co.* (1893), 9 R. 1).

(*s*) 33 & 34 Vict. c. 78.

(*t*) *Ibid.*, ss. 28, 41, 43, 44. As to discontinuance, see p. 810, *post*.

(*u*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 18; *Re Dudley and Kingswinford Tramways*, *supra*.

SECT. 3.
Construc-
tion.

SECT. 3.—Construction.

SUB-SECT. 1.—Gauge and Rails.

Construction
of track.

1376. Every tramway must be constructed on the gauge prescribed by the special Act (*w*), or, if there be none, on such gauge as will admit of the use of carriages constructed for use upon railways of a gauge of 4 feet 8½ inches, and to be so laid and maintained that the uppermost surface of the rail shall be on a level with the surface of the road (*x*).

Inspection

No tramway may be opened for public traffic until it has been inspected and certified as fit for traffic in the prescribed manner (*a*).

SUB-SECT. 2.—Interference with Other Traffic.

(i.) Roads.

Conditions of
interference.

1377. The promoters may from time to time open and break up any road (*b*) for the purpose of making, laying down, maintaining and renewing a duly authorised tramway or any part or parts of it, subject to the following restrictions:—

(1) They must give notice of their intention to the road authority (*c*) at least seven days before the commencement of the work, specifying the time of commencement and the portion of the road proposed to be dealt with (*d*).

(2) They must not open or break up or alter the level of any road except under the superintendence and to the satisfaction of the road authority, unless such superintendence is withheld at the time specified in the notice or discontinued during the work, and must pay all the reasonable expenses of such authority with respect to the superintendence (*e*).

(*w*) As to the meaning of "special Act," see Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 23; and p. 787, *ante*.

(*x*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 25. As to the space between rails etc., see also Board of Trade Memorandum, November, 1900, on these matters; and note (*g*), p. 783, note (*b*), p. 785, *ante*; compare title RAILWAYS AND CANALS, Vol. XXIII., pp. 686, 687. The intention of the Act has, however, in part not been carried out, as in practice it has been found that carriages and trucks cannot run upon the pattern of rail prescribed by regulation for use on tramways.

(*a*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 25.

(*b*) "Road" is defined as "any carriageway being a public highway, and the carriageway of any bridge forming part of or leading to the same" (*ibid.*, s. 3). Unauthorised interference with a road or street may be prosecuted under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 14; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 167.

(*c*) As to road authorities, see note (*h*), p. 782, *ante*.

(*d*) *St. Luke's Vestry v. North Metropolitan Tramways Co.* (1876), 1 Q. B. D. 760; *Barham v. Ipswich Dock Commissioners* (1885), 54 L. T. 23. As to the meaning of "at least," see title TIME, pp. 448, notes (*h*), (*k*), 449, *ante*; as to the right of a local authority to dispense with notice in cases of urgency, see note (*d*), p. 793, *post*.

(*e*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 26. In *St. Luke's Vestry v. North Metropolitan Tramways Co.*, *supra*, it was held that so far as a tramway company merely raised the sleepers and rails to the level of the

(3) They must not, without the consent of the road authority (*f*), deal at any one time with a greater length than 100 yards of any road not exceeding a quarter of a mile in length, and, in the case of roads exceeding that length, must leave an interval of at least a quarter of a mile between any two places at which they open or break up the road, and must not open or break up a greater length than 100 yards at any such place (*g*).

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Construc-
tion.

(ii.) *Bridges.*

1378. Where the carriageway over any bridge forms part of or is a road within the jurisdiction of the road authority (*h*), but the bridge is vested in any person, persons, or corporation distinct from the road authority, any work which the promoters are empowered to construct, affecting or in any way interfering with the structural work of the bridge, must be constructed at the cost of the promoters, under the superintendence and to the reasonable satisfaction of such person, persons, or corporation, unless such superintendence has been withheld after notice given seven days before the commencement of the work by the promoters (*i*).

Supervision
of road
authority.

(iii.) *Level Crossings.*

1379. Where the carriageway in or upon which any tramway is proposed to be laid down is crossed by any railway or tramway on the level, any work which the promoters are empowered to construct, affecting or interfering with such railway or tramway or the traffic thereon, must be constructed and maintained at the cost of the promoters under the superintendence and to the reasonable satisfaction of the person, corporation, or company owning the railway or tramway, unless such superintendence is refused or withheld after notice given seven days before the commencement of the work by the promoters (*k*).

Supervision
of railway
company.

road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining and keeping the road in good condition and repair under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28, rather than doing such work as would call for the superintendence of the road authority under *ibid.*, s. 26.

(*f*) See note (*h*), p. 782, *ante*.

(*g*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 26; *Wandsworth Corporation v. London United Tramways (1901), Ltd.*, (1905), 69 J. P. 340; *Hyde Corporation v. Oldham, Ashton and Hyde Electric Tramways, Ltd.* (1900), 64 J. P. 596, C. A., where it was held that the term "road" does not include footway as well as carriageway, and that a tramway company could not break up the footway without the consent of the road authority. As to similar powers of breaking up streets, see titles ELECTRIC LIGHTING AND POWER, Vol. XII., p. 542; GAS, Vol. XV., p. 307; TELEGRAPHS AND TELEPHONES, pp. 360 *et seq.*, *ante*; WATER SUPPLY.

(*h*) See note (*h*), p. 782, *ante*.

(*i*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 26; *Victoria Corporation v. Patterson, Same v. Lang*, [1899] A. C. 615, P. C.

(*k*) Tramways Act, 1870 (33 & 34 Vict. c. 76), s. 26; Standing Orders of the House of Lords (Private Business), 1911, No. 13a; Standing Orders of the House of Commons (Private Business), 1913, No. 13a.

SECT. 3.

Construc-
tion.

Duties as to
reinstatement.

SUB-SECT. 3.—*Completion of Works and Reinstatement of Roads.*

1380. When the promoters have opened or broken up any portion of any road they must comply with the following conditions:—

(1) They must with all convenient speed, and in all cases within four weeks, unless the road authority (*l*) otherwise consents in writing, complete the work on account of which the road was opened or broken up, and, subject to the formation, maintenance, or renewal of the tramway, fill in the ground and make good the surface to the satisfaction of the road authority, restoring the road to as good a condition as it was in before the opening and breaking up, and clearing away all surplus paving or metalling material or rubbish occasioned thereby (*m*).

(2) They must cause in the meantime the place where the road is opened or broken up to be fenced and watched and properly lighted at night.

(3) They must pay all reasonable expenses of the repair of the road for six months after its restoration, so far as such expenses are increased by the opening or breaking up (*n*).

SUB-SECT. 4.—*Repair of Road.*

Maintenance
of track.

1381. The promoters must, at their own expense, maintain and repair to the satisfaction of the road authority (*o*), and with such materials and in such manner as the road authority directs, so much of any road upon which a tramway belonging to them is laid as lies between the rails; and, where two tramways are laid by the same promoters in any road at not more than 4 feet from each other, the portion of road between the tramways; and in each case so much of the road as extends 18 inches beyond the rails of and on each side of any such tramway (*p*). If they abandon the whole or any part of their undertaking and take up any part of any tramway belonging to them, they must, with all convenient speed, and within six weeks, unless the road authority otherwise consents in writing, fill in the ground and make good the surface, restoring, to the satisfaction of the road authority, the portion of road to as good a condition as it was in before the tramway was laid, and clearing away all surplus paving or metalling material or rubbish occasioned by such work (*p*).

(*l*) As to the road authority, see note (*h*), p. 782, *ante*.

(*m*) Tramways Act, 1870 (33 & 34 Vict. c. 78, s. 27; *Stockport and Hyde Division of the Hundred of Macclesfield Highway Board v. Cheshire County Council* (1891), 61 L. J. (Q. B.) 22.

(*n*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 27. Failure of the promoters to comply with these provisions as to restoration and repair is punishable by a penalty not exceeding £20, and a further penalty not exceeding £5 for each day during which any such failure continues after the first day on which the penalty is incurred, without prejudice to the enforcement by specific performance of the requirements of the Tramways Act, 1870 (33 & 34 Vict. c. 78), or to any other remedy against them (*ibid.*, s. 27).

(*o*) See note (*h*), p. 782, *ante*.

(*p*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28; *R. v. Croydon and Norwood Tramways Co.* (1886), 18 Q. B. D. 39, C. A.; *R. (Dublin Corporation) v. FitzGibbon*, [1910] 2 I. R. 236.

The promoters must also in the meantime provide for the fencing, watching and lighting at night of the place where the road is opened or broken up; and if they fail to comply with the foregoing provisions the road authority itself may, after seven days' notice to the promoters, open and break up the road and do the necessary works of repair, maintenance, or restoration, and recover the expenses incurred by it from the promoters (g).

SECT. 3.
Construc-
tion.

The road authority and the promoters may enter into, alter, renew, or vary contracts or arrangements for paving and keeping in repair the whole or any portion of the roadway of any road on which a tramway has been laid by the promoters, and with respect to the proportion of the incidental expense to be paid by either of the parties (r).

Special
agreements.

SUB-SECT. 5.—*Interference with Apparatus of Gas, Water, or Telegraphic Undertakings.*

1382. For the purpose of laying down, maintaining, or renewing any of their tramways, and where it appears necessary or expedient in order to prevent frequent interruption of traffic by repairs or works connected therewith, the promoters may from time to time alter the position of any mains or pipes for the supply of gas or water, or any tubes, wires or apparatus for telegraphic or other purposes (s), subject to the following restrictions:—

Powers of
promoters.

(1) They must, before laying down a tramway in a road in which any mains or pipes, tubes, wires, or apparatus may be laid,

Delivery of
plans etc.

(g) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28. As to expenses, see *St. Luke's Vestry v. North Metropolitan Tramways Co.* (1876), 1 Q. B. D. 760. As to the extent of the liability of, and the recovery of expenses from, a tramway company which was held liable under a special Act to repair the "junction" of the paving between the pavement maintained by the company and the surface maintained by the local authority, see *Norwich Corporation v. Norwich Electric Tramways Co.* (1907), 97 L. T. 911; *Norwich Corporation v. Norwich Electric Tramways Co., Ltd.*, [1906] 2 K. B. 119, C. A.; *West v. Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A. The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28, imposes no liability on a company to remove snow, where such removal is in the nature of cleansing or is done to make the road more convenient for traffic, although where snow is an obstruction rendering the road impassable and unfit for traffic, its removal probably falls within the duty to maintain and repair (*Acton District Council v. London United Tramways*, [1909] 1 K. B. 68; see also *Amesbury Guardians v. Wilts Justices* (1883), 10 Q. B. D. 480; *Ogston v. Aberdeen District Tramways, Co.*, [1897] A. C. 111; *Montreal City v. Montreal Street Railway*, [1903] A. C. 482, P. C. As to the liability of a tramway company for damage arising from an obstruction caused by a railway company which had broken up a road and removed the tramway under its statutory powers, see *Barham v. Ipswich Dock Commissioners* (1885), 54 L. T. 23.

(r) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 29. Promoters are not bound to provide for scavenging etc., except in so far as is necessary to keep their part of the road in repair (*Burnley Corporation v. Lancashire County Council* (1889), 54 J. P. 279); see also *Over Darwen Corporation v. Lancashire Justices* (1887), 58 L. T. 51; *Leek Improvement Commissioners v. Stafford Justices* (1888), 20 Q. B. D. 794, C. A.; *Aldred v. West Metropolitan Trams Co.*, [1891] 2 Q. B. 398, C. A.; *Barnett v. Poplar Corporation*, [1901] 2 K. B. 319 (where the liability for damage

(s) For note (s) see p. 792, *post*.

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tion.

whether they contemplate altering the position of any such mains or pipes, tubes, wires, or apparatus or not, give seven days' notice to the company, or persons, owning or controlling them of their intentions, and deliver a plan and section of the proposed work; and if such company or persons are of opinion that the proposed construction or alteration would endanger their works or apparatus or interfere with the supply of gas, water, or telegraphic or other communication, they may give notice (*t*) to the promoters to lower or alter the position of the mains, pipes, tubes, or apparatus in such manner as may be considered necessary, any difference as to the necessity of lowering or alteration being settled in accordance with the provisions of the Tramways Act, 1870 (*u*), with respect to the settlement of such differences (*w*). Any alteration must be made with as little detriment and inconvenience to the company or persons owning or controlling the mains or pipes, tubes, wires, or apparatus, or to the inhabitants of the district, as the circumstances admit (*x*), and under the superintendence of such company or persons, or of their surveyor or engineer, for which purpose the promoters must give forty-eight hours' notice (*a*).

Provision of
substitutes.

(2) They must not remove or displace any mains, pipes, tubes, wires, or other apparatus or works belonging to or controlled by any such company or persons, or in any way impede the passage of water, gas, or telegraphic or other communication, without the the consent of and except in the manner approved by such company or persons, until good and sufficient mains, pipes, and other works necessary for continuing the supply of water, gas, or telegraphic or other communication, as sufficiently as the same was supplied by those

arising from non-repair by a tramway company, which had entered into a contract with the local authority under which the repair of the portion of the road on which the tramway was laid was undertaken by the road authority, was held to be transferred to the road authority); and compare the cases cited in note (*q*), p. 791, *ante*.

(*s*) This now, presumably, includes telephonic communication, steam power, compressed air and the like.

(*t*) *Hastings Tramways Co. v. Hastings and St. Leonards Gas Co.*, [1906] 2 Ch. 578, C. A.; *Re Ilford Gas Co. and Ilford Urban District Council* (1903), 88 L. T. 236; *Bristol Tramways and Carriage Co. v. National Telephone Co.*, [1899] 2 Ch. 282.

(*u*) 33 & 34 Vict. c. 78.

(*w*) *Ibid.*, s. 33; see p. 795, *post*.

(*x*) *Bristol Tramways and Carriage Co. v. National Telephone Co.*, *supra*; *R. v. East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466; *Wolverhampton Tramways Co., Ltd. v. Great Western Rail. Co.* (1886), 56 L. T. 892; *Fenwick v. East London Rail. Co.* (1875), L. R. 20 Eq. 544.

(*a*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30. The operation of the provision is not confined to cases where the object of the alteration is to prevent interruption of traffic, but applies where the alteration is necessary to allow of the construction of the tramway, and the powers of the provision are not confined to alterations of pipes and apparatus in the road in which the tramway is authorised to be laid, nor to pipes and apparatus within the promoters' limits of deviation. The provision by implication gives the promoters the power of entering on private land necessary to enable them to carry out the alterations which it authorises (*Re Rhondda Urban District Council and Taff Vale Rail. Co.* (1907), 97 L. T. 892, C. A.).

proposed to be removed or displaced, have first been made and laid down at the expense of the promoters, in lieu of such mains, pipes, and works, and are ready for use (b).

(3) They must make good all damage to property belonging to or controlled by such company or persons, and make full compensation to all parties for loss or damage arising from interference with such property or with the private service pipes of any person supplied with water or gas; and they are also liable to a penalty not exceeding £20 for every day upon which the interruption occurs, if by any of their operations they interrupt the supply of water or gas in or through any main or main pipe (c).

SECT. 3.
Construc-
tion.

Making good
damage.

SUB-SECT. 6.—*Interference with Sewers and Drains.*

1383. Where any tramway, or any work connected therewith, interferes with any sewer, drain, watercourse, subway, defence, or work, or in any way affects the sewerage or drainage of any district, the promoters must not commence any work until fourteen days' previous notice (d) in writing of their intention, with all necessary particulars (e), has been left at the principal office of the proper authority, and such authority, unless it fails to do so within fourteen days after service of such notice and particulars, has signified its approval of the same. The promoters must also comply with and conform to all reasonable directions and regulations of the authority in executing the works, and provide, by such new, altered, or substituted works as the authority may require, for the prevention of injury or impediment to the sewers and works, saving harmless the authority against all and every expense occasioned thereby.

Conditions of
interference.

(b) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30. The enactment also provides that the mains and works must be laid down "to the satisfaction of the surveyor or engineer of such water or gas or other company, or of such person, or, in case of disagreement between such surveyor or engineer and the promoters, as an engineer appointed by the Board of Trade may direct," and that no mains, pipes or other apparatus shall be laid down contrary to the regulations of any Act of Parliament relating to water, gas, or other companies, or to telegraphs. Though the provision includes all forms of supply and communication, it is the practice, in the case of undertakings to which the Electric Lighting Acts (see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 542, note (a)) apply, to provide that alterations of lines etc. shall be done only in terms of these Acts. It may be noted that the Tramways Act, 1870 (33 & 34 Vict. c. 78), which contemplated nothing more complex than the rails for a horse tramway, makes no provision as to road improvements and widenings carried out in connexion with their construction, or as to the protection of bridges, culverts etc., or as to the erection of posts and standards etc.; see titles GAS, Vol. XV., p. 358, note (p); TELEGRAPHS AND TELEPHONES, pp. 360 *et seq.*, *ante*; WATER SUPPLY.

(c) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30; *Re Bristol Gas Co. and Bristol Tramways and Carriage Co., Ltd.*, [1910] 1 K. B. 114, C. A. As to notice before commencing any work, see the text, *infra*.

(d) Notice may be dispensed with in cases of urgency (*St. Luke's Vestry v. North Metropolitan Tramways Co.* (1876), 1 Q. B. D. 760).

(e) *Brentford Urban District Council v. London United Tramways, Ltd.* (1901), 45 Sol. Jo. 408 (where it was held that the tramway company, having given the fourteen days' notice of the commencement of works prescribed by this provision, had sufficiently complied with the statute, and that the local authority, having failed to express its approval or disapproval within that period, could not maintain an action for a declaration to restrain the company from executing such works).

SECT. 3.
Construc-
tion.

All the works must be done under the direction, superintendence and control of the engineer or other officers of the authority, and at the reasonable cost and expense of the promoters, and any new, altered, or substituted works, or defence connected therewith, which have been so completed by or at the cost of the promoters are thereafter as completely under the jurisdiction and control of and as fully maintained by the authority as other sewers or works (*f*).

SUB-SECT. 7.—*Power to Break up Road on which Tramway is Laid.*

Conditions of
exercise.

1384. The powers of breaking up any road (*g*) along or across which any tramway is laid, and the powers vested in local (*h*) or road (*i*) authorities for any of the purposes for which they are constituted, or in any company, body, or person for any purposes with respect to gas or water supply or telegraphic communication, are unaffected by the Tramways Act, 1870 (*j*), but the exercise of such powers is limited by the following restrictions:—

(1) The authority, company, or person must cause as little detriment to the promoters as circumstances admit.

(2) Except in cases of urgency (*k*), they must give to the promoters and their lessees, if any, eighteen hours' notice at least of their intention to commence any work which will interrupt the traffic on the tramway, specifying the time at which the work will be begun; but they are not liable to pay to the promoters or lessees any compensation for injury done to the tramway (*l*) by the execution of such work, or for loss of traffic occasioned thereby, or for the reasonable exercise of the powers vested in them.

(3) Whenever they shall so require for the purpose of executing such work, the promoters, or their lessees, must either stop traffic on the tramway referred to in the notice, or shore up and secure it at their own risk and cost during the execution of the work, but such work must be completed by the local or road authority with all reasonable speed.

(4) No company, body, or person may execute any such work so far as it immediately affects the tramway except under the superintendence and to the reasonable satisfaction of the promoters, unless they refuse such superintendence at the time specified in the notice or discontinue it during the progress of the work, and the expense of the execution must be borne by the company, body, or person executing it (*m*).

(*f*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 31.

(*g*) See note (*b*), p. 788, *ante*.

(*h*) See note (*f*), p. 781, *ante*.

(*i*) See note (*h*), p. 782, *ante*.

(*j*) 33 & 34 Vict. c. 78.

(*k*) *St. Luke's Vestry v. North Metropolitan Tramways Co.* (1876), 1 Q. B. D. 760.

(*l*) *R. v. East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466; *Wolverhampton Tramways Co. v. Great Western Rail. Co.* (1886), 56 L. J. (Q. B.) 190 (where a railway company was held to be authorised to remove the plaintiffs' tramway for the purpose of reconstructing, in the interests of public safety, a bridge which the railway company had maintained and repaired for forty years).

(*m*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 32; compare pp. 790,

SUB-SECT. 8.—*Settlement of Differences.*

SECT. 3.

Construc-
tion.Settlement of
differences.

1385. In the case of any difference (*n*) between the promoters or lessees and any local or road authority, or gas or water company, or other company or person possessing sewers, drains, tubes, wires or apparatus for telegraphic or other purposes (*o*), with respect to any interference or control exercised by or claimed to be exercised by either of the parties in respect of any tramway or work, or in relation to any work or proceedings, or the propriety or mode of execution of such work, or the amount of any compensation to be made by or to the promoters or lessees, or any other subject or thing regulated by the Tramways Act, 1870 (*p*), the matter in difference must be settled by an engineer or other fit person nominated by the Board of Trade on the application of either party, the expenses of the reference being borne and paid as the referee directs (*q*).

SECT. 4.—*Working.*SUB-SECT. 1.—*Carriages.*

1386. The promoters and their lessees may use on their tramways carriages (*r*) with flange wheels or wheels suitable only to run on the flanged wheels.

793, *ante*. As to the meaning of “additional expenses” and “interruption of traffic” under this provision, see *Bristol Tramways and Carriage Co. v. National Telephone Co.*, [1899] 2 Ch. 282; *Re Bristol Gas Co. and Bristol Tramways and Carriage Co., Ltd.*, [1910] 1 K. B. 114, C. A. (where it was held that the words of the statute, “work whereby the traffic on the tramway will be interrupted,” do not necessarily involve a complete cessation of the tramway traffic).

(*n*) *Bristol Trams and Carriage Co. v. Bristol Corporation* (1890), 25 Q. B. D. 427, C. A.; *R. v. Croydon and Norwood Tramways Co.* (1886), 18 Q. B. D. 39, C. A.

(*o*) See note (*s*), p. 792, *ante*.

(*p*) As to questions with respect to whether any work executed ought “reasonably to satisfy” either of the parties, see Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 26—32; *St. Luke’s Vestry v. North Metropolitan Tramways Co.* (1876), 1 Q. B. D. 760; *Lanarkshire Tramways Co. v. Motherwell Burgh* (1908), 16 Scots Law Times, 63; *Bristol Trams and Carriage Co. v. Bristol Corporation*, *supra*.

(*q*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33; *R. v. Croydon and Norwood Tramways Co.*, *supra*; *R. v. Devonport Justices, Ex parte Devonport Tramways Co.* (1909), 101 L. T. 424; *Norwich Corporation v. Norwich Electric Tramways Co., Ltd.*, [1906] 2 K. B. 119, C. A.; *R. v. Garrett and Hammersmith Borough Council, Ex parte London United Tramways, Ltd.* (1909), 100 L. T. 533. This rule does not apply in the case of certain differences between the promoters or lessees and licensee (see Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 39), which must be determined by two justices; see *Regent’s Canal Dock Co. v. London County Council* (1907), 71 J. P. 201, where it was held that the justices’ jurisdiction is not ousted by the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33.

(*r*) A tramcar may be a “stage carriage” within the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), ss. 13, 15, which provide against overcrowding (*Brian v. Aylward* (1902), 18 T. L. R. 371; compare *Black v. Neilson* (1897), 2 Adam, 424 (decided under the Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.)), but is not an omnibus within the Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), from the operation of which it is excluded (*ibid.*, s. 3). As to the liability of tramcars to duty under the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), see *Hickman v.*

SECT. 4.
Working.

rail prescribed by their special Act and, subject to the provisions of the special Act and those of the Tramways Act, 1870 (*s*), they are entitled to the exclusive use of their tramways for carriages having such wheels (*t*).

No carriage may extend more than 11 inches on each side beyond the outer edge of the wheels (*u*).

SUB-SECT. 2.—*Motive Power.*

Prescribed by
special Act.

1387. The motive power to be used on any tramway is prescribed by the special Act, and where no such power is prescribed all carriages used on any tramway must be moved by animal power only (*v*).

SUB-SECT. 3.—*Bye-laws.*

Scope of
bye-laws.

1388. Local authorities (*a*) may frame bye-laws for the regulation of the rate of speed (*b*) to be observed in travelling on any tramway in

Birch (1889), 24 Q. B. D. 172. A tramcar has been held to be a "coach" under a local Act (stat. 1767) 7 Geo. 3, c. lxxiii., s. 12 (*Plymouth, Stonehouse, and Devonport Tramway Co. v. General Tolls Co., Ltd.* (1896), 75 L. T. 467, C. A.; affirmed (1898), 14 T. L. R. 531, H. L.); see also *London Tramways Co. v. Bailey* (1877), 3 Q. B. D. 217; *Armstrong v. South London Tramways Co., Ltd.* (1890), 64 L. T. 96, C. A.; *Burton v. Nicholson*, [1909] 1 K. B. 397 (where a tramcar was held to be a "carriage" under the Motor Cars (Use and Construction) Order, 1904, art. iv. (Stat. R. & O., 1904, p. 516), as regards the rule of the road; see title STREET AND AERIAL TRAFFIC, pp. 276, 277, *ante*). As to carriages used on a light railway, see p. 819, *post*. The term "regular running cars" has been held, in an agreement between advertising contractors and promoters providing for the payment of rent in respect of each regular running car, to include any cars which were employed in the service of the undertakers as rolling stock for regular use at the commencement of the year and which were intended for employment as regular running cars, and it was held that regular running was not incompatible with occasional withdrawals for repairs (*Griffiths and Millington, Ltd. v. Southampton Corporation* (1906), 70 J. P. 179).

(*s*) 33 & 34 Vict. c. 78.

(*t*) *Ibid.*, s. 34. A penalty not exceeding £20 is imposed on persons using such carriages except under lease or licence from the Board of Trade (*ibid.*, s. 54; see p. 809, *post*); compare *Cottam v. Guest* (1880), 6 Q. B. D. 70; *Manchester Corporation and Manchester Carriage and Tramway Co. v. Andrews & Son* (1889), 5 T. L. R. 470; *Re London County Council and London Street Tramways Co.*, [1894] 2 Q. B. 189, 205, C. A.; *Liverpool Tramways Co. v. Liverpool Omnibus Co.*, [1870] W. N. 126; *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456. As to the power of a local authority to license carriages using the tramways, see Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 48.

(*u*) *Ibid.*, s. 34.

(*v*) *Ibid.* Under the powers conferred on it in this behalf by *ibid.*, s. 64 (4), the Board of Trade has issued regulations from time to time with respect to motive power by steam and various forms of electrical traction; see *Bell v. Stockton etc. Tramways Co.* (1887), 51 J. P. 804. The Board of Trade regulations for cable traction require cars to be so constructed as to enable the driver to command the fullest view of the road, but a staircase leading to the roof shutting off a small part of the road does not indicate such a want of reasonable regard for public safety as to constitute a fault on the part of the tramway company (*Cass v. Edinburgh and District Tramways Co.*, [1909] S. C. 1068). In *St. Helens District Tramways Co. v. Wood* (1891), 56 J. P. 70, a tramway company was held responsible for the neglect of an engine driver to comply with the Board of Trade regulations as to lamps on engines.

(*a*) As to local authorities, see note (*f*), p. 781, *ante*.

(*b*) *Taylor v. Goodwin* (1879), 4 Q. B. D. 228; *Cannan v. Abingdon*

their districts, the distances at which carriages using the tramway shall be allowed to follow each other, the stopping of such carriages, and the traffic on the road on which the tramway is laid (c); and the promoters and their lessees are similarly empowered to make bye-laws for preventing the commission of any nuisance in or upon any carriage, or in or against any premises, and with respect to the travelling in or upon any carriage belonging to them (d).

Notice of the publication of bye-laws, made either by the local authority or by the promoters or their lessees, must be published by the insertion of an advertisement within one month of the making of the bye-law once at least in each of two successive weeks in a newspaper published in the district or, if there is no newspaper published in the district, in the county in which it is situated, or, if there be none, in some adjoining county, and also once at least in the *London Gazette* (e). A copy of every such proposed bye-law must also be sent to the Board of Trade not less than two calendar months before it will come into operation, and, if made by the local authority, must be delivered to the promoters of the tramway, and, if made by the promoters, to the local authority, and no bye-law which has been disallowed by the Board within two calendar months after it has been laid before the Board shall be of any effect (f).

The bye-laws may impose reasonable penalties for offences, not exceeding 40s. for each offence, with further penalties for continuing offences (g).

SECT. 4.
Working.

Publication
of proposed
bye-laws.

Penalties.

(Earl), [1900] 2 Q. B. 66; *Simpson v. Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405, C. A.; *London and South Western Rail. Co. v. Myers* (1881), 45 J. P. 731; and, as to liability for dangerous driving, see title NEGLIGENCE, Vol. XXI., pp. 411 *et seq.*

(c) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 46. A municipal corporation which has acquired certain tramways may be compelled by mandamus to comply with its local Act and make bye-laws specifying the distance at which one tramcar should follow another (*R. v. Manchester Corporation*, [1911] 1 K. B. 560). As to the construction of a local regulation with respect to the number of passengers to be carried "in or on" a carriage on a tramway, see *Stokell v. Baldwin* (1892), 8 T. L. R. 346.

(d) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 46.

(e) *Ibid.*, s. 46, Sched. C, Part II.

(f) *Ibid.*, s. 46.

(g) *Ibid.*, s. 47. As to the reasonableness of bye-laws, see *Egginton v. Pearl* (1875), 33 L. T. 428; *Heap v. Day* (1886), 34 W. R. 627; *Apthorp v. Edinburgh Street Tramways Co.* (1882), 10 R. (Ct. of Sess.) 344; *Gentel v. Rapps*, [1902] 1 K. B. 160; *Lowe v. Volp*, [1896] 1 Q. B. 256; *Hanks v. Bridgman*, [1896] 1 Q. B. 253; *Smith v. Butler* (1885), 16 Q. B. D. 349; *Badcock v. Sankey* (1890), 54 J. P. 564 (where the case turned on inconvenience through the excessive number of passengers); *Hartley v. Wilkinson* (1885), 49 J. P. 726 (where it was held that the driver of an engine had been rightly convicted for the emission of steam causing annoyance to the public in contravention of a bye-law prohibiting the practice). As to the liability of passengers for infringement of bye-laws relating to the delivery of tickets, see *Wilson v. Fearnley* (1905), 92 L. T. 647; *Hunt v. Green* (1906), 96 L. T. 23; *Heap v. Day*, *supra*; *Hanks v. Bridgman*, *supra*; *Lowe v. Volp*, *supra*. The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 64, empowers the Board of Trade to make rules, but not bye-laws. Though, however, there is no general power under that Act to make bye-laws, it is the practice to empower the Board of Trade to do so under special Acts. The Board has issued model bye-laws for the use of

SECT. 4.

SUB-SECT. 4.—*Liability for Injuries to Employees.*Working.

Liability for
injuries.

1389. Tramway companies are not liable to their employees in respect of injuries resulting from employment under the Employers' Liability Act, 1880 (*h*), unless the employee is a workman employed in manual labour (*i*); but they are so liable under the Workmen's Compensation Act, 1906 (*j*), which applies to all persons employed on tramways except those employed otherwise than by way of manual labour whose remuneration exceeds £250 per annum, casual labourers and outworkers (*k*).

SUB-SECT. 5.—*Notice of Accidents to Employees.*

Notice to
Board of
Trade.

1390. Where any accident occurs in connexion with the construction, use, working, and repair of any tramroad or tramway, which causes loss of life or such bodily injury to an employee as to prevent him from being employed for five hours on his ordinary work on any one of the three following working days, notice in writing must be sent to the Board of Trade as soon as possible, and, in case of an accident not resulting in death, not later than six days after the accident, specifying the time and place of the accident, the name and address of any person killed or injured, the work on which he was employed, and the nature of the injury, and failure to comply with this provision is punishable by a fine of 40s. (*l*).

SECT. 5.—*Rights and Liabilities of Promoters.*SUB-SECT. 1.—*Extent of Rights over Roads and Subjacent Minerals.*

Subordinate
rights of
promoters.

1391. The promoters of a tramway cannot acquire any right other than that of user of any road along or across which their tramway is laid (*m*). Such user must in no way interfere with or limit the

local authorities and promoters under this provision. Where a bye-law provided that every passenger shall enter or mount upon or depart from or get off a car by the hindermost or conductor's platform and not otherwise, it was held that a passenger who, on the arrival of a car at the terminus of the tramway, had alighted from the end which while the car was in motion was the driver's end had committed a breach of the bye-law (*Monkman v. Stickney*, [1913] 2 K. B. 377).

(*h*) 43 & 44 Vict. c. 42; see title MASTER AND SERVANT, Vol. XX., pp. 134 *et seq.*

(*i*) The driver of a tramcar is not so employed (*Morgan v. London General Omnibus Co.* (1884), 13 Q. B. D. 832, C. A., not following *Wilson v. Glasgow Tramways and Omnibus Co.* (1878), 5 R. (Ct. of Sess.) 981; *Cook v. North Metropolitan Tramways Co.* (1887), 18 Q. B. D. 683; see also *Hunt v. Great Northern Rail. Co.*, [1891] 1 Q. B. 601. See, generally, title MASTER AND SERVANT, Vol. XX., pp. 134 *et seq.*

(*j*) 6 Edw. 7, c. 58; see title MASTER AND SERVANT, Vol. XX., pp. 153 *et seq.*

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 1, 13. As to the liability of tramway companies to persons employed by contractors, see title MASTER AND SERVANT, Vol. XX., pp. 192 *et seq.*

(*l*) Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), ss. 1—3. Where the Board of Trade deems it advisable it may order a formal investigation (*ibid.*, s. 3).

(*m*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 57. The promoters have, apparently, only an easement as far as the land is concerned, but they have an exclusive right to use the tramway and to grant licences to other

rights of any owner, lessee, or occupier of mines or minerals lying under or adjacent to so such road, nor is the owner, lessee, or occupier liable to make good, or pay compensation for, damage to the tramway occasioned by the ordinary working of the mines (*n*). The rights of the promoters also in no way affect the powers of road authorities or of the owners, commissioners, or lessees of railways, tramways, or inland navigations with respect to widening altering, diverting, or improving any road, railway, tramway, or inland navigation (*o*), or of local or police authorities with respect to the regulation of traffic (*p*), or the right of the public to pass along or across any part of a road on which a tramway is laid, whether on or off the tramway, with carriages not having wheels suitable only to run on the rails (*q*).

SECT. 5.
Rights and
Liabilities
of
Promoters.

SUB-SECT. 2.—*Recovery of Charges.*

1392. Subject to the regulations prescribed by their special Act, the promoters and their lessees may demand and take tolls and charges, not exceeding the sums therein specified, in respect of their tramway, and must exhibit a list of those authorised to be taken in a conspicuous place inside and outside each of the carriages used on the tramway (*r*).

Authorised
fares.

persons to use it (*Re London County Council and London Street Tramways Co.*, [1894] 2 Q. B. 189, C. A., per LINDLEY, L.J., at p. 205; compare *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456). As to the rating of tramway companies in respect of their undertaking, see title RATES AND RATING, Vol. XXIV., pp. 7, note (*b*), 13, note (*n*), 38, note (*a*), 86.

(*n*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 59. As to the reservation of mineral rights, compare Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 82; and as to damage caused by working of minerals to the road, *A.-G. v. Logan*, [1891] 2 Q. B. 100; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Wednesbury Corporation v. Lodge Holes Colliery Co., Ltd.*, [1907] 1 K. B. 78, C. A.

(*o*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 60. As to the rights of road authorities, see *Bristol Trams and Carriage Co. v. Bristol Corporation* (1890), 25 Q. B. D. 427, C. A.

(*p*) Tramways Act, 1870 (33 & 34 Vict. c. 78) s. 61. As to traffic regulation, compare Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 21—23; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; and, in the Metropolis, Metropolitan Police Acts, 1839 (2 & 3 Vict. c. 47); 1856 (19 & 20 Vict. c. 2); Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); see also *Ramsay v. Thomson & Sons*, (1881), 9 R. (Ct. of Sess.) 140; *Jardine v. Stonefield Laundry Co.* (1887), 14 R. (Ct. of Sess.) 839; *R. v. Devonport Justices, Ex parte Devonport Tramways Co.* (1909), 101 L. T. 424; and title STREET AND AERIAL TRAFFIC, pp. 296, 270, *ante*.

(*q*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 62. As to the rule of the road, compare *Burton v. Nicholson*, [1909] 1 K. B. 397; and title STREET AND AERIAL TRAFFIC, pp. 267, 277, *ante*.

(*r*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 45. Compare *ibid.*, s. 10, which provides that every Provisional Order must specify the charges to be demanded and taken by the promoters. In *Egginton v. Pearl* (1875), 33 L. T. 428, it was held that a passenger's fare was legally demandable at any point of his journey, and that his refusal to pay till the end of it was an infringement of a reasonable bye-law which required that every passenger should pay his fare upon demand; compare *Edinburgh Street Tramways Co. v. Torbain* (1877), 3 App. Cas. 58. A passenger leaving a car and completing the journey authorised under a ticket issued to him thereon upon another car may, on refusal to make any further payment, be convicted for travelling without paying his fare

SECT. 5.

SUB-SECT. 3.—*Liabilities.*Rights and
Liabilities
of
Promoters.Extent of
liability.

1393. The promoters or their lessees are liable for all accidents, damages, and injuries happening through their act or default, or the acts or defaults of their employees, by reason or in consequence of any of their works or carriages, and they are required to save harmless all road and other authorities, companies or bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages and injuries (s).

(*Bastaple v. Metcalfe*, [1906] 2 K. B. 288). In *Nimmo v. Lanarkshire Tramways Co.* (1912), 49 Sc. L. R. 549, it was held that a person, not being a workman, who declined to pay more than the fare demanded from workmen in cars run at certain times for their convenience, having acted without intent to defraud and in vindication of what he regarded as a civil right; was not liable to conviction for contravention of the Tramways Act, 1890 (33 & 34 Vict. c. 78), s. 56, and also that the tramway company was not entitled to discriminate in the matter of charges between persons using workmen's cars. It seems that the actual tolls in force for the time being, and not the maximum tolls authorised by statute, must be exhibited; compare *Gregson v. Potter* (1879), 4 Ex. D. 142.

(s) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 55. This provision does not make the promoters or their lessees liable for mere accidents, caused without negligence, by their use of tramways, but applies only to a wrongful act or default (*Brocklehurst v. Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (1886), 17 Q. B. D. 118; *Goldberg & Son, Ltd. v. Liverpool Corporation* (1900), 82 L. T. 362, C. A.; *West v. Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A.; *Sadler v. South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q. B. D. 17, C. A.). Where there was uncontradicted evidence in an action for negligence causing injuries to a passenger on an electric tramway that the car was in good order and properly worked, and that the company had used every possible precaution known to electrical engineers to prevent the occurrence of the accident that took place, it was held that the defendant company, not being in the position of insurers against all risks, was entitled to judgment (*Newberry v. Bristol Tramways and Carriage Co.* (1912), 107 L. T. 801, C. A.). In *Leaver v. Pontypridd Urban District Council* (1911), 76 J. P. 31, H. L., two men wheeling a truck set it on end against a wall bounding a narrow road in order to avoid an approaching tramcar, the driver of which, after slowing down until the front part of the car had passed the men in safety, drove on at an increased speed, causing the car to strike the truck and thus fatally injuring one of the men, and it was held that this constituted sufficient evidence of negligence to go to the jury in an action by the widow against the owner under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93); see title NEGLIGENCE, Vol. XXI., pp. 454 *et seq.* As to the liability of the promoters for assaults committed by their servants, see *Smith v. North Metropolitan Tramways Co.* (1891), 55 J. P. 630, C. A.; *Seymour v. Greenwood* (1861), 6 H. & N. 359; *Dyer v. Munday*, [1895] 1 Q. B. 742, C. A.; and title MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*; as to unjustifiable prosecution or detention of passengers by their officers under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 52 (as to which see, further, p. 808, *post*), see *Delany v. Dublin United Tramways Co., Ltd.* (1892), 30 L. R. Ir. 725, C. A. (where a conductor was held not to be liable or guilty of unnecessary violence when ejecting a drunken man entering a car, though he did not in the circumstances act with the most perfect presence of mind); *Furlong v. South London Tramways Co.* (1884), Cab. & El. 316; *Charleston v. London Tramways Co.* (1888), 32 Sol. Jo. 557, C. A. (where the defendants, who had given written instructions to their conductors not to give passengers into custody without the authority of an inspector or timekeeper, were held not liable in an action for false imprisonment by a passenger in one of their cars

SUB-SECT. 4.—*Limitation of Rights.*

SECT. 5.

Rights and
Liabilities
of
Promoters.Limits on
exercise of
powers.

1394. The rights of the promoters are strictly limited by the powers conferred on them for the purposes of the special Act incorporating them. The power of interfering with public highways by laying down and maintaining tramways on them is limited to the promoters and their lessees, the promoters being the person or company empowered to construct the tramways; the right

who had been detained and given into custody by a conductor, since the act was beyond the scope of his employment); *Rayson v. South London Tramways Co.*, [1893] 2 Q. B. 304, C. A. (where the defendants were held liable in an action for malicious prosecution by a person against whom a summons in respect of an offence against the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 51, had been dismissed); *Knight v. North Metropolitan Tramways Co.* (1898), 14 T. L. R. 286; *Radley v. London County Council* (1913), 29 T. L. R. 680. As regards the use of electricity for motive power, tramway companies would appear not to be liable for nuisance caused by the exercise without negligence of their statutory powers (*National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.*, [1902] A. C. 381, P. C.). As to the liability of the promoters under their statutory powers generally, see *West v. Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A., where it was held that the plaintiff, a market gardener, had a common law right of action for injury caused to his plants through the use of blocks of beechwood, impregnated with creosote, by a tramway company, which was authorised by its special Act to pave with wood, but might have employed a well-known method not involving the use of creosote, and was not protected from liability by its Act. In *Clarke v. West Ham Corporation*, [1909] 2 K. B. 858, C. A., the defendant corporation was held to be liable for damages sustained by a passenger on its tramway through coming into contact with a standard which was electrically charged owing to a defect constituting a breach of the statutory regulations of the Board of Trade, and was also held not to be entitled to impose a condition limiting its liability for negligence without giving the passenger, who was willing to pay the published fare, the option of travelling at a higher fare without any such condition. Where a tramway is leased, the owners contracting to do repairs at the cost of the lessees, the owners are liable to the lessees for damage arising from the negligence of a contractor employed by them to do the repairs (*City of Birmingham Tramways Co., Ltd. v. Law*, [1910] 2 K. B. 965). The protection under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), extends to local authorities empowered by statute to work tramways (*Lyles v. Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A.; compare title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 342). As to the liability of tramway companies with respect to keeping roads in repair under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 28, see p. 790, *ante*; *Dublin United Tramways Co. v. Fitzgerald*, [1903] A. C. 99 (where the company was held liable for damages resulting from neglect to sprinkle a road with sand in frosty weather); *Re Norwich Corporation and Norwich Electric Tramways Co.* (1908), 99 L. T. 133; *Barnett v. Poplar Corporation*, [1901] 2 K. B. 319; *Aldred v. West Metropolitan Trams Co.*, [1891] 2 Q. B. 398, C. A.; *Howitt v. Nottingham Tramways Co.* (1883), 12 Q. B. D. 16. As to their liabilities with respect to the alteration of mains, pipes and the like, see p. 791, *ante*; *Re Rhondda Urban District Council and Taff Vale Rail. Co.* (1907), 97 L. T. 892, C. A.; *Re Ilford Gas Co. and Ilford Urban District Council* (1903), 88 L. T. 236; *Hastings Tramways Co. v. Hastings and St. Leonards Gas Co.*, [1906] 2 Ch. 578, C. A.; and as to their liabilities with respect to sewerage and drains, see Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33; *R. v. Croydon and Norwood Tramways Co.* (1887), 18 Q. B. D. 39, C. A.; *Bristol Trams and Carriage Co. v. Bristol Corporation* (1890), 25 Q. B. D. 427, C. A.

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Rights and
Liabilities
of
Promoters.

conferred is a personal one, which cannot be claimed by any person not coming within the designation of promoters or lessees of promoters, unless it expressly extends to the promoters' assignees (a).

SECT. 6.—Powers of Local Authorities.

SUB-SECT. 1.—Power of Purchase.

Conditions of
exercise.

1395. Where the promoters of a tramway in any district are not the local authority, that authority may, with the approval of the Board of Trade, require the promoters to sell their undertaking, or so much of it as is within the district, either within six months after the expiration of twenty-one years from the time when they were empowered to construct it, within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board with respect to the discontinuance of a tramway (b) or the insolvency of the promoters (c). The purchase can, however, only be made if the local authority has decided to effect it by resolution passed at a special meeting, of which previous notice has been given in the manner in which such notices are usually given, and at which two-thirds of the members are present and vote, and a majority of those present and voting concur in the resolution (d). The local authority must pay the then value of the tramway, exclusive of any allowance for past or future profits or any compensation for compulsory sale or other consideration whatsoever, and of all lands, buildings, works, materials, and plant of the promoters suitable for the purposes of the undertaking (e), including buildings outside the

Price to be
paid.

(a) *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456, per Lord HERSCHELL, L.C., at p. 463; compare *Eccles Corporation v. South Lancashire Tramways Co.*, [1910] 2 Ch. 263, C. A. Where a local authority purchased the undertaking of a tramway company which was also empowered to run omnibuses, it was held that the statutory powers of the authority did not authorise it to work omnibuses in connexion with the tramways (*A.-G. v. London County Council*, [1902] A. C. 165). Similarly, a local authority empowered to use all tramways "belonging to or leased by" the authority for the purpose, *inter alia*, "of conveying and delivering animals, goods, minerals, or parcels," has been held not to be entitled to expend any part of the borough fund or the receipts of its tramways, or the proceeds of any borough rate, or any other moneys for establishing or maintaining the business of carriers, except as part of or in connexion with its tramway undertaking, and in respect of articles carried on tramways belonging to or leased to the authority or on which the authority had power to run carriages (*A.-G. v. Manchester Corporation*, [1906] 1 Ch. 643; compare *A.-G. v. Mersey Railway*, [1907] 1 A. C. 415).

(b) Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 41; see p. 810, *post*.

(c) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 42; see p. 810, *post*.

(d) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.

(e) *Ibid.*; *Re Manchester Carriage and Tramways Co. and Manchester Corporation* (1902), 87 L. T. 504 (where part of the tramways within a local authority's district already belonged to the authority, but were worked by the promoters of the rest of the tramways within the district jointly with such promoters' part, and it was held that the local authority was bound under the provision to take all lands, works, materials and plant used by the promoters for the joint working of the whole system as "lands, works, materials and plant of the promoters suitable and used by them

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Powers of
Local
Authorities.

district of the local authority (*f*), the value being determinable in case of difference by a referee nominated by the Board of Trade on the application of either party, and the expenses of reference being borne and paid as the referee directs (*g*). When any such sale has been made, all the rights, powers, and authorities of the promoters in respect to the undertaking are transferred to and vested in and may be exercised by the purchasing authority as if the tramway was constructed by it under a Provisional Order, and it is deemed to be the promoter in reference to such Order (*h*).

The local authority may pay the purchase-money and any expenses incurred in the purchase out of the same rate, and has the same powers of borrowing on the security of such rate, as if the expenses were incurred in applying for, obtaining, and carrying into effect a Provisional Order, and where the local rate is insufficient for these purposes on account of any limitation by law, the Board of Trade may extend its limits by a Provisional Order to be confirmed in the same manner as an Order for the promotion of a tramway. Subject to the foregoing provisions, two or more local authorities may jointly purchase any undertaking or so much of it as is within their districts (*i*).

Fund out of
which price
payable.

for the purposes of " the part of the tramways belonging to the promoters) ; compare *Haston v. Edinburgh Street Tramways Co., Ltd.* (1887), 14 R. (Ct. of Sess.) 621.

(*f*) *Manchester Carriage and Tramways Co., Ltd. v. Swinton and Pendlebury Urban Council*, [1906] A. C. 277.

(*g*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43. It has been held under this provision that when one tramway has been incorporated with others by statute in one undertaking, the local authority may purchase such tramway within six months after the expiration of twenty-one years from the time when the promoters were authorised to construct the undertaking, although no right to purchase the other lines has arisen, or although they may not be within the district of the purchasing authority, and although the general system of the tramway may be dislocated by such purchase (*North Metropolitan Tramways Co. v. London County Council* (1895), 60 J. P. 23, C. A.). The basis of valuation is the value of the tramway as successfully constructed and in complete working condition, after deducting a proper sum for depreciation, but without taking into account rights of user (*Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456; *London Street Tramways Co. v. London County Council*, [1894] A. C. 489); see also *Re Manchester Carriage and Tramways Co., Ltd. and Ashton-under-Lyne Corporation* (1904), 68 J. P. 576 (purchase of dépôt); *Re Southampton Tramways Co. and Southampton Corporation* (1899), 81 L. T. 652, C. A. (where it was held that the referee must take into account the fact that the undertaking was subject to the contingency of being sold compulsorily); *North Metropolitan Tramways Co. v. Leyton Urban District Council* (1908), 98 L. T. 792, C. A. (where a local authority had purchased a tramway running over private land, and was held liable to pay not merely for the materials of the tramway, but for some easement over such land). It has been held that the fact that the local authority would have to contribute to the cost of widening the street, if it had to make the tramway itself at the date of its requisition to sell, ought not to be taken into consideration for the purpose of assessing the " then value " of the tramway under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43 (*London, Deptford and Greenwich Tramways Co. v. London County Council*, [1905] 1 K. B. 316).

(*h*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43. As to the time of purchase, see *Wallasey United Tramways and Omnibus Co. v. Wallasey Urban District Council* (1900), 17 T. L. R. 152, H. L.

(*i*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43; as to the working of tramways by a local authority, see note (*p*), p. 805, *post*.

SECT. 6.
Powers of
Local
Authorities.

Voluntary
sale.

1396. Where a tramway has been opened in any district for a period of six months the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, persons, corporation, or company, or, provided that the purchase has been approved by a resolution passed at a special meeting under similar conditions to those above stated as to compulsory purchase, to a local authority. All the rights, powers, authorities, obligations, and liabilities of the promoters are after such sale transferred to and exercisable by the purchasers in the same manner as if the tramway had been constructed by such purchasers under the powers conferred by special Act, with respect to which they are deemed to be the promoters. Where the purchase is made by a local authority, such authority may pay the purchase-money and all incidental expenses out of the same funds, and has the same powers and is subject to the same conditions as in the case of a compulsory purchase as described above (*j*).

SUB-SECT. 2.—Power of Leasing.

Terms of
lease.

1397. A local authority which has constructed or acquired a tramway may, with the consent of the Board of Trade and subject to the provisions of the Tramways Act, 1870 (*k*), demise by lease, to be approved by the Board, the right of user of the tramway, and of demanding and taking the tolls and charges authorised in respect thereof, to any person, persons, corporation, or company, the lease being made for a term or terms not exceeding twenty-one years and renewable for a similar term with the consent of the Board. Every such lease implies a condition of re-entry on the discontinuance of the working of the tramway or any part thereof by the lessees for three calendar months, if the discontinuation is not occasioned by circumstances beyond their control, other than the want of sufficient funds (*l*).

(*j*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 44. As to compulsory purchase, see p. 802, *ante*; as to the extent of powers transferred under this provision, see *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456; *Re Pontypridd and Rhondda Valleys Tramways Co., Ltd.* (1889), 58 L. J. (CH.) 536; *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.; *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A.

(*k*) 33 & 34 Vict. c. 78.

(*l*) *Ibid.*, s. 19. As to discontinuance of working, see p. 810, *post*; as to the validity of leases under this provision and the capacity of the lessees, see *Omnibus Conveyance Co. v. Liverpool United Tramways and Omnibus Co.* (1882), 26 Sol. Jo. 580. Where there was a provision in a lease of tramways that the lessees should "keep the lessors free from all expenses whatever in connection with the said tramways," it was held that all assessments, rates and taxes, whether imperial or local, were expenses within this provision (*Glasgow Corporation v. Glasgow Tramway and Omnibus Co.*, [1898] A. C. 631). Where a corporation agreed to repair a tramway at the cost of a company to whom it had leased it, and to facilitate the maintenance of the tram service during the repairs, the lessees were held entitled to recover the amounts paid by them to passengers injured through the derailment of a car resulting from the negligence of a contractor who had been employed by the corporation and had agreed to be responsible for all damage arising from the relaying of the track (*City of Birmingham Tramways Co., Ltd. v. Law*, [1910] 2 K. B. 965). Where a local authority was empowered by special Act to purchase a tramway constructed in its borough within a specified period and the promoters, without

No lease of a tramway may be approved by the Board of Trade unless the intention to make the lease has been published by the local authority by an advertisement inserted once at least in each of two successive weeks in one and the same newspaper published in the district affected by it, or in one published in the county in which such district is situated, or in one published in some adjoining county, and has also been published once at least in the *London Gazette*. Every such advertisement must contain the term of the lease, the rent received, a general description of the covenants and conditions contained therein, and the place where the lease is deposited for public inspection; and a copy of the lease must be deposited for this purpose during office hours at the office of the local authority or some other convenient place within the district to which the lease relates (m).

SECT. 6.
Powers of
Local
Authorities.

Advertise-
ment.

SUB-SECT. 3.—*Power to Work.*

1398. Nothing in the Tramways Act, 1870 (n), authorises any local authority to place carriages and run them upon, or to demand tolls and charges for the use of, a tramway (o), but this power may be given by special provisions in a Provisional Order or special Act (p).

Special
powers
required.

completing it, had assigned their rights to a company, it was held that such assignment did not require the approval of the Board of Trade, and that the Board, by certain documents, signed by an assistant secretary, sufficiently recognised the company as the transferee of the undertaking (*Hartlepool Electric Tramways Co. v. Hartlepool Corporation* (1911), 75 J. P. 537, C. A.).

(m) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 19, Sched. C, Part I. In *British Electric Traction Co. v. Inland Revenue Commissioners*, [1902] 1 K. B. 441, C. A., where a lease to the plaintiff company provided that the lessees should, in addition to rent, pay to the local authority £100 for each mile of tramway in lieu of repairing the road, and also so much per annum per unit of electricity supplied by the local authority, these additional rents being recoverable by distress, it was held that *ad valorem* duty was payable in respect of the amounts payable in lieu of repairs, but not on the minimum of any sum payable for electricity supplied. Where an agreement for the lease of a tramway by a local authority to a company provided that the company should be liable to a penalty if it failed to give a service in accordance with the requirements of the local authority, and the special Act confirming the agreement provided, *inter alia*, that "any penalties under the said agreement" should be recoverable summarily, it was held that this proviso was included under the lease, and was applicable on the failure of the company to comply with its conditions (*R. v. Devonport Justices, Ex parte Devonport Tramways Co.* (1909), 101 L. T. 424). As to the limitation of powers of local authorities and the delegation of powers by lessees, see *Eccles Corporation v. South Lancashire Tramways Co.*, [1910] 2 Ch. 263, C. A.; as to licences, see p. 809, *post*; as to penalties, see p. 808, *post*.

(n) 33 & 34 Vict. c. 78.

(o) *Ibid.*, s. 19; as to tolls and bye-laws, see pp. 796, 797, 799, *ante*.

(p) See the model form of Provisional Order issued by the Board of Trade, clause 38; London County Tramways Act, 1896 (59 & 60 Vict. c. li.), which empowers the London County Council to work tramways. A local authority may be empowered by Act, if the Committee on the Bill thinks that the special local circumstances justify it, to construct, acquire, or lease any tramway or portion of a tramway beyond the limits of its district, in cases where the tramway or portion of tramways is connected with the

SECT. 6.
Powers of
Local
Authorities.

Rates.

The authority may, however, leave the tramway open to be used by the public, demanding and taking the tolls and charges authorised (q).

SUB-SECT. 4.—*Expenses of Provisional Order.*

Loans.

1399. All expenses incurred by a local authority (v) which is the promoter of any tramway in applying for, obtaining, and carrying into effect the purposes of a Provisional Order must be defrayed out of the local rate (s), and are to be deemed to be purposes for and to which such rate may be made and applied (t). Where the rate is insufficient for the payment of such expenses on account of legal limitations the Board of Trade may, by the Provisional Order, extend the limits to such amount as the Board thinks fit and prescribe for such payment (u).

The local authority may borrow any sums necessary for defraying such expenses for the purposes of the Provisional Order on the credit of the local rate, and may, for securing the repayment of sums so borrowed, mortgage the local rate to the persons by or on whose behalf such sums are advanced, provided that such sums do not exceed such amount as may be sanctioned by the Board of Trade (w). The money may be borrowed for such time, not exceeding thirty years, as the local authority may, with the sanction of the Board, determine, and, subject to repayment within thirty years,

tramway authorised to be constructed, acquired or worked by the local authority (Standing Orders of the House of Lords (Private Business), 1911, No. 133; Standing Orders of the House of Commons (Private Business), 1913, No. 170a; and compare Standing Orders of the House of Lords (Private Business), 1911, No. 133a; Standing Orders of the House of Commons (Private Business), 1913, No. 171, empowering a local authority in cases where it works tramways to enter into agreements for running powers over tramways connected therewith).

(q) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 19.

(r) As to the meaning of local authority, see note (f), p. 781, *ante*.

(s) The term "local rate" as defined by the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 3, Sched. A, Part I., and modified by later legislation, comprises, in the City of London, presumably, a "consolidated rate" (see City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 168; City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), s. 8); in the Metropolis, the county rate levied by the London County Council (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (1), 4, 8 (9), 69 (4); County Rates Act, 1852 (15 & 16 Vict. c. 81); in urban and rural sanitary districts, the rates levied by the councils of such districts (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (1)); in local districts constituted under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and districts formed by a county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41), rates levied by the councils of such districts (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 271; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57); and compare *R. v. Barnes, Ex parte Ratcliff* (1896), 13 T. L. R. 25); in rural parishes, the parish rate levied by the parish council or, where there is no such council, the parish meeting (Local Government Act, 1896 (56 & 57 Vict. c. 73), ss. 1 (2), 6 (1), 19). A county council in England, other than the London County Council, is not a local authority for the purpose of the Tramways Act, 1870 (33 & 34 Vict. c. 78). It may, however, apply for an order under the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 2.

(t) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 20.

(u) *Ibid.*

(w) *Ibid.*, s. 20 (1).

the local authority may either pay off the amount borrowed by equal annual instalments, or in every year set apart as a sinking fund, and accumulate at compound interest by investment in Exchequer Bills or other Government securities, a sufficient sum to pay off the moneys borrowed or a part thereof at such times as the authority may determine (*x*). The provisions of the Commissioners Clauses Act, 1847 (*a*), with respect to mortgages executed by the Commissioners apply to all mortgages executed under the foregoing provisions (*b*). The local authority must keep separate accounts of all payments made in applying for, obtaining and carrying into effect the Provisional Order, and in the repayment of moneys borrowed, and also of all moneys received by way of rent or tolls in respect of the tramway authorised thereby; and any surplus remaining in its hands after payment of all the foregoing charges must be applied to the purposes for which the local rate may be applied (*c*).

SECT. 6.
Powers of
Local
Authorities.

SECT. 7.—Offences.

1400. The obstruction of any person acting under the authority of the promoters in the lawful exercise of their powers in setting out, making, forming, laying down, repairing, or renewing any tramway, or the defacement or destruction of any mark made for setting out the line of any tramway, or the damaging or destruction of any property of the promoters or their lessees or licensees, is an offence in each case punishable by a fine not exceeding £5 (*d*).

Obstruction
of works etc.

1401. Any person who, travelling or having travelled in any carriage on a tramway, avoids, or attempts to avoid, payment of his fare, or who, having paid his fare for a certain distance, knowingly and wilfully proceeds in such carriage beyond such distance without paying the additional fare for the additional distance, or attempts to avoid such payment, or who knowingly

Non-pay-
ment of fares.

(*x*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 20 (2).

(*a*) 10 & 11 Vict. c. 16, ss. 77—85. The terms "special Act" and "Commissioners" in these provisions are to be respectively construed to mean a Provisional Order under the Tramways Act, 1870 (33 & 34 Vict. c. 78), and a local authority (*ibid.*, s. 20).

(*b*) *Ibid.*, s. 20.

(*c*) *Ibid.*; compare Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 31, empowering a local authority to borrow any sum which it is authorised to borrow, notwithstanding any provision in any earlier Act; see title MONEY AND MONEY-LENDING, Vol. XXI., p. 61. The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 2, contains certain special provisions in this behalf relating to the Metropolis.

(*d*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 49. As to obstruction, see *Hartley v. Chadwick* (1904), 68 J. P. 512, where it was held that the drivers of tramcars and of vehicles must act "reasonably" when meeting, that the driver of a tramcar has no absolute right to make all other vehicles get out of his way, and that the driver of a dray has no absolute right to maintain his course on the left or usual driving side in such circumstances. As to a motor passing a tramcar, see *Burton v. Nicholson*, [1909] 1 K. B. 397; and title STREET AND AERIAL TRAFFIC, pp. 272, 273, *ante*. The fact that a company is authorised to run tramways on a highway does not exempt its drivers from the common law obligation to take reasonable care not to injure persons lawfully using the highway (*Ratlee v. Norwich Electric Tramway Co.* (1902), 18 T. L. R. 562, C. A.);

SECT. 7.
Offences.

and wilfully refuses or neglects to quit such carriage on arriving at the point to which he has paid his fare, is liable to a fine not exceeding 40s. for every such offence (*e*). Any officer or servant of the promoters or lessees of a tramway, and all persons called by him to his assistance, may seize and detain, until he can be conveniently taken before a justice or otherwise discharged by due course of law, any person who is discovered either in or after committing or attempting to commit any of the foregoing offences, and whose name or residence is unknown to such officer or servant (*f*).

Dangerous
goods.

1402. No person is entitled to carry, or require to be carried, any goods of a dangerous nature on any tramway, and any person sending any such goods by any tramway without distinctly marking their nature on the outside of the package containing them, or otherwise giving written notice to the book-keeper or other servant with whom they are left at the time of their sending, is liable to a fine not exceeding £20 for every such offence. The promoters or their lessees may also refuse to take any parcel which they suspect to contain goods of a dangerous nature, or require it to be opened to ascertain the fact (*g*).

see also titles NEGLIGENCE, Vol. XXI., p. 415; NUISANCE, Vol. XXI., pp. 520, 521. As to interference with tramways, see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX. p. 706, note (*b*).

(*e*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 51. As to the liability of a passenger on refusal to pay his fare on demand after the loss of his ticket, see *Hunt v. Green* (1906), 96 L. T. 23; and, where such loss is due to the fault of an official of the company, *Wilson v. Fearnley* (1905), 92 L. T. 647. A passenger who has paid the fare entitling him to travel from his starting point to another point on the line is not entitled to alight at an intermediate place, walk a certain distance, and get on to another tramcar in order to complete the length of the journey paid for (*Bastaple v. Metcalfe*, [1906] 2 K. B. 288). A passenger who, having been carried beyond his destination through neglect of the conductor of the tramcar to stop, and having thus travelled too far without any intention to defraud, refuses to pay his fare as a protest, and lodges a complaint with the company, is liable to pay such fare under a bye-law that each passenger shall pay the legal fare on demand of an authorised officer of the company (*Tuffley v. Tate* (1906), 96 L. T. 24; compare *Heap v. Day* (1886), 34 W. R. 627; *Lowe v. Volp*, [1896] 1 Q. B. 256; *Hanks v. Bridgman*, [1896] 1 Q. B. 253; *Nimmo v. Lanarkshire Tramways Co.* (1912), 49 Sc. L. R. 549).

(*f*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 52. As to the liability of the promoters or their lessees for the acts of their servants under this and the foregoing provisions, see note (*s*), p. 800, *ante*. It has been held that a person stepping on to a tramcar from the street did not leave the street within the meaning of a provision in a local Act that "every known or reputed thief found in any street or place adjacent with intent to commit any crime" might be arrested (*Martin v. M'Intyre*, [1910] S. C. (Justiciary) 72). As to bye-laws, see pp. 796, 797, *ante*.

(*g*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 53. The sender of specially dangerous goods is liable at common law for damage (*Farrant v. Barnes* (1862), 11 C. B. (N. S.) 553), but there must apparently be proof of guilty knowledge to make such person liable under this provision (*Hearne v. Garton* (1859), 2 E. & E. 66); compare Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 105; *East Indian Railway v. Kalidas Mukerjee*, [1901] A. C. 396, P. C.; and title CARRIERS, Vol. IV., p. 27.

1403. Any person who uses on a tramway or any part thereof any carriages having flange or other wheels suitable to run only on the rail of the tramway, except under a lease from or by agreement with the promoters, or under a licence from the Board of Trade, is liable for every such offence to a fine not exceeding £20 (*h*).

SECT. 7.
Offences.

Unauthorised
user.

SECT. 8.—Compulsory Licences.

1404. If, on the representation of the local or road authority or of twenty ratepayers in any district, it is proved to the satisfaction of the Board of Trade that the public is deprived of the full benefit of any tramway, the Board may grant a licence, if necessary after inquiry by a referee, to any company or person to use it for such traffic as is authorised by the special Act, with carriages to be approved by the Board (*i*).

Condition of
grant.

1405. The licence, which may be for any period not less than one nor more than three years, must specify the number of carriages, the times at which they may run, and the tolls to be paid for the use of the tramway by the licensee, who must permit one person, duly authorised for that purpose by the promoters or their lessees, to ride free of charge upon each of their carriages for the whole or any part of the journey (*k*).

Terms of
licence.

1406. On failure of the licensee to pay the tolls due in respect of passengers carried in any carriage, the promoters may sell such carriage, or, if it be removed from the tramway or premises, any other carriages thereon, retaining the amount payable and the

Rights of
promoters.

(*h*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 54. It is not necessary to prove that any obstruction has been caused to the tramway in order to secure conviction under this provision (*Cottam v. Guest* (1880), 6 Q. B. D. 70); and see the cases cited in note (*i*), p. 796, *ante*.

(*i*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 35. Neither licensees nor lessees are included under the term "promoters," which includes only the undertakers and their permitted assigns (*Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A., *per* LINDLEY, L.J., at p. 51); compare note (*a*), p. 802, *ante*. The consent of the Board of Trade is essential to the validity of the licence. In *Salford Corporation v. Eccles Corporation*, [1912] A. C. 465, the tramways authorised by the respondent corporation's special Act were constructed by and demised to the Salford Corporation. The Salford Corporation, without the sanction of the Board of Trade, granted to the South Lancashire Tramways Company a licence to run over a small portion of the respondent corporation's tramways adjoining those of the Salford Corporation. It was provided by the respondent corporation's special Act that any such licence in respect of its tramways must be approved by the Board of Trade; but in the Act authorising the tramways of the Salford Corporation no such provision was included, such tramways being defined by that Act to include any tramways demised to the Salford Corporation: and it was held that the licence granted to the company was *ultra vires*, inasmuch as by the demise to the Salford Corporation the tramways of the respondent corporation were not shifted from the operation of its special Act to that of the appellant corporation, and the company might be restrained by injunction from using the respondent corporation's tramways. As to inquiries by a referee on behalf of the Board of Trade, see note (*g*), p. 795, *ante*.

(*k*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 35 (1)—(6). The Board may at any time revoke, alter, or modify any licence for good cause shown to the Board (*ibid.*).

SECT. 8.
Compulsory
Licences.

charges and expenses of the sale out of the moneys arising from such sale, and rendering any overplus, and such carriages as remain unsold, to the person entitled (*l*). They may also require the licensee to give an account of the number of passengers to an officer authorised by them (*m*), and any licensee failing to do so is liable to a penalty not exceeding £5, in addition to any tolls payable in respect of the passengers carried (*n*).

Liabilities of
licensees.

Licensees are also liable for any trespass or damage done by their carriages, horses, or servants to or upon the tramway of the promoters or to the property of any other person (*o*).

SECT. 9.—*Abandonment and Discontinuance of Working.*

Order of
Board of
Trade.

Removal of
tramway.

1407. If the promoters discontinue the working of any tramway or part of a tramway in any district for three calendar months, and the discontinuance is not due to circumstances beyond their control, other than insufficiency of funds, the Board of Trade may, on proof of the discontinuance to its satisfaction, declare by Order that the powers of the promoters shall cease and determine unless purchased by the local authority (*p*). Where any such order is made, the road authority (*q*) may, under the authority of a certificate for the purpose from the Board, remove the tramway (*r*) or part of it so discontinued at any time after the expiration of two months from the date of the Order. The promoters must pay to the road authority the cost of the removal and of making good the road as certified by the clerk or some authorised officer of the road authority; and the road authority, on failure of the promoters to pay the amount so certified within one calendar month of the delivery of the certificate or a copy of it to them, may without previous notice, but without prejudice to any other remedy for the recovery of the amount, sell and dispose of the materials by public auction or private sale for such sum and to such person or persons as the authority shall think fit, and reimburse itself the amount of the certified cost and of the cost of the sale out of the proceeds, paying the balance, if any, to the promoters (*s*).

SECT. 10.—*Insolvency of Promoters.*

Order of
Board of
Trade.

1408. If it appears to the local or road authority (*t*) that the promoters of any tramway opened for traffic in the district of the authority are so insolvent as to be unable to maintain or work

(*l*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 36.

(*m*) *Ibid.*, s. 37.

(*n*) *Ibid.*, s. 38. Disputes as to the amount of toll or the charges incident to any detention or sale of carriages are settled by two justices (*ibid.*, s. 39).

(*o*) *Ibid.*, s. 40.

(*p*) *Ibid.*, s. 43; see pp. 802 *et seq.*, *ante*.

(*q*) As to the road authority, see note (*h*), p. 782, *ante*.

(*r*) The expression "tramway" apparently includes all works in the road, such as posts, pillars, boxes, wires and the like.

(*s*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 41.

(*t*) As to local and road authorities, see notes (*f*), p. 781, (*h*), p. 782, *ante*.

it with advantage to the public, the Board of Trade may, on a representation to that effect from the road authority, direct an inquiry by a referee into the truth of the representation. If the referee finds that the promoters are as insolvent as has been represented, the Board may by Order declare that their powers shall cease and determine at the expiration of six calendar months from the making of the Order, and the road authority may remove the tramway in the same manner, and subject to the same provisions with respect to the payment and recovery of costs, as in the case of the abandonment and discontinuance of tramways (*u*).

SECT. 10.
Insolvency
of
Promoters.

SECT. 11.—*Return and Application of Deposit.*

1409. The court in which a deposit is made by the promoters of any tramway in accordance with the provisions of the Tramways Act, 1870 (*w*), respecting Provisional Orders must order the deposit fund to be paid or transferred to the depositors or as they shall direct on their application :—

When return
ordered.

(1) If they complete and open the tramway for public traffic in accordance with the Confirmation Act and Board of Trade Rules within the time prescribed by the Order, or such time as prolonged by special direction of the Board, or, where there has been no time prescribed and no prolongation by the Board, within two years of the passing of that Act (*a*);

(2) If any portion of the line of tramway is opened for public traffic within such time as aforesaid, and a certificate of the Board is produced specifying the length of such portion and the portion of the fund which bears to the whole of the deposit fund the same proportion as the length of tramway opened bears to the whole length authorised (*b*);

(3) On the production of a certificate of the Board evidencing the refusal of either House of Parliament to confirm a Provisional Order on which a deposit has been made or to authorise a portion only of any tramway comprised in such Order, or the withdrawal of an Order before confirmation (*c*).

1410. The depositors are entitled to receive payment of any interest or dividends from time to time accruing on the deposit

Interest on
deposit.

(*u*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 42. As to the winding up of unregistered tramway companies incorporated by special Acts, see title COMPANIES, Vol. V., pp. 649, 650; as to the rights of debenture-holders, see *ibid.*, p. 738; as to inquiries by a referee on behalf of the Board of Trade, see p. 795, *ante*; as to the duty of maintaining a tramway out of the profits prior to the payment of dividends, see *Dent v. London Tramways Co.* (1880), 16 Ch. D. 344; *Davison v. Gillies* (1879), 16 Ch. D. 347, n.; as to the legality of the transfer of shares for the purpose of obtaining votes, see *Mann v. Patent Cable Tramways Corporation* (1886), 2 T. L. R. 454.

(*w*) 33 & 34 Vict. c. 78, s. 12; Board of Trade Rules, rr. xx.—xxiv. Promoters (other than a local authority), who are exempted from a deposit (see note (*j*), p. 786, *ante*), are liable to a penalty in case of default (Board of Trade Rules, r. xxi.).

(*a*) Board of Trade Rules, r. xxiii.

(*b*) *Ibid.*

(*c*) *Ibid.*, r. xxiv.

SECT. 11.
Return and
Application
of Deposit.

Compensation
from deposit.

fund, and on their application the court in which the deposit is made may from time to time make such order as seems fit respecting the payment of such interest or dividends (*d*).

1411. Where an undertaking has not been completed within the time limited by the special Act (*e*), the High Court may, notwithstanding anything in the special Act or Board of Trade Rules, order that the deposit fund should be applied towards compensating:—

(1) Any landowners or other persons whose property has been interfered with or rendered less valuable by the commencement, construction, or abandonment of the undertaking, or any portion of it, or who have been subjected to injury or loss arising from any compulsory powers of taking property given in connexion with the undertaking, and have received no compensation or inadequate compensation therefor (*f*); and

(2) The road authorities (*g*) for expenses incurred in taking up any tramway or materials placed by a tramway company in or on any roads vested in or maintainable by such authorities, and in making good all damage caused to such roads by the construction or abandonment of the tramway (*h*).

Receivers and
liquidators.

1412. If a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has

(*d*) Board of Trade Rules, r. xxiv.

(*e*) *A.-G. v. Bournemouth Corporation*, [1902] 2 Ch. 714, C. A. (where it was held that in the absence of a notice of non-completion under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 18, other evidence on the subject is not excluded).

(*f*) *Re West Yorkshire Tramways Act, 1906*, [1913] 1 Ch. 170, C. A.; *Re Ruthin and Cerrig-y-Druidion Railway Act* (1886), 32 Ch. D. 438; *Re Potteries, Shrewsbury and North Wales Rail. Co.* (1883), 25 Ch. D. 251, C. A.; *Re Southport and Lytham Tramroad Act, 1900*, *Ex parte Hesketh*, [1911] 1 Ch. 120, C. A. (where a tramway company was authorised to construct a tramway crossing land belonging to the respondent with all necessary and proper embankments, and it was held that the non-construction of an embankment in accordance with the covenant was not the necessary consequence of the abandonment of the undertaking, and that the respondent was not entitled to compensation from the deposit fund).

(*g*) As to the road authorities, see note (*h*), p. 782, *ante*.

(*h*) Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1 (1); compare Board of Trade Rules, r. xxii. The court has no jurisdiction under the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1, to make an order for repayment of a deposit until the expiry of the time limited for the completion of the undertaking, even though the company's compulsory powers of land purchase have expired and it has neither raised capital nor taken steps for the acquisition of land, and has passed a resolution abandoning the undertaking (*Ex parte Chambers*, [1893] 1 Ch. 47); compare *Re Peckham, Dulwich and Crystal Palace Tramways Bill*, [1910] 2 Ch. 1, C. A.; and see, further, title PARLIAMENT, Vol. XXI., p. 735, note (*w*). A person whose land is compulsorily acquired by a tramway company for the purpose of widening a street, no part of the tramway actually passing over the land, is entitled to compensation for depreciation in the value of his adjoining property by reason of the land being used for part of the street, but not for the depreciation caused by the running of the trams along the street (*R. v. Mountford, Ex parte London United Tramways* (1901), *Ltd.*, [1906] 2 K. B. 814).

been abandoned, the court may, subject to payment of compensation, and notwithstanding any provision as to forfeiture to the Crown (*i*), order that the deposit fund or any part of it shall be paid or transferred to the receiver or liquidator to be applied as part of the assets of the company for the benefit of the creditors (*j*). Subject to any such application, the court, after such public notice as seems to the court reasonable, may order the deposit fund or any part of it to be paid or transferred to the depositors or the persons claiming through or under them (*k*).

SECT. 11.
Return and
Application
of Deposit.

SECT. 12.—*Control of Tramways by the Crown in Emergency.*

1413. Whenever it is declared by Order in Council that it is expedient that the Government should have control over railroads, a Secretary of State may by warrant empower any persons specified therein to take possession of any tramway and all the stations or accommodation necessary for its working, and employ it as he may direct, paying compensation for any loss or injury under the Lands Clauses Consolidation Act, 1845 (*l*), all contracts with respect to the working of the tramway being enforceable against the Crown during its possession in the same manner as they would have been against

Right to take
possession.

(*i*) The most important change effected by the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), with respect to the law and practice as to deposits under the old Board of Trade Rules before its passing is the grant of discretion to the court to deal with the fund in spite of any provision as to forfeiture to the Crown.

(*j*) As to who are creditors, see *Ex parte Bradford and District Tramways Co.*, [1893] 3 Ch. 463; *Re Manchester, Middleton and District Tramways Co.*, [1893] 3 Ch. 638; *Re Waterford, Lismore and Fermoy Rail. Co.* (1870), 4 I. R. Eq. 490; *Re Dublin, Rathmines and Rathcoole Rail. Co.* (1878), 1 L. R. Ir. 98; *Re Hull, Barnsley and West Riding Junction Railway*, [1893] W. N. 83; *Re Coventry and Nuneaton Tramways Co.* (1888), 4 T. L. R. 458. They include the general creditors of the company, including persons who lent the money to the promoters to enable them to make the deposit, and all distinction between meritorious and non-meritorious creditors has ceased to exist since the passing of the Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27) (*Ex parte Bradford and District Tramways Co.*, *supra*; *Muir v. Forman's Trustees* (1903), 5 F. (Ct. of Sess.) 546; compare *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 1 Ch. 261, C. A.; *Re Lancashire, Derbyshire and East Coast Railway Acts*, [1903] W. N. 184. Where a company has been ordered to be wound up, the court has no jurisdiction to order the liquidator's general costs of the liquidation to be paid out of the deposit fund, and he cannot be allowed thereout any costs beyond those of proceedings taken by him in reference to the application of the deposits (*Re Colchester Tramways Co.*, [1893] 1 Ch. 309; compare *Turpin v. Somerton etc. Tramway Co.*, [1900] W. N. 94). As to the appointment of receivers generally, see title RECEIVERS, Vol. XXIV., pp. 337 *et seq.*; as to the winding up of companies, see title COMPANIES, Vol. V., pp. 390 *et seq.*

(*k*) Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1 (2), (3). The proper evidence with respect to the application for payment in the case of the abandonment of a tramway is a Board of Trade notice under the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 18, but it has been held that in the absence of such a notice other evidence of the non-commencement of works is not excluded (*A.-G. v. Bournemouth Corporation*, [1902] 2 Ch. 714, C. A., overruling *Re Dudley and Kingswinford Tramways Co.* (1893), 63 L. J. (Ch.) 108.

(*l*) 8 & 9 Vict. c. 18.

SECT. 12.
Control of
Tramways
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Crown in
Emergency.

the promoters and their lessees (*m*). The Crown may also, whenever an order for the embodiment of the Militia or Territorial Force is in operation, declare by order that traffic for naval and military purposes shall have precedence over other traffic on any tramway (*n*), and any naval or military officer authorised to do so may, while such order is in force, require the promoters or their lessees to forward the traffic specified therein by any means he deems expedient, any failure to comply with or obstruction of the warrant being punishable by a fine of £50. No warrant may be in force for more than one month unless renewed, and every order is revocable by the Crown and ceases to operate on the disembodiment of the Militia or Territorial Force (*o*).

Remunera-
tion to
promoters.

The promoters or lessees of any tramway required to receive and forward traffic in accordance with the foregoing provisions are entitled to the payment of such reasonable remuneration as may be agreed upon or, in default of agreement, determined by arbitration (*p*).

Compensa-
tion.

The Secretary of State or the Admiralty may, on petition, compensate any person suffering loss through acts done under their authority, except in the case of contracts made subsequently, or which, though made before, might have been determined subsequently, to the date of an order (*q*).

(*m*) Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 16, by which "railroad" is defined to include any "tramway" as described in the text; see, further, titles CONSTITUTIONAL LAW, Vol. VII., p. 69; ROYAL FORCES, Vol. XXV., pp. 52, 80.

(*n*) National Defence Act, 1888 (51 & 52 Vict. 31), s. 4 (1). "Railway" is defined to include "any tramway, whether worked by animal or mechanical power, or partly in one way and partly in the other," and "railway company" as meaning any person actually engaged in working a railway as owner or lessee or otherwise (*ibid.*, s. 4 (8)); see, further, titles CONSTITUTIONAL LAW, Vol. VII., p. 69; ROYAL FORCES, Vol. XXV., pp. 52, 80. By the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 6, and an Order in Council of the 19th March, 1908 (Stat. R. & O., 1908, p. 963), the National Defence Act, 1888 (51 & 52 Vict. c. 3), s. 4, is made applicable to the Territorial Force in the same manner as to the Militia. The Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 34 (1), and an Order in Council of the 9th April, 1908 (Stat. R. & O., 1908, p. 878), provided for the transfer of the battalions of Militia specified in the Order to the Army Reserve maintained under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). It has, however, been held that the Militia units so transferred were not destroyed but reorganised (*Re Donald, Moore v. Somerset*, [1909] 2 Ch. 410); and the power of embodying or disembodiment the Militia vested in the Crown by the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 18—which is apparently analogous to that with respect to the Territorial Force—is presumably not affected by the provisions of the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9); see title ROYAL FORCES, Vol. XXV., p. 62, note (*h*).

(*o*) National Defence Act, 1888 (51 & 52 Vict. c. 31), ss. 4 (2), 8 (3)—(5).

(*p*) *Ibid.*, s. 4 (6).

(*q*) *Ibid.*, s. 4 (7). *Quære* whether tramcars, being stage carriages within the meaning of the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 13, as regards overcrowding (*Brian v. Aylward* (1902), 18 T. L. R. 371), and under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 22 (*London Tramways Co. v. Bailey* (1877), 3 Q. B. D. 217), are within the meaning of the Army Act (44 & 45 Vict. c. 58), s. 115 (1), (2), as amended by the Army (Annual) Act, 1909 (9 Edw. 7,

Part II.—Naval and Military Tramways.

SECT. 1.—*Provisional Orders.*

SUB-SECT. 1.—*Application by the Crown.*

1414. Any of His Majesty's principal Secretaries of State or the Admiralty (*r*) may apply to the Board of Trade for a Provisional Order authorising the construction, maintenance and use of tramways on any land belonging to or to be acquired by them, or along or across any road (*s*).

SECT. 1. Provisional Orders.

Application
for pro-
visional order.

SUB-SECT. 2.—*Contents.*

1415. The Board of Trade must insert such provisions of the Tramways Act, 1870 (*a*), with or without modification, and such other provisions as in the opinion of the Board are necessary for the protection of the local and road authorities, the public, and any person whose interests may be affected by the construction or user of such tramway, and for giving suitable powers to the Secretary of State and his subordinates (*b*).

Application
of Tramways
Act, 1870.

1416. Every Provisional Order authorising the construction and maintenance of tramways along or across any road must contain either the statutory provisions relating to (1) the breaking-up, reinstatement, repair and paving of roads (*c*); (2) the protection of gas and water companies and sewers (*d*); (3) the rights of authorities and companies to open roads (*e*); and (4) the reference to the Board of Trade for settlement of any differences between promoters and an authority or company (*f*); or such other provisions with reference to the matters hereinbefore mentioned as to the Board may seem necessary or proper (*g*).

Contents of
Provisional
Order.

1417. Any Provisional Order may authorise the acquisition of lands by the Secretary of State, with the approval of the

Acquisition
of lands.

c. 3), s. 5, which empowers general and field officers, authorised by order of a Secretary of State, in case of emergency, to requisition, *inter alia*, "carriages of every description (including motor cars and other locomotives), whether for the purposes of carriage or haulage"; see title ROYAL FORCES, Vol. XXV., p. 50. As to the duty of promoters and their lessees to carry His Majesty's mails if required by the Postmaster-General to do so, see the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), ss. 2, 3; and title POST OFFICE, Vol. XXII., pp. 652, 653.

(*r*) The Admiralty has the same powers as a Secretary of State with respect to the construction, maintenance, and working of tramways; and every reference in the Military Tramways Act, 1887 (50 & 51 Vict. c. 65), to a Secretary of State includes the Admiralty (Naval Works Act, 1899 (62 & 63 Vict. c. 42), s. 2).

(*s*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 3. The word "road" includes any highway (*ibid.*, s. 12).

(*a*) 33 & 34 Vict. c. 78.

(*b*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 4.

(*c*) See p. 788, *ante*.

(*d*) See pp. 791, 793, *ante*.

(*e*) See p. 794, *ante*.

(*f*) See p. 795, *ante*.

(*g*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 4.

SECT. 1. Treasury, and may contain such provisions, with or without Provisional modification, of the Lands Clauses Acts (*h*) as in the opinion of the Orders. Board of Trade may be expedient (*i*).

SUB-SECT. 3.—*Publication and Confirmation.*

Publication. **1418.** Every such Provisional Order must be published in the *London Gazette*, and by deposit and advertisement in such manner as the Board of Trade may require, and must be confirmed either by Act of Parliament or by His Majesty by Order in Council (*j*).

Confirmation by Parliament. **1419.** If within one month after publication and such advertisement as the Board of Trade may direct a petition is received by the Board against a Provisional Order by any local or road authority within whose district it is proposed to authorise any tramways, or by the owner or occupier of any land which the Secretary of State is authorised to acquire, such Provisional Order must be confirmed by Parliament (*k*).

Confirmation by Order in Council. **1420.** If no such petition has been received at the expiration of one month after publication and such advertisement as the Board of Trade may direct, or if any petition received by the Board has been withdrawn, every such Provisional Order must be submitted to His Majesty in Council and be confirmed by Order in Council (*l*).

Revocation of Order. **1421.** Any Provisional Order may, on the application of the Secretary of State, be revoked, amended, extended or varied by the Board of Trade by a further Provisional Order (*m*).

SUB-SECT. 4.—*Application by a Local Authority.*

User by local authority. **1422.** The local authority of any district, in which a tramway has been constructed by the Secretary of State along any road, or any person (*n*) may apply to the Board of Trade for a Provisional Order authorising them to use such tramways in addition to the Secretary of State and settling the terms and conditions of such user (*o*).

(*h*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(*i*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 5.

(*j*) *Ibid.*, s. 10.

(*k*) *Ibid.*, s. 10 (2). A Bill with the object of confirming a Provisional Order may be introduced into either House of Parliament. The Provisional Order must be set out at length in the schedule to the Bill. If a petition against a Provisional Order is presented while any such Bill is pending, the Bill is referred to a select committee, before which the petitioner may appear and oppose as in the case of a Bill for a special Act. An Act of Parliament confirming a Provisional Order under this Act is deemed a public general Act (*ibid.*). As to Bills to confirm Provisional Orders generally, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

(*l*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 10 (3). A Provisional Order confirmed in this manner has the same force and effect as if confirmed by Act of Parliament (*ibid.*).

(*m*) *Ibid.*, s. 10 (4). Such further Provisional Order must be duly confirmed as provided under the Act (*ibid.*).

(*n*) The word "person" includes a corporation (*ibid.*, s. 12).

(*o*) *Ibid.*, s. 11. The promoters, namely, the local authority or person applying for such Provisional Order (*ibid.*), must give such notice to the Secretary of State of the application as may be prescribed (*ibid.*). The promoters must apply in the same manner and subject to the same conditions as if the application were for a Provisional Order under the provisions

1423. Any such Provisional Order may authorise the promoters to use such tramways on such payment and subject to such conditions as to the maintenance and repair of the tramway or road as the Board of Trade deems expedient (*p*); or, if the Secretary of State so desires, may authorise the sale of the tramways by him to the promoters in such manner and subject to such conditions as to the user of the tramway by the Secretary of State as the Board deems expedient (*q*).

SECT. 1.
Provisional
Orders.
Terms of user.

SECT. 2.—*Working.*

1424. The carriages used on any naval or military tramway may have flange wheels or wheels suitable only to run on the rail prescribed by the Provisional Order (*r*), but must be moved by the power prescribed by the Provisional Order. In the absence of any power being prescribed, animal power only may be used (*s*).

Carriages.

1425. Any Provisional Order authorising the use of electricity, either as a motive power or otherwise, must contain provisions for the protection of the telegraphs of the Postmaster-General (*t*).

Electricity.

1426. The Secretary of State may, with the approval of the Board of Trade, make such bye-laws and regulations (*a*) as in the opinion of the Board are necessary for the protection of the public against danger in the use of steam or mechanical power with regard to the traffic on and the use of any tramways on which such steam or mechanical power is used (*b*).

Bye-laws.

SECT. 3.—*Penalties.*

1427. Any Provisional Order may contain provisions imposing penalties on any person injuring, obstructing or trespassing on any tramway, or any carriage used thereon, or in any way contravening any provision of such Provisional Order (*c*).

Offences.

of the Tramways Act, 1870 (33 & 34 Vict. c. 78) (Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 11). As to such applications, see pp. 781 *et seq.*, *ante*.

(*p*) The provisions of the Tramways Act, 1870 (33 & 34 Vict. c. 78), apply so far as they are applicable or unless they are expressly varied by the Provisional Order (Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 11). As to such provisions, see p. 790, *ante*.

(*q*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 11.

(*r*) *Ibid.*, s. 6. Subject to the provisions of the Provisional Order and of the Act, the Secretary of State has the exclusive use of the tramways for carriages with flange wheels or other wheels suitable only to run on the rail so prescribed. Any other person so using them, except under the authority of the Provisional Order, is liable to a penalty not exceeding £20 for every such offence (*ibid.*). The penalty is recoverable summarily (*ibid.*, s. 9; Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 56).

(*s*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 6; compare p. 796, *ante*.

(*t*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 6.

(*a*) Any such regulations may impose penalties for any offence against the same (*ibid.*, s. 8).

(*b*) *Ibid.* Such bye-laws may, with the approval of the Board of Trade, be rescinded, annulled, or added to by the Secretary of State. All bye-laws and regulations made under this provision must be signed by the Secretary of State and by a secretary or assistant secretary of the Board of Trade (*ibid.*); compare pp. 796, 797, *ante*.

(*c*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 7.

SECT. 3.
Penalties.
Penalties.

1428. No penalty imposed by any Provisional Order, bye-law, or regulation may exceed £5 for each offence, or in the case of a continuing offence £5 for the first day and £1 for every additional day (*d.*).

Part III.—Light Railways.

SECT. 1.—*Constitution and Duties of Light Railway Commissioners.*

Appointment
and duties.

1429. The Light Railway Commissioners are appointed by the President of the Board of Trade(*e*) for the purpose of facilitating the construction and working of light railways in Great Britain (*f.*),

(*d*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65), s. 9. Penalties under the Act are recoverable summarily (*ibid.*; Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 56).

(*e*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 1 (1). The President of the Board of Trade has power to fill any vacancy caused by the death, resignation, or incapacity of any of the Commissioners (*ibid.*, s. 1 (3)). The Board of Trade may, with the consent of the Treasury, appoint such persons as the Board thinks necessary for the purpose of the execution of the Commissioners' duties (*ibid.*, s. 1 (5)).

(*f*) *Ibid.*, s. 1 (1). A light railway is not defined under the Act. Light railways are divided into three classes: Class A, lines on lands acquired (with motive power mostly steam); Class B, lines on public roads (with motive power mostly electric); Class N, lines which cannot be classed either in Class A or in Class B; see *Wakefield and District Light Railways v. Wakefield Corporation*, [1907] 2 K. B. 256, C. A.; affirmed, *sub nom. Wakefield Corporation v. Wakefield District Light Railways*, [1908] A. C. 293; *Tottenham Urban District Council v. Metropolitan Electric Tramways, Ltd.* (1913), 29 T. L. R. 720, H. L. A light railway may include a funicular railway (*Ventnor (Funicular) Light Railway* (1909), Light Railway Commissioners' Report, List XXVI., No. 6, Parliamentary Paper, 1911, 105; *Malvern Funicular Light Railway* (1910), Light Railway Commissioners' Report, List XXVIII., No. 3, Parliamentary Paper, 1912, 108); and authority may be given to work a mineral or industrial railway as a light railway (*Bere Alston and Calstock Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 102; *North Staffordshire Railway* (1907), Light Railway Commissioners' Report, List XVIII., No. 12, Parliamentary Paper, 1907, 188). Power may be reserved to the Board of Trade to require a railway used for goods and mineral traffic to be opened as a passenger-carrying light railway (*Wales and Loughton Case* (1900), 2 Oxley, Light Railways Procedure: Reports and Precedents, 23). A purely urban tramway in one borough which might have been promoted under the Tramways Act, 1870 (33 & 34 Vict. c. 78), ought not to be promoted as a light railway and may be rejected on that ground (*Taunton Case* (1897), Light Railway Commissioners' Report, List II., No. 17, Parliamentary Paper, 1902, 198, followed in *Colchester Case* (1899), Light Railway Commissioners' Report, List V., No. 8, Parliamentary Paper, 1902, 198, and in *Aberdare Case* (1900), Light Railway Commissioners' Report, List VI., No. 39, Parliamentary Paper, 1902, 198; and see *Finchley Case* (1900), Light Railway Commissioners' Report, List VI., No. 15, Parliamentary Paper, 1902, 198; *Luton and District Case* (1902), 2 Oxley, Light Railways Procedure: Reports and Precedents, 137; *London Corporation Foreign Cattle Market, Deptford Case* (1897), Light Railway Commissioners' Report, List II., No. 2, Parliamentary Paper, 1902, 198); but tramways partly in and partly outside a borough have been promoted as light railways (*Crewe Case* (1897), Light Railway Commissioners' Report, List I., No. 2, Parliamentary Paper, 1902, 198, followed in *Potteries Case* (1897), Light Railway Commissioners' Report, List I., No. 13, Parliamentary Paper, 1902, 198; but see *Tottenham Urban District Council v. Metropolitan Electric Tramways, Ltd.* (1913), 29 T. L. R.

and it is their duty to hear applications for orders authorising the construction of light railways (*g*), to hold local inquiries for that purpose (*h*), and generally to offer so far as they are able every facility for considering and maturing proposals with reference to light railways (*i*).

The Commission consists of three Commissioners, who may act by any two of their number (*k*).

SECT. 1.
Constitution
and Duties
of Light
Railway
Commissioners.

SECT. 2.—Application for Orders.

SUB-SECT. 1.—Who may Apply.

1430. Every application for an order authorising the construction of a light railway must be made to the Commissioners (*l*) in the month of May or November (*m*), and may be made by the council of the county, borough, or district through any part of which the proposed railway is to pass (*n*), or by the promoter, who may be an individual, corporation, or company (*o*), or by such council and promoter jointly (*p*).

Local
authorities
and
promoters.

720, H. L., *per* Lord MOULTON, at p. 723). A light railway may be allowed for the purpose of joining an existing tramway to an existing light railway (*Weston-super-Mare Junction Light Railway* (1910), Light Railway Commissioners' Report, List XXVII., No. 8, Parliamentary Paper, 1911, 105); or to connect a harbour with an existing light railway (*Southwold Harbour Light Railway Case* (1911), Light Railway Commissioners' Report, List XXXI., No. 5, Parliamentary Paper, 1912, 108); or to serve a dock (*Grimsby District Case* (1905), Light Railway Commissioners' Report, List XIII., No. 8, Parliamentary Paper, 1907, 188). The carriages used on a light railway are not "omnibuses" within the Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), and therefore are not "hackney carriages" within the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 37, 45, and they therefore do not require to be licensed to ply for hire (*Yorkshire (Woollen District) Electric Tramways v. Ellis*, [1905] 1 K. B. 396).

(*g*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 2. A company empowered to construct or work a parliamentary railway may be authorised by a light railway order to construct and work or to work such railway or any part of it as a light railway (*ibid.*, s. 18; *Carmyllie Case* (1897), Light Railway Commissioners' Report, List I., No. 20, Parliamentary Paper, 1902, 198; *North Sunderland Railway (Extension) Case* (1898), Light Railway Commissioners' Report, List III., No. 20, Parliamentary Paper, 1902, 198; and see note (*f*), p. 818, *ante*).

(*h*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (1).

(*i*) *Ibid.*, s. 1 (2). The powers of the Commissioners are continued for a further period of five years by the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 10.

(*k*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 1 (7). As to their salaries, see *ibid.*, s. 1 (4), (6); Light Railway Commissioners (Salaries) Act, 1901 (1 Edw. 7, c. 36), s. 1.

(*l*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 2.

(*m*) Light Railways Rules, 1913, r. 33 (Stat. R. & O. 1913, No. 1111).

(*n*) As to such applications, see p. 837, *post*.

(*o*) A Lunacy Board has no power to construct and work a light railway (*Uphall and Bangour Case* (1898), Light Railway Commissioners' Report, List V., No. 53, Parliamentary Paper, 1902, 198). The application in the case of corporate bodies must be under seal; in any other case the application must be signed by the promoter, or in the case of more than two promoters, by any three of them (Light Railways Rules, 1913, r. 33). As to what documents must accompany the application, see pp. 822, note (*r*), 823, *post*.

(*p*) Before lodging the application the promoter must pay a fee of £50 by cheque in favour of an assistant secretary of the Board of Trade (Light Railways Rules, 1913, r. 37).

SECT. 2.

Applica-
tion for
Orders.

Notices.
Advertis-
ment.

SUB-SECT. 2.—*Notices of Application.*

1431. Before an application can be considered by the Commissioners certain notices must be published and served by the applicants (*q*).

1432. Notice of the proposed application must in every case be published in a local newspaper once at least in each of two consecutive weeks in the month of May or November (*r*). The notice must describe the line, the termini, the proposed gauge and motive power of the railway, the lands proposed to be taken, and the quantity and the purpose for which it is proposed to take them (*s*). It must be subscribed with the name of the person responsible for its publication, and must name a place where the plan of the proposed works and the lands to be taken, the book of reference to the plan, the section and the estimate of the proposed works can be inspected, and where copies of the draft order can be obtained (*t*).

Notice in
London
Gazette.

1433. Notice of the proposed application must also be published in the *London Gazette*, giving the names of the promoters, their solicitors or agents, the termini of the railway, and the names of the counties or parishes through which the proposed railway is to run (*u*).

Owners and
occupiers.

1434. Every owner, lessee (*a*), and occupier of any land intended to be taken or within the limits of deviation shown on the deposited plan must be served with a notice describing the particular lands in each case, inquiring whether the person so served assents or dissents to the taking of such land, and requesting the person, if he dissents, to state his objections (*b*).

(*q*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (2); see the text, *infra*. Where a promoter has statutory power to construct a railway, but applies for power to do so as a light railway, the application may be rejected unless the rules are observed and notices served so far as may be applicable or necessary in the circumstances (*Gifford and Garvald Case* (1901), 1 Oxley, Light Railways Procedure: Reports and Precedents, 31).

(*r*) Light Railways Rules, 1913, r. 1. The newspaper must be one published in the area to be traversed by the proposed railway, or if no newspaper is published in such area, then in a newspaper published in the county in which such area, or any part thereof, is situate. Copies of the newspaper containing the advertisements must be sent both to the Commissioners and to the Board of Trade (*ibid.*). An application of which no notice has been published in a local newspaper may be rejected (*Finchley, Hendon, Edgware and District Case* (1899), Light Railway Commissioners' Report, List VI., No. 16, Parliamentary Paper, 1902, 198); an application to vary a portion of a proposed route by carrying the line through certain streets as to which no public notice has been given may be disallowed (*Cheltenham and District Case* (1896), Light Railway Commissioners' Report, List I., No. 1, Parliamentary Paper, 1902, 198).

(*s*) Light Railways Rules, 1913, r. 2. Where it is proposed to take lands compulsorily for the purpose of erecting a station for generating electrical energy, the notice must also state if it is proposed to use the water of any stream, river or lake for such purpose (*ibid.*).

(*t*) *Ibid.* The notice must state that copies of the draft order are obtainable on payment of not exceeding 1s. per copy (*ibid.*); and see *ibid.*, r. 10. The notice must further state that in accordance with the rules objections should be made to the Commissioners in writing, and that a copy of the objections should be sent to the promoters (*ibid.*, r. 2).

(*u*) *Ibid.*, 1913, r. 3.

(*a*) The words "owner," and "lessee," include reputed owner and reputed lessee (*ibid.*, r. 27).

(*b*) *Ibid.* The notice must be served in the same month in which

1435. Every owner and lessee (c) of any railway, tramway, or canal which will be crossed or otherwise interfered with by the proposed railway must be served with a notice of the proposed application, stating the place where a plan of the proposed railway has been or will be deposited, and a similar notice must be served on the road authority, other than a county, borough, district, or parish council, of any road along which it is proposed to lay rails or with which it is proposed otherwise to interfere (d).

SECT. 2.
Applica-
tion for
Orders.

Railway and
other com-
panies; road
authorities.

1436. Where it is proposed to take for the purposes of a light railway any land being part of, or any easement affecting, a common (e), a statement in writing must be sent to the Board of Agriculture and Fisheries describing the common affected and the mode in which it will be affected (f).

Board of
Agriculture
and Fisheries.

1437. All notices must be signed by the promoter or promoters, or by his or their solicitor or agents, in the case of a council by its clerk, or in the case of a company by one of its principal officers (g).

Signature of
notices.

SUB-SECT. 3.—*Deposits.*

1438. The promoters must deposit with the clerk of the council

Deposit with
local
authority.

the notice of the proposed application is advertised (Light Railways Rules, 1913, r. 27). A special notice must be served where part only of a house, building, or manufactory is proposed to be acquired (*ibid.*; see note (u), p. 824, *post*). For forms of notices, see schedule to the Rules. Failure to serve notices may necessitate the withdrawal or rejection of the application (*Hayling Island Case* (1900), Light Railway Commissioners' Report, List VIII., No. 7, Parliamentary Paper, 1902, 198; *Devon South Hams Case* (1899), Light Railway Commissioners' Report, List VII., No. 15, Parliamentary Paper, 1902, 198; *Central Wilts Case* (1903), Light Railway Commissioners' Report, List XIV., No. 6, Parliamentary Paper, 1904, 122). (e) Including a reputed owner and reputed lessee (Light Railways Rules, 1913, r. 28).

(d) *Ibid.* The notice must be served in the same month in which the notice of the proposed application is advertised (*ibid.*). The Commissioners may reject any application where such notice has not been served (*Devon South Hams Case, supra*).

(e) For the definition of a common, see Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 21 (2); and note (g), p. 834, *post*.

(f) Light Railways Rules, 1913, r. 8. A copy of the draft order and of so much of the plan, section, book of reference, and ordnance map as relates to the common must accompany this statement (*ibid.*). The notice of the proposed application must in such a case state the name of such common and of any parish in which the same is situate, and the quantity of such common proposed to be taken or used; as to notice of the proposed application, see p. 820, *ante*; see, further, title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 493.

(g) Light Railways Rules, 1913, r. 35. Notices may be partly in writing and partly in print (*ibid.*), and may be served (i.) by delivering the same to or at the residence of the person to whom they are addressed; or (ii.) in the case of an owner or occupier of premises, by delivering the same or a true copy thereof to some person on the premises or, in the absence of any person, by fixing the notice on some conspicuous part of the premises; or (iii.) by post by a prepaid letter, in which case the notice is deemed to be served at the time when the letter containing the notice would be delivered in the ordinary course of post, and service is proved by proving that the notice was properly addressed and put in the post (*ibid.*, r. 36). Where any addition to, or alteration of, any work is proposed during the progress of an application, the promoters must, provided that such addition or alteration is not of such extent or character as to make it inconvenient or inadvisable in the opinion of the Commissioners that the same should be

SECT. 2.
Applica-
tion for
Orders.

of every county, borough, district or parish in or through which any part of the proposed railway is to be made or which may be otherwise affected thereby copies of (1) the draft order; (2) the plan and book of reference to the plan; (3) the section of the proposed works; (4) the estimate of the expenses of the proposed railway (*h*); and (5) the ordnance map (*i*), with the line of railway and its mile points indicated so as to show generally the course, length, and direction of the proposed railway (*j*).

Board of
Trade and
other depart-
ments.

1439. The promoters must deposit with the Board of Trade two copies of the draft order and of all the documents mentioned above (*k*), and must deposit copies of the notice and draft order with the Postmaster-General, the Commissioners of Customs, and the Office of Works, and copies of the notice only with the Treasury, the Board of Agriculture and Fisheries, the Commissioners of Inland Revenue, the Admiralty, the War Office, and the Office of Woods and Forests (*l*).

Tidal waters;
rivers.

1440. Where tidal lands within the ordinary spring tides will be affected by the proposed railway, a copy of the draft order and plan and section of the proposed works with the ordnance map marked "Tidal Waters" must be deposited with the Harbour Department of the Board of Trade (*m*); and where the work is to be situate on the banks, foreshore, or bed of any river having a board of conservators, similar documents must be deposited with the conservators of such river (*n*).

dealt with under the said application, publish such advertisements and give such notices and make such deposits as are required under the Light Railways Rules relating to applications for amending orders or may be required by the Commissioners (*ibid.*, r. 38).

(*h*) For the form of estimates, see *ibid.*, rr. 31, 32. Incomplete and inadequate estimates are a ground for rejecting the application (*County of Middlesex (Extensions) No. 4 Case (1901)*, 2 Oxley, Light Railways Procedure: Reports and Precedents, 126).

(*i*) The scale of the ordnance map must be not less than one inch to a mile (Light Railways Rules, 1913, r. 4). As to the contents of plans, book of reference and section, see *ibid.*, rr. 11—26.

(*j*) *Ibid.*, r. 4. In the case of a council other than a county council so much only of the plan, section, and book of reference as relates to the district of each such council need be deposited (*ibid.*). A statement of these deposits must be included in the notice of application (see p. 820, *ante*). The application may be rejected if this rule is not complied with (*Monmouth and Abergavenny Case (1898)*, 1 Oxley, Light Railways Procedure: Reports and Precedents, 44; *County of Middlesex (Extensions) No. 4 Case, supra*). The documents are deposited in the same month in which the application is made and are open to inspection during office hours (Light Railways Rules, 1913, r. 4). On or before the last day of the month the plan, book of reference, and section must be deposited at the place specified in the notice, and must be open to inspection at all reasonable times (*ibid.*, r. 9).

(*k*) One copy of these deposits with the Board of Trade is available for public inspection (*ibid.*, r. 5, n.).

(*l*) *Ibid.*, r. 5. Failure to comply with this rule may entail the rejection of the application (*Chatham, Rochester, and Gillingham Case (1898)*, Light Railway Commissioners' Report, List IV., No. 5, Parliamentary Paper, 1902, 198).

(*m*) Light Railways Rules, 1913, r. 6. Tidal waters must be coloured blue, and if the plan includes any bridges across tidal waters, the dimensions as regards span and headway of the nearest bridges above and below the proposed new bridge must be marked on the plan (*ibid.*).

(*n*) *Ibid.*; as to tunnels under a river, see *ibid.*

Where it is proposed to authorise the making or extension of any dam, weir, or obstruction to the passage of fish in any river or estuary, a copy of the draft order and of so much of the plan, section, book of reference, and ordnance map as relates thereto must be deposited with the Board of Agriculture and Fisheries and with the fishery board of such river or estuary (o).

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Applica-
tion for
Orders.
Fisheries.

1441. Every application to the Commissioners for an order must be accompanied, in addition to a short statement of the proposed application and of the nature of the traffic to be carried, by (1) three copies of the draft order, the plan, the book of reference, the section, the ordnance map, and the estimate; (2) a statement as to the proposed gauge and motive power of the railway; (3) a list, with their postal addresses, of the owners, lessees, and occupiers on whom notices have been served (p); (4) a list of the councils of every county, borough, district and parish with whom deposits have been made; (5) a list of the railway, tramway or canal companies on whom notices have been served; (6) a statement whether, where the consent of the Board of Agriculture and Fisheries is necessary, such consent has been obtained; (7) a statement whether it is proposed that the council of any borough or district shall expend or advance any money, and, if so, of the nature and amount of such expenditure or advance; (8) a statement whether it is proposed to apply to the Treasury for the advance of any money and, if so, of the amount of advance; and (9) a certificate that the required fee of £50 has been paid (q). Where the applicant is an existing company, a certificate must be deposited with the Commissioners certifying that the members of the company have assented to the application and in the proper manner (r).

Documents
for Commis-
sioners.

SUB-SECT. 4.—*Procedure on Application.*

1442. The Commissioners must satisfy themselves that all reasonable steps have been taken for consulting the local and road authorities (s), and the owners and occupiers of land whose areas and lands are affected by the application, and must hold a local inquiry in order to possess themselves of all such information as they may consider material or useful for determining the expediency of granting the application (t).

Local
inquiries.

(o) Light Railways Rules, 1913, r. 7.

(p) A similar list of those on whom special notice has been served (see p. 821, *ante*) must also be included in this list (Light Railways Rules, 1913, r. 33).

(q) The above lists of the councils and of the railway and other companies must contain a statement whether such councils and companies have intimated assent or dissent (*ibid.*, r. 33 (d), (e)). A statement must be deposited within the prescribed period with the Commissioners showing the assent, dissent or neutral attitude of every owner, lessee and occupier on whom notices have been served (*ibid.*, r. 34).

(r) *Ibid.*, r. 34. The certificate must (*ibid.*) be deposited before the local inquiry (as to which see the text, *infra*) is held. On an application by a light railway company for power to enter into agreements with another existing company, a certificate of approval of the application by the other company's shareholders is unnecessary, as such application is not within the meaning of this rule (*Hadlow (Amendment) Case* (1901), 2 Oxley, Light Railway Procedure: Reports and Precedents, 46).

(s) As to the local and road authorities, see note (f), p. 781, note (h), p. 782, *ante*.

(t) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (1). Where an

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tion for
Orders.

Proof of
notices etc.
Objections.

Settlement of
draft order.

1443. Every applicant must satisfy the Commissioners that the notices required to be published in the local newspaper, and to be served on the owners, lessees and occupiers of land intended to be taken, have been published and served in the prescribed manner, and that the plan and book of reference are in the prescribed form (*u*).

1444. The Commissioners must give full opportunity for any objections to be laid before them, and must consider such objections, whether made formally or informally (*a*).

1445. If the Commissioners decide to grant the application, they must settle any draft order for authorising the railway submitted by the applicants, and must insert provisions for the safety of the public, particulars of the lands proposed to be taken, and all such matters as in their opinion are necessary for the proper construction and working of the railway (*b*).

SUB-SECT. 5.—*Consideration of Application by Commissioners.*

Matters to be
considered.

1446. An application for an order authorising a light railway is considered by the Commissioners with reference to all material circumstances, including (1) the utility of the proposed railway and the advantage offered thereby to the public; (2) the desire of the persons living or interested in the district for the proposed railway, and the extent and nature of the opposition to the application; (3) the safety of the public; (4) the probable effect of the competition upon existing railways; and (5) the financial prospects of the proposed undertaking.

Local cir-
cumstances.

1447. The circumstances in each case differ greatly, but applications which do not offer sufficient advantage to the public (*c*), or

application does not sufficiently conform with the rules of the Board of Trade, it may be rejected without a local inquiry being held (*Gifford and Garvald Case* (1896), Light Railway Commissioners' Report, List I., No. 23, Parliamentary Paper, 1902, 198; *Finchley, Hendon, Edgware and District Case* (1899), Light Railway Commissioners' Report, List VI., No. 16, Parliamentary Paper, 1902, 198), or in cases where the Commissioners are of opinion that the applicants have no power to construct a light railway (*Uphall and Bangour Case* (1898), Light Railway Commissioners' Report, List V., No. 53, Parliamentary Paper, 1902, 198).

(*u*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (2) (*a*), (*b*). Where it is proposed to acquire part only of a house, building or manufactory, no such provision is to be made in any order unless the Commissioners are satisfied that a special notice of such proposal has been given under *ibid.*, s. 7 (2) (*b*), to the owner, lessee and occupier of such house, building or manufactory (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 4; and see Light Railways Rules, 1913, r. 27).

(*a*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (3). Objection may be taken on the ground that the proposed undertaking will destroy or injure natural scenery or an object of historical interest; full opportunity must be given for the hearing of any objection on this ground (*ibid.*, s. 22). As to other grounds of objection, see the text, *infra*. Objections must be made in writing to the Light Railways Commissioners and the date prescribed in each case and a copy sent to the solicitors or agents of the promoters (Light Railways Rules, 1913, r. 10); a copy of this rule must be printed as a notice at the end of the draft order (*ibid.*).

(*b*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (4).

(*c*) *Wolverhampton and Bridgnorth Case* (1899), Light Railway Commissioners' Report, List VI., No. 37, Parliamentary Paper, 1902, 198 (scheme rejected which without junction did not offer sufficient public advantage, although the railway proposed to serve a district entirely without railway accommodation); *Penarth and Cardiff Case* (1897), Light

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Applica-
tion for
Orders.

which do not appear to serve the district in the best practicable way, may be rejected (*d*). If any serious opposition is raised against the proposed railway, the general demand on the part of the persons living or interested in the district in favour of the application must be sufficient to outweigh it and to justify the grant of compulsory powers (*e*).

1448. It is the practice of the Commissioners to reject an application which is dangerous to the public, as for instance by reason of the whole or part of the line passing along narrow or difficult roads (*f*), or crossing an important railway line on the level (*g*), or

Danger to
public.

Railway Commissioners' Report, List III., No. 26, Parliamentary Paper, 1902, 198 (application considered unsatisfactory in the interest of public convenience); *Lynmouth and Minehead Case* (1898), Light Railway Commissioners' Report, List IV., No. 18, Parliamentary Paper, 1902, 198 (reasonable requirements of tourists not sufficient ground in face of strong opposition); *Midlothian Case* (1897), Light Railway Commissioners' Report, List I., No. 27, Parliamentary Paper, 1902, 198; *Lastingham and Sinnington Case* (1897), Light Railway Commissioners' Report, List II., No. 8, Parliamentary Paper, 1902, 198; *West Manchester Case* (1897), Light Railway Commissioners' Report, List II., No. 19, Parliamentary Paper, 1902, 198; *Cuckmere Valley Case* (1897), Light Railway Commissioners' Report, List III., No. 7, Parliamentary Paper, 1902, 198; *Bromley and District Case* (1903), Light Railway Commissioners' Report, List XIV., No. 5, Parliamentary Paper, 1904, 122; *East and West Yorkshire Union Light Railways (Extension) Case* (1911), Light Railway Commissioners' Report, List XXX., No. 5, Parliamentary Paper, 1912, 108 (application rejected; public case sufficiently met by accommodation by way of sidings by arrangement with the existing collieries).

(*d*) *Penzance, Newlyn, and St. Just Case* (1898), 1 Oxley, Light Railways Procedure: Reports and Precedents, 57; *Hounslow, Slough and Datchet Case* (1902), 2 Oxley, Light Railways Procedure: Reports and Precedents, 140 (rejected because the line was in two sections without any connexion).

(*e*) *Midland and South Western Junction Railway (Ludgershall and Military Camps) Case* (1898), Light Railway Commissioners' Report, List IV., No. 19, Parliamentary Paper, 1902, 198; *London, Barnet, Edgware and Enfield Case* (1898), Light Railway Commissioners' Report, List IV., No. 15, Parliamentary Paper, 1902, 198 (application rejected because of the opposition by all the local authorities interested); *Burnham, Berrow and Brent Knoll Case* (1898), Light Railway Commissioners' Report, List IV., No. 4, Parliamentary Paper, 1902, 198 (general support of the district necessary for the success of an application; and see *Hastings, Bexhill and District Case* (1898), Light Railway Commissioners' Report, List III., No. 11, Parliamentary Paper, 1902, 198; *Finchley, Hendon and District Case* (1898), Light Railway Commissioners' Report, List III., No. 8, Parliamentary Paper, 1902, 198 (public desire for electric tramways not sufficiently established); *Heddingham and Long Melford Case* (1898), Light Railway Commissioners' Report, List IV., No. 12, Parliamentary Paper, 1902, 198.

(*f*) *Rochester, Chatham and District Case* (1898), Light Railway Commissioners' Report, List III., No. 22, Parliamentary Paper, 1902, 198 (application rejected as to certain lines on account of steepness and narrowness of road although the lines were generally needed, particularly by dockyard workmen); *Llanfair and Beaumaris Case* (1898), Light Railway Commissioners' Report, List III., No. 25, Parliamentary Paper, 1902, 198; *Isle of Thanet Light Railway (Extensions) Case* (1899), Light Railway Commissioners' Report, List V., No. 25, Parliamentary Paper, 1902, 198 (objection on account of narrowness of the road taken by the road authority, and objections on other grounds by the frontagers).

(*g*) *Peterborough and District Case* (1900), Light Railway Commissioners'

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tion for
Orders.
—
Competition.

by reason of there not being sufficient provision for widening roads (*h*).

1449. Where competition is likely to affect an opposing railway company, the Commissioners must determine whether it is of a character contemplated as being admissible under the statute (*i*); if it is not admissible, they must reject the application (*k*).

Financial
position.

1450. The Commissioners may reject an application if they are not satisfied with the way in which the financial position is put before them (*l*), or if the whole scheme is not before them (*m*), or may grant the application subject to the appointment of responsible persons as directors (*n*). A scheme which is likely to become

Report, List VI., No. 31, Parliamentary Paper, 1902, 198 (the traffic on the important railway line being very heavy). A junction of a light railway with an existing railway must, so far as is reasonably practicable, avoid interference with the passenger traffic lines of the existing railway (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 23).

(*h*) *Hounslow, Slough and Datchet Case* (1902), Light Railway Commissioners' Report, List XI., No. 20, Parliamentary Paper, 1903, 124 (absence of sufficient provision for widening roads).

(*i*) Compare Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 9 (3).

(*k*) *Bridgwater, Langport and Glastonbury (Somersetshire) Case* (1899), Light Railway Commissioners' Report, List VI., No. 9, Parliamentary Paper, 1908, 133; *Camborne, Redruth and District Case* (1907), Light Railway Commissioners' Report, List V., No. 5, Parliamentary Paper, 1908, 133; *Musselburgh Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 219; *Hamilton, Motherwell and Wishaw Case* (1899), Light Railway Commissioners' Report, List V., No. 49, Parliamentary Paper, 1902, 198; *County of Hertford No. 1 Case* (1900), Light Railway Commissioners' Report, List VII., No. 10, Parliamentary Paper, 1902, 198; *Tickhill Case* (1900), Light Railway Commissioners' Report, List VII., No. 35, Parliamentary Paper, 1902, 198; *Potteries (Extensions) Case* (1901), 2 Oxley, Light Railways Procedure: Reports and Precedents, 110. Competition was not proved to the satisfaction of the Commissioners in some of the above applications, and Orders were made so as to leave the question to be decided by the Board of Trade. In *Ramsbottom, Edenfield and Rawtenstall Case* (1902), 2 Oxley, Light Railways Procedure: Reports and Precedents, 158, and *Ashby, Swadlincote and Burton Case* (1902), 2 Oxley, Light Railways Procedure: Reports and Precedents, 138, the Commissioners rejected applications, although in the former application they were satisfied that the proposed line was greatly desired, and in the latter application with the greatest regret, as the public need was never more thoroughly demonstrated. Under the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), it is open to the Commissioners in such cases now to make an Order, so that the Board of Trade may submit the proposals to Parliament under *ibid.*, s. 1; and see p. 828, *post*.

(*l*) *Preston and Lytham Case* (1901), Light Railway Commissioners' Report, List X., No. 13, Parliamentary Paper, 1902, 198.

(*m*) *London County (Clapham, Wandsworth and Kingston Road) Case* (1900), Light Railway Commissioners' Report, List VII., No. 22, Parliamentary Paper, 1908, 133; *London County (Deptford, Shooter's Hill and Woolwich) Case* (1900), Light Railway Commissioners' Report, List VII., No. 23, Parliamentary Paper, 1908, 133; *London County (New Cross, Lewisham and Eltham) Case* (1900), Light Railway Commissioners' Report, List VII., No. 24, Parliamentary Paper, 1908, 133. In these cases the applications were rejected because, although considerable road widening was necessary, application for the necessary powers to acquire the land and houses required was not included in the scheme or made to the Commissioners, and therefore the whole scheme was not before them.

(*n*) *Orpington, Cudham and Tatsfield Case* (1899), Light Railway Commissioners' Report, List V., No. 35, Parliamentary Paper, 1902, 198.

a charge on the rates (*o*), or which fails to disclose any prospect of return on a large outlay, may be rejected (*p*); and where a council proposes to spend money in constructing a railway, a part of which is outside its area, it must be shown that the council will obtain a proportionate advantage from such expenditure (*q*).

SECT. 2.
Applica-
tion for
Orders.

1451. The Commissioners have refused to consider an application for a light railway of the tramway type upon a road on which Parliament had recently refused to allow tramways (*r*), and also upon a road on which parliamentary powers for the construction of tramways were still in existence (*s*); but they have granted an application conditionally upon a Bill before Parliament asking for powers to run tramways over the same road not being passed (*t*).

Light rail-
ways in lieu
of tramway.

SUB-SECT. 6.—*Appeal from Refusal of Order.*

1452. Where an application for a light railway has been refused, the applicants, if the council of any county, borough, or district, may appeal to the Board of Trade, who may, if it thinks fit, remit the application, with or without instructions, to the Light Railway Commissioners for further consideration (*a*).

Appeal to
Board of
Trade.

SUB-SECT. 7.—*Submission of Order to Board of Trade.*

1453. Every order made by the Light Railway Commissioners must be submitted to the Board of Trade for confirmation (*b*), accompanied by (1) such particulars and plans as the Board may require, and (2) a report stating the objections to the application and the manner in which they have been dealt with, and any other matters in reference to the order which the Commissioners may think fit to insert in the report (*c*).

Report to
Board of
Trade.

Public notice must be given by the Board of Trade of every order so submitted, and the notice must state that any objections to the confirmation of the order must be lodged with the Board of Trade and the date by which such objections must be lodged (*d*).

Notice.

(*o*) *Crewe Case* (1901), Light Railway Commissioners' Report, List IX., No. 5, Parliamentary Paper, 1902, 198.

(*p*) *Norwich and Dereham Case* (1900), Light Railway Commissioners' Report, List VIII., No. 15, Parliamentary Paper, 1902, 198 (scheme rejected although the district needed further railway communication).

(*q*) *City of Bath Case* (1900), Light Railway Commissioners' Report, List VII., No. 9, Parliamentary Paper, 1902, 198 (out of a total of eighteen miles, seven miles were outside the city's area).

(*r*) *London United Tramways, Ltd. (Extensions) Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 224.

(*s*) *Paisley Case* (1898), 1 Oxley, Light Railways Procedure: Reports and Precedents, 182.

(*t*) *Spen Valley (Extensions) Case* (1900), Light Railway Commissioners' Report, List VII., No. 34, Parliamentary Paper, 1902, 198.

(*a*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 7 (6).

(*b*) Every order made by the Commissioners is provisional only, and has no effect until confirmed (*ibid.*, s. 7 (5)).

(*c*) *Ibid.*, s. 8 (1).

(*d*) *Ibid.*, s. 8 (2). The Board of Trade has no power to hear objections on the ground of competition which are not lodged in time, but will hear evidence on objections on the ground of public safety, although such objections are not in time, because, quite apart from any objection by any individual objector on this ground, the Board of Trade has to consider every order with special reference to public safety (*Southwold Case* (1901), 2 Oxley, Light Railways Procedure: Reports and Precedents, 26; and see note (*h*), p. 828, *post*).

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Applica-
tion for
Orders.Points to be
considered.Remission of
order.Powers of
Board of
Trade.Effect of
confirmation.SUB-SECT. 8.—*Consideration and Confirmation by Board of Trade.*

1454. Every order submitted to the Board of Trade must be considered by the Board with special reference to (1) the expediency of requiring the proposals to be submitted to Parliament; (2) the safety of the public; and (3) any objection (*e*) lodged in accordance with the Light Railways Act, 1896 (*f*).

1455. The Board of Trade may remit any order to the Light Railway Commissioners for further consideration, or may itself hold or institute a local inquiry and hear all parties interested (*g*).

1456. The Board of Trade may confirm any order with or without modification (*h*), or may refuse to confirm any order either by upholding an objection (*i*), or because by reason of the magnitude of the proposed undertaking, or of its effect on the undertaking of an existing railway company, the Board is of opinion that the application ought to be submitted to Parliament (*k*). In the latter case the Board of Trade may, if it thinks fit, submit the proposals to Parliament by bringing in a Bill for the confirmation of the order (*l*).

1457. Every order confirmed by the Board of Trade has the same effect as if enacted by Parliament (*m*), and is conclusive evidence

(*e*) As to objections on the ground that the proposed undertaking may destroy scenery or objects of historical interest, see note (*a*), p. 824, *ante*.

(*f*) 59 & 60 Vict. c. 48, s. 9 (1). The Light Railway Commissioners must give the Board of Trade any information or assistance which may be required for this purpose (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 9 (2)).

(*g*) *Ibid.*, s. 9 (6). The Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), Part I., applies to any such inquiry as if the inquiry were held on an application made in pursuance of a special Act; and as if, in the case of an inquiry held with reference to an objection made to an application under the Light Railways Act, 1896 (59 & 60 Vict. c. 48), the persons making the objection were also parties to the application within the meaning of the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 3 (Light Railways Act, 1896 (59 & 60 Vict. c. 48) s. 15 (1)). As to inquiries under the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), see titles RAILWAYS AND CANALS, Vol. XXIII., pp. 739, 740; TRADE AND TRADE UNIONS, p. 516, *ante*.

(*h*) The Board of Trade may modify the provisions of any order for ensuring the safety of the public (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 9 (4)), or for removing any objection lodged with the Board in accordance with the Act (*ibid.*, s. 9 (5)).

(*i*) The Board of Trade must consider every objection lodged and not withdrawn, and must give to the persons making the objection an opportunity of being heard (*ibid.*, s. 9 (5)).

(*k*) *Ibid.*, s. 9 (3). For instances where applications have been refused for this reason, see *Staines and Egham Case* (1900), 2 Oxley, Light Railways Procedure: Reports and Precedents, 87; *South Shields, Sunderland and District Case* (1901), 2 Oxley, Light Railways Procedure: Reports and Precedents, 133; *Coatbridge and Airdrie Case* (1898), 1 Oxley, Light Railways Procedure: Reports and Precedents, 149.

(*l*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 1. In such a case the Board of Trade must make a special report to Parliament with respect to the order (*ibid.*, s. 1 (3)). If, while such Bill is pending in either House of Parliament, a petition is presented against the order, such Bill may be referred either to a select or joint committee, before either of which the petitioner may appear and oppose as in the case of private Bills (*ibid.*, s. 1 (2)).

(*m*) A light railway order is an Act of Parliament as defined in the Telegraph Act, 1878 (41 & 42 Vict. c. 76) (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 25).

that the requirements of the Light Railways Act, 1896 (*n*), have been complied with (*o*).

SECT. 3.—*Contents of Orders.*

1458. Any order may contain provisions incorporating any of the provisions of the Clauses Acts (*p*), but the Board of Trade has no power to authorise any variation of the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement (*q*).

1459. The Commissioners have power to make provision in an order for enabling the promoters to acquire part only of a house, building, or manufactory (*r*), unless it can be shown to the authority to whom the question of disputed compensation is submitted that such part cannot be severed from the remainder of the property without material detriment thereto (*s*). No such provision must be made unless the Commissioners are satisfied that the requisite notices have been given (*t*).

1460. Any order may also contain provisions imposing obligations with respect to the safety of the public (*a*), giving powers for constructing and working the railway, and any works incidental

SECT. 2.

Applica-
tion for
Orders.

Incorporation
of statutes.

Acquisition
of part of
building.

Obligations
and powers.

(*n*) 59 & 60 Vict. c. 48.

(*o*) *Ibid.*, s. 10.

(*p*) The Clauses Acts are defined by the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 28, as meaning the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12); the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92) (see title RAILWAYS AND CANALS, Vol. XXIII., pp. 619 *et seq.*); and the Companies Clauses Acts, 1845—1889 (see title COMPANIES, Vol. V., pp. 674 *et seq.*). The Clauses Acts only apply when and so far as they are incorporated or applied by the order authorising the light railway (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 12 (1)). In *Gosforth and Ponteland Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 95, where it was sought to dispense with the provisions of the Light Railways Act, 1896 (59 & 60 Vict. c. 48), for determining the compensation for lands compulsorily taken (*ibid.*, s. 13 (1)), the Commissioners held that they had no power to declare the provisions of the Light Railways Act, 1896 (59 & 60 Vict. c. 48), relating to the incorporation of the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12) to be inapplicable.

(*q*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (*a*). If any variation is required, the Board of Trade must make a special report to Parliament (*ibid.*). An application which was incomplete in that there was no provision in the draft order for road widening, to obtain powers for which a Bill was before Parliament, was rejected by the Commissioners on the ground that the double procedure before them and Parliament nullified the provision that nothing in the provision is to authorise any variation of the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement (*London County (Deptford, Shooter's Hill and Woolwich) Case* (1900), 2 Oxley, Light Railways Procedure: Reports and Precedents, 74).

(*r*) Thus varying the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92, as to which see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 70 *et seq.*

(*s*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 4.

(*t*) As to the notices required, see pp. 820, note (*u*), 824, *ante*.

(*a*) *North Wales Narrow Gauge Railways (Beddgelert Extension) Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 101 (where the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19, was incorporated). The enactments imposing obligations on railway

SECT. 3.
Contents
of Orders.

Constitution
of managing
body.

thereto, and for making agreements (*b*) with railway and other companies, or any authority, person or body of persons, and for carrying the order into effect (*c*).

1461. Any order may provide for the constitution of a company as a body corporate for carrying out the objects of the order, and for the representation of any council advancing money on the managing body of the authorised railway (*d*).

Railway.

1462. Any order may authorise a company which has power to construct or work a railway to construct and work or to work such railway or any part of it as a light railway (*e*).

Financial
provisions.

1463. Any order may authorise a council to advance or borrow money, limit such amount, and regulate the terms on which such money is to be advanced or borrowed (*f*), provide the manner in which profits are to be divided (*g*), fix the maximum rates and charges for traffic (*h*), and the time within which the railway must be constructed, and provide for the proper audit of the accounts of the managing body of the light railway (*i*).

companies with respect to the safety of the public which are set out in the Light Railways Act, 1896 (59 & 60 Vict. c. 48), Sched. II., only apply to a light railway when and so far as they are incorporated or applied by the order (*ibid.*, s. 12 (1)), but the general enactments relating to railways apply, with the exception of the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79) (duties to be levied in respect of passengers) (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 12 (2)).

(*b*) The practice of scheduling agreements is open to objection, and is not generally permitted by the Board of Trade (*Southwold Case* (1901), 2 Oxley, Light Railways Procedure: Reports and Precedents, 26).

(*c*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (3), amending the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (*c*), (*d*).

(*d*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (*e*), (*f*). The Board of Trade may, on the application of any company thus incorporated, order such company to be wound up if satisfied, either by statutory declaration or otherwise, that such company, owing to the sale of its undertaking or otherwise, is unable to carry out the objects for which it was incorporated. After such order is made, the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), apply as if such company had resolved by special resolution that the company be wound up voluntarily (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 7).

(*e*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 18; *North Staffordshire Railway (Trentham, Newcastle and Silverdale Light Railway) Case* (1912), Light Railway Commissioners' Report, List XXXI., No. 3, Parliamentary Paper, 1913, 113; *Mawddwy Railway (Light Railway) Case* (1911), Light Railway Commissioners' Report, List XXVI., No. 8, Parliamentary Paper, 1912, 108 (application to reconstruct and work as a light railway an existing but derelict railway); *North Shropshire Light Railway Case* (1911), Light Railway Commissioners' Report, List XXII., No. 6, Parliamentary Paper, 1912, 108.

(*f*) The Commissioners have refused to allow a company to apply for general purposes any money raised under a light railway order and not used for that purpose (*Aberdeenshire Case* (1897), 1 Oxley, Light Railways Procedure: Reports and Precedents, 16).

(*g*) Such a provision is inserted where an undertaking is promoted by a council, or where an advance is made by a council to a light railway company as part of its share capital (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (*h*)).

(*h*) The order may empower lists of the rates and charges to be fixed in the carriages of the railway in a prominent place (*Nelson and District Case* (1900), 1 Oxley, Light Railways Procedure: Reports and Precedents, 203).

(*i*) Such a provision is inserted where the managing body is not a local authority (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (1)).

1464. Any order may, in the case of a new company, require such company to make a deposit and provide for the time of making, and the application of, such deposit, and may empower any local authority to acquire the authorised railway (*j*), and generally may contain provisions which, whether similar to the above or not, may be considered ancillary to, or expedient for carrying out, the objects of the order (*k*).

SECT. 3.
Contents
of Orders.
Deposits etc.

1465. The sale and transfer, under a light railway order, of a railway which obtained powers under an Act of Parliament has been held inadmissible (*l*), and provisions giving a corporation powers to supply electric energy outside their own district (*m*), or provisions which, although agreed between the parties, are not called for by any special circumstances, and depart from the decisions of the Commissioners in previous applications, have been disallowed (*n*).

Provisions
disallowed.

1466. Any matter which under any light railway order is to be determined by arbitration (*o*) must, subject to any special provisions of the order, be determined either (1) by the Board of Trade, or if the Board thinks fit by a single arbitrator appointed by the Board (*p*);

Determina-
tion of
disputes.

(*j*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11. The Commissioners have in exceptional circumstances made the consent of a county council necessary jointly with the consents of the local and road authorities where these consents were required by the order (*Waltham Cross and Enfield Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 196, following *London United Tramways, Ltd. (Light Railway Extensions) Case* (1898), 1 Oxley, Light Railways Procedure: Reports and Precedents, 164); they may authorise a road authority (a county council) to make bye-laws (where the road is repairable by them), in lieu of a local authority (*Bromsgrove Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 238), or make a road authority the purchasing authority outside an urban district (*ibid.*; *Worcester and District Case* (1900), 1 Oxley, Light Railways Procedure: Reports and Precedents, 240). This power to acquire is always given, in the case of a railway laid on a public road, either to the road authority or to a local authority at the expiration of a certain period, or successive periods, prescribed by the order. Where an authority is authorised and agrees to buy a light railway at a price to be settled in case of difference by arbitration, the proper basis of valuation is not the value to the light railway company of the railway as an income-earning concern, but that of the railway *in situ* capable of earning a profit (*Dudley Corporation v. Dudley, Stourbridge and District Electric Traction Co.* (1907), 97 L. T. 556, H. L.).

(*k*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 11 (*m*); see *Dartford District Deviation Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 49 (powers granted to authorise construction of pier for interchange of traffic, and to levy tolls).

(*l*) *Portmadoc, Beddgelert and Snowdon Case* (1898), Light Railway Commissioners' Report, List IV., No. 31, Parliamentary Paper, 1902, 198.

(*m*) *Nelson and District Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 203.

(*n*) *Worcester and District Case*, *supra*.

(*o*) As to the determination by arbitration of any matter under the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12) incorporated in a light railway order, see Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13, which is limited to such matters, and does not refer generally to any matter to be determined by arbitration under a light railway order.

(*p*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 9 (1). The Arbitration Act, 1889 (52 & 53 Vict. c. 49), applies for the purpose of determining

SECT. 3.
Contents
of Orders.

or (2) by the Light Railway Commissioners as arbitrators if the parties make a joint application for the purpose (q).

SECT. 4.—*Acquisition of Land.*

Appointment
of arbitrator.

1467. Where any order incorporates the Lands Clauses Acts (r), any matter which under those Acts might have been determined by the verdict of a jury, by arbitration, or by two justices, must be referred to and determined by a single arbitrator appointed by the parties, or, if the parties do not concur, by an arbitrator appointed by the Board of Trade (s).

Matters to be
considered.

1468. The arbitrator must, in determining the amount of compensation due to any proprietor of land, have regard to the extent to which the remaining and contiguous lands belonging to such proprietor may be benefited by the proposed light railway (t), and must award costs according to the scale fixed under rules made by the Board of Trade (u).

the matter, as if such matter were an arbitration pursuant to a submission; the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), applies with reference to any such determination and appointment as if the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), or the order were a special Act within the meaning of the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 4 (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 9 (2), (3)); see note (g), p. 828, *ante*.

(q) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 8 (1). The Commissioners may, with the consent of the parties, be appointed by the Board of Trade where the Board of Trade has power under an order to appoint an arbitrator. In such case the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), applies as if the Commissioners were appointed by the Board of Trade in pursuance of a special Act; and the Arbitration Act, 1889 (52 & 53 Vict. c. 49), applies for the purpose of determining the matter as if the arbitration were pursuant to a submission (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 8 (2)); see, generally, title ARBITRATION, Vol. I., pp. 437 *et seq.*

(r) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(s) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13 (1). The Light Railway Commissioners have no power to vary this provision (*Mid-Suffolk Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 91). This provision "only extends to the assessment of the amount of compensation and the basis of the assessment. It does not extend to the enforcing of the award after it has been made. Consequently the award remains enforceable as it was under s. 35 of the Lands Clauses Consolidation Act, 1845 [8 & 9 Vict. c. 18], unaffected in this respect by the Arbitration Act, 1889 [52 & 53 Vict. c. 49]" (*R. v. Barton and Immingham Light Railway, Ex parte Simon*, [1912] 3 K. B. 72, *per* Lord ALVERSTONE, C.J., at p. 75). The costs of a reference and award of an arbitration under this provision are governed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49) (even though the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is incorporated in the order), and are therefore in the discretion of the arbitrator (*Baxter v. Midland Railway* (1905), 93 L. T. 538). Such costs must, if required, under the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), be taxed and settled by a master of the Supreme Court, whose decision is not open to review (*Re Cannings, Ltd., and Middlesex County Council*, [1907] 1 K. B. 51, C. A.). The costs of a solicitor on an application for an order must be taxed on the Chancery scale, and not on the parliamentary scale (*Re Peterson*, [1909] 2 Ch. 398, C. A.); see title SOLICITORS, Vol. XXVI.

(t) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13 (1).

(u) *Ibid.*, s. 13 (2). The concurrence of the Lord Chancellor to these

1469. Any order (*w*) may authorise the payment to trustees of any purchase-money or compensation not exceeding £500 (*x*).

SECT. 4.
Acquisition
of Land.

Payment to
trustees.

Limited
owners.

1470. Any person with power either by statute or otherwise to sell and convey land for the purpose of any works of a light railway may convey free from all incumbrances (*a*), with the sanction of the Board of Agriculture and Fisheries (*b*), either without payment of any purchase-money or compensation or at a price less than the real value (*c*); and the land of any landowner (*d*) who contributes any money for the same purpose may, with the sanction of the Board of Agriculture and Fisheries, be charged with such contribution (*e*); but the Board must, before giving its sanction, be satisfied that a permanent increase in the value either of the land held by the same title, or of other land of the same landowner, will be effected (*f*).

rules is necessary (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13 (2)). The scale varies according as the amount awarded does not exceed £300, exceeds £300 but does not exceed £500, or exceeds £500 (Light Railways (Costs in Arbitrations) Rules, 1898 (Stat. R. & O. Rev., Vol. XI., Railway, p. 78)). No fees to counsel are allowed if the sum awarded does not exceed £300; if the sum awarded exceeds £300, but does not exceed £500, such fees for counsel will be allowed as the taxing master considers reasonable; where the amount exceeds £500, see *ibid.* In order to ascertain which scale applies the amount awarded must include (i.) any sums awarded by the arbitrator in respect of any land or interest in lands taken for or injuriously affected by the execution of any works or order under the Act; (ii.) any amounts which the arbitrator may deduct in arriving at such sums in respect of the permanent increase of value in the remaining and contiguous lands of the same proprietor; and (iii.) the expenses of any accommodation works which may be prescribed by the award, or which the light railway company may have agreed to construct for the protection and advantage of the claimant (*ibid.*, r. 4). The arbitrator must, if required, certify the amounts of such deductions and expenses (*ibid.*). The arbitrator has no power to award solicitor and client costs (*ibid.*, r. 5). These rules do not apply to the fees and remuneration properly payable and charged by the arbitrator (*ibid.*, r. 6), which fees can be recovered by the claimant from the person directed or liable to pay the same (*ibid.*). As to an arbitrator recovering fees for services under this provision, see *Tuckett v. Isle of Thanet Electric Tramways and Lighting Co., Ltd.* (1901), *Times*, 21st December.

(*w*) Under the Light Railways Act, 1896 (59 & 60 Vict. c. 48); see also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 154, 155.

(*x*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 14.

(*a*) Where any land is subject to incumbrances notice must be given to every incumbrancer, and the Board of Agriculture and Fisheries must consider any objections raised before giving its sanction to the conveyance (*ibid.*, s. 19 (3)).

(*b*) In the case of Crown lands, the sanction of the Treasury, in lieu of the Board of Agriculture and Fisheries, is necessary (*ibid.*, s. 20).

(*c*) *Ibid.*, s. 19 (1). Similar powers are conferred upon the Commissioners of Woods to convey Crown lands (*ibid.*, s. 20).

(*d*) Within the meaning of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).

(*e*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 19 (2). The manner in which a charge is made and its effect is the same as in the case of a charge under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114) (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 19 (2)); see title LAND IMPROVEMENT, Vol. XVIII., pp. 280 *et seq.*

(*f*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 19 (3). Such

SECT. 4.
Acquisition
of Land.
Commons.

1471. No common, or easement over or affecting any common (*g*), may be purchased, taken, or acquired without the consent of the Board of Agriculture and Fisheries, and unless the Board is satisfied that the purchase is necessary, that the exercise of the powers conferred by the order will not cause greater injury to the common than is necessary, and that all proper steps have been taken in the interest of the commoners and of the public to add other land in lieu of the land taken (*h*), and to secure convenient access from one part of the common to the other where the common is divided (*i*).

SECT. 5.—*Amending Orders.*

SUB-SECT. 1.—*Purposes.*

Scope of
amending
orders.

1472. Any order may be altered or added to by an amending order (*k*), which may authorise the promoters either to vary the whole or any part of the railway authorised by, or to repeal or alter any provision in, the former order. An amending order may vary the whole or any part of a light railway by extension (*l*), deviation (*m*), extension and deviation (*n*), or abandonment (*o*). An amending order may repeal or alter (*p*) any provision in the former order by

increase, in the case of a conveyance, must exceed the real value (in the opinion of the Board) of the land conveyed, or the difference between such value and the price (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 19 (3)).

(*g*) "Common" includes any land subject to be inclosed under the Inclosure Acts, 1845—1899 (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 541, note (*t*)), any metropolitan common within the meaning of the Metropolitan Commons Acts, 1866—1898 (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 606, note (*f*)), and any town or village green (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 21 (2); and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 493).

(*h*) Other land in lieu of the land taken must be added if and where this can properly be done (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 21 (1)).

(*i*) *Ibid.*

(*k*) *Ibid.*, s. 24.

(*l*) *East Kent Light Railway (Extension) Case* (1912), Light Railway Commissioners' Report, List XXXI., No. 2, Parliamentary Paper, 1913, 113; *Didcot and Watlington Light Railway (Extension) Case* (1899), Light Railway Commissioners' Report, List V., No. 13, Parliamentary Paper, 1902, 198; *Llandudno and Colwyn Bay Light Railway (Extension No. 2) Case* (1907), Light Railway Commissioners' Report, List XXII., No. 10, Parliamentary Paper, 1909, 97; *York Corporation Light Railways (Extensions) Case* (1911), Light Railway Commissioners' Report, List XXXI., No. 7, Parliamentary Paper, 1912, 108.

(*m*) *Dartford District (Deviation) Case* (1899), Light Railway Commissioners' Report, List VI., No. 13, Parliamentary Paper, 1902, 198; *West Hartlepool (Extensions) Case* (1900), Light Railway Commissioners' Report, List VII., No. 38, Parliamentary Paper, 1902, 198; *County of Hertford Light Railways (Watford Deviation) Case* (1912), Light Railway Commissioners' Report, List XXX., No. 3, Parliamentary Paper, 1913, 113.

(*n*) *Callington Light Railway (Amendment) Case* (1907), Light Railway Commissioners' Report, List XXIII., No. 2, Parliamentary Paper, 1909, 97.

(*o*) *Central Essex Light Railway (Extension of Time) Case* (1908), Light Railway Commissioners' Report, List XXIV., No. 3, Parliamentary Paper, 1909, 97 (application (*inter alia*) to abandon portion of line); *County of Hertford (Cheshunt) Light Railways Case* (1910), Light Railway Commissioners' Report, List XXIX., No. 2, Parliamentary Paper, 1912, 108.

(*p*) *London and South Western Railway (Basingstoke and Alton) (Amend-*

authorising an extension of time (*g*), the transfer of a light railway to a railway company (*r*) or other body, or the release of parliamentary deposit and the substitution of new provisions with reference to a deposit fund (*s*), or may add any provision authorising the revival of powers of a previous order (*a*), further borrowing powers (*b*), or the increase of specified fares on certain routes (*c*), and so forth.

ing) Case (1900), Light Railway Commissioners' Report, List VI., No. 24, Parliamentary Paper, 1902, 198 (application to substitute cattle-guards for gates at some of the less important level crossings); *Derwent Valley Light Railway (Amendment) Case* (1911), Light Railway Commissioners' Report, List XXX., No. 4, Parliamentary Paper, 1912, 108 (application by local authority for power to subscribe to the share capital).

(*g*) This is the amending order most often applied for (see *Barton and Immingham Light Railway (Extension of Time) Case* (1912), Light Railway Commissioners' Report, List XXIX., No. 1, Parliamentary Paper, 1912, 108; *Derwent Valley Light Railway (Extension of Time) Case* (1912), Light Railway Commissioners' Report, List XXVIII., No. 1, Parliamentary Paper, 1912, 108), and may be required for different purposes (*Merthyr Tydfil Light Railway (Amendment) Case* (1911), Light Railway Commissioners' Report, List XXX., No. 10, Parliamentary Paper, 1912, 108 (postponement of period for compulsory purchase by local authorities); *North Lindsey Light Railways (Amendment) Case* (1910), Light Railway Commissioners' Report, List XXIX., No. 8, Parliamentary Paper, 1912, 108 (extension of time in respect of and power to construct and work as a light railway a railway previously authorised by Act of Parliament); *Avonmouth Light Railway (Revival and Extension of Time) Case* (1912), Light Railway Commissioners' Report, List XXX., No. 1, Parliamentary Paper, 1912, 108; *West Cheshire Light Railway Case* (1912), Light Railway Commissioners' Report, List XXVIII. (revival of powers and extension of time therefor), No. 4, Parliamentary Paper, 1912, 108; *Leek Caldon, Low and Hartington Light Railways (Borrowing Powers) Case* (1912), Light Railway Commissioners' Report, List XXVII., No. 5, Parliamentary Paper, 1912, 108 (extension of period for repayment of loans from county council)).

(*r*) *Tickhill Light Railway (Amendment) Case* (1907), Light Railway Commissioners' Report, List XXII., No. 8, Parliamentary Paper, 1909, 97.

(*s*) *Wolverhampton and Cannock Chase Railway (Light Railway) (Amendment) Case* (1907), Light Railway Commissioners' Report, List XXIII., No. 6, Parliamentary Paper, 1909, 97.

(*a*) *Blackburn, Whalley and Padiham Light Railway (Extension of Time) Case* (1907), Light Railway Commissioners' Report, List XXIII., No. 1, Parliamentary Paper, 1909, 97; *Glamorgan County Council (Morriston to Pontardawe) Light Railways Case* (1911), Light Railway Commissioners' Report, List XXXI., No. 9, Parliamentary Paper, 1912, 108; *Avonmouth Light Railway (Revival and Extension of Time) Case, supra*; *County of Hertford (Cheshunt) Light Railways Case* (1910), Light Railway Commissioners' Report, List XXIX., No. 2, Parliamentary Paper, 1912, 108.

(*b*) *Campbelltown and Macbride Light Railway (Amendment) Case* (1907), Light Railway Commissioners' Report, List XXIII., No. 9, Parliamentary Paper, 1909, 97; *Bradford Corporation (Nidd Valley) Light Railway (Amendment) Case* (1908), Light Railway Commissioners' Report, List XXIV., No. 2, Parliamentary Paper, 1909, 97 (application for further borrowing powers and extension of period for repayment of loan); *Leek Caldon, Low, and Hartington Light Railway (Borrowing Powers) Case* (1911), Light Railway Commissioners' Report, List XXX., No. 7, Parliamentary Paper, 1912, 108; *Southwold (Further Capital Powers) Case* (1906), Light Railway Commissioners' Report, List XXI., No. 13, Parliamentary Paper, 1908, 133 (application to re-arrange capital powers); *Kent and East Sussex (General Powers) Case* (1907), Light Railway Commissioners' Report, List XXII., No. 4, Parliamentary Paper, 1908, 133.

(*c*) *Bath Electric Tramways (Light Railways) (Amendment) Case* (1908),

SECT. 5. The Board of Trade may require an amending order to be submitted to Parliament, having regard to the scope and provisions of the original order (*d*).

Consents.

1473. No amending order may confer any power to acquire the railway except with the consent of the owners (*e*). Such consent is, however, unnecessary in the case of an order amending an order which empowers any local authority to acquire a light railway on a public road; and such amending order may, on the application by any local or road authorities in whose area any part of the railway is situate, determine or vary the authorities by whom the railway may be acquired, and make such further provisions as may be necessary in connexion therewith. The consent of the owners of the railway is, however, necessary if it is sought to alter the period within which such right of acquisition may be exercised, or the basis on which the purchase-money is to be assessed (*f*).

SUB-SECT. 2.—*Application.*

Advertisement.

1474. Notice of the proposed application (*g*), describing the nature of the proposed amendment, must in every case be published in a local newspaper once at least in each of two consecutive weeks in the month of May or November, and must be advertised shortly in the *London Gazette* (*h*).

Service of notices.

1475. If an amending order proposes to authorise the promoters to vary or relinquish the whole or any part of the railway authorised by the former order, or to extend the time limited by such order or otherwise for the compulsory purchase of lands, notice must be served in the month in which the notice is advertised on every owner, lessee and occupier affected (*i*), and if an amending order proposes to repeal or alter a provision contained in the former order for the protection of any person, public body or company specifically named, the promoters must, in the month in which the notice is advertised, give notice of their intention to repeal or alter such provision to every person, public body or company affected (*k*).

Light Railway Commissioners' Report, List XXIV., No. 1, Parliamentary Paper, 1909, 97; *Cheltenham and District Light Railways (Amendment) Case* (1908), Light Railway Commissioners' Report, List XXV., No. 2, Parliamentary Paper, 1909, 97. The application was subsequently withdrawn ((1912), Light Railway Commissioners' Report, List XXV., No. 2, Parliamentary Paper, 1912, 108).

(*d*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 24 (*b*).

(*e*) *Ibid.*, s. 24 (*c*).

(*f*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 6.

(*g*) Any authority or person may apply for an amending order (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 24 (*a*)). Every application is subject to the provisions with reference to the original order (*ibid.*, s. 24), and to the same procedure, except that the requirements of rules which are inapplicable to applications for amending orders will be dispensed with (Light Railways Rules, 1913, r. 41). The rules as to fees apply to applications for amending orders; see *ibid.*, r. 37.

(*h*) *Ibid.*, rr. 1—3. For the definition of a local newspaper, see note (*r*), p. 820, *ante*; for a form of advertisement, see Encyclopædia of Forms and Precedents, Vol. IX., p. 362.

(*i*) Light Railways Rules, 1913, r. 29.

(*k*) *Ibid.*, r. 30.

1476. Any objection to an amending order must be made to the Light Railway Commissioners by the date prescribed in each case in writing and a copy must be sent to the solicitors or agents of the promoters (l).

SECT. 5.
Amending
Orders.
Objections.

SECT. 6.—*Powers of Local Authorities.*

SUB-SECT. 1.—*Application for Orders.*

1477. The council of any county, borough or district may apply, either alone or jointly with any individual, corporation or company (m), for an order authorising a light railway (n). Power to apply.

SUB-SECT. 2.—*Construction and Working.*

1478. Any council, if so authorised (o), may undertake to construct and work or to contract for the construction and working of the authorised light railway (p) or do any act incidental to such construction and working (q). If the proposed undertaking is wholly or partly outside the council's area, the council must join with the council of the outside area or must prove to the satisfaction of the Board of Trade that such construction or working is expedient in the council's interests (r).

Power to
construct.

SUB-SECT. 3.—*Advances to Light Railway Companies.*

1479. Any council, if so authorised (s), may advance to a light railway company, either by way of loan or as part of the share capital of the company, such amount as may be authorised by the order (a). If the railway for which the advance is proposed to be made is wholly or partly outside the council's area, the council must join with the council of the outside area, or must prove to the satisfaction of the Board of Trade that such advance is expedient

Power to
lend money.

(l) Light Railways Rules, 1913, r. 10. A copy of this rule must be printed as a notice at the end of the draft order (*ibid.*).

(m) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 2 (c).

(n) *Ibid.*, s. 2. A municipal corporation working an electric railway and carrying passengers thereby is entitled to the protection of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), in an action by an injured passenger for damages for negligence, and such action must therefore be brought within six months from the happening of the injury (*Lyles v. Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A.). As to the protection of local authorities, see, further, title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 299 *et seq.*

(o) No order authorising a council to undertake the construction and working of a light railway may be made except on an application made by the council in pursuance of a special resolution as required by the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 3 (2) (a), Sched. I.

(p) A council may join any other council or person or body of persons for this purpose (*ibid.*, s. 3 (1) (c)).

(q) *Ibid.*, s. 3 (1) (d).

(r) *Ibid.*, s. 3 (2) (b).

(s) No order authorising a council to advance money to a light railway company shall be made except on an application by the council in pursuance of a special resolution as required by *ibid.*, s. 3 (2) (a), Sched. I. The resolution, so long as it is passed before the inquiry is held, may be passed after the deposit of the application (*County of Middlesex* (No. 2) *Case* (1901), 2 Oxley, Light Railways Procedure: Reports and Precedents, 59).

(a) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 3 (1) (b). A council may join any other council or person or body of persons for this purpose (*ibid.*, s. 3 (1) (c)).

SECT. 6
Powers
of Local
Authorities.

in its interests (*b*). The expenditure, if authorised, must be limited by the order to such amount as the Board of Trade thinks fit in the circumstances (*c*).

SUB-SECT. 4.—*Expenses.*

Rates.

1480. Any expenses incurred by any council and allowed by the Light Railway Commissioners (*d*) with reference to any application or intended application (*e*) under the Light Railways Act, 1896 (*f*), may be paid, in the case of a county council (*g*) as general expenses, in the case of a borough council out of the borough fund or rate or as general expenses under the Public Health Acts (*h*), and in the case of a district council other than a borough council as general expenses under the Public Health Acts (*i*).

Loans.

1481. Any council authorised to expend money by an order authorising a light railway may raise the money required by borrowing in manner authorised by the order (*j*), if the expenditure

(*b*) Light Railways Act 1896 (59 & 60 Vict. c. 48), s. 3 (2) (*b*). For the form of statutory declaration by the clerk to the council under this provision, see *Southend-on-Sea and District Case* (1899), 1 Oxley, Light Railways Procedure: Reports and Precedents, 189, 191.

(*c*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (1), amending the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 3 (2) (*b*). The Board of Trade has power to extend the amount which a council is authorised to advance, on the council's application (*ibid.*, s. 16 (3)).

(*d*) A council applying for allowances must lodge with the secretary to the Light Railway Commission a statement of expenses and a formal application under a resolution of the council for allowance, and must pay the Board of Trade the sum of £1 in all cases where the amount exceeds £25, and a further sum at the rate of £1 per centum on the amount of expenses included in the statement delivered with the application (Light Railways Rules, 1913, r. 39).

(*e*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (4).

(*f*) 59 & 60 Vict. c. 48.

(*g*) Expenses incurred by a county council may be declared by the order authorising the railway or, in the case of an unsuccessful application, by the Light Railway Commissioners, to be chargeable exclusively on certain parishes only (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (1)). The Commissioners originally had no power to charge a part only of a parish (*Wick and Lybster Case* (1898), 1 Oxley, Light Railways Procedure: Reports and Precedents, 88), but such power was expressly given by the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (4). Such expenses must be levied as expenses for a special county purpose under the Local Government Act, 1888 (51 & 52 Vict. c. 41) (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (1)).

(*h*) Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (6), amending Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (1).

(*i*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (1). As to the general expenses of a county council, see title LOCAL GOVERNMENT, Vol. XIX., p. 358; as to the borough fund and borough rate of a borough council, see *ibid.*, pp. 319 *et seq.*; as to the general expenses of a borough council under the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 380, 381; as to the general expenses of a council other than a borough council, see *ibid.*, pp. 380 *et seq.*; as to the Public Health Acts, see *ibid.*, p. 361, note (*a*).

(*j*) Suitable provision must be made in the order for requiring the replacement of the money within a period fixed, as occasion requires by the Board of Trade or other Government department, by means of a sinking fund or otherwise (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (5), amending the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (4)).

is capital expenditure; if the expenditure is not capital expenditure, the money is raised as if it were on account of the expenses of an application under the Light Railways Act, 1896 (*k*). Any council making a profit in respect of a light railway must apply the same in aid of the rate out of which the expenses of the council are payable (*l*).

SECT. 6.
Powers
of Local
Authorities.

SUB-SECT. 5.—*Joint Committees.*

1482. The councils of any county, borough or district may appoint a joint committee for the purposes of any application for an order authorising a light railway or for the joint construction or working of a light railway, or for any other purpose in connexion therewith which may be convenient (*m*).

Purposes
for which
appointed.

SECT. 7.—*Loans and Special Advances by Treasury.*

1483. The Treasury may make an advance by way of loan to any light railway company to which a council has advanced or agreed to advance money (*n*). No such advance may exceed one quarter of the total amount required or exceed the amount for the time being advanced by the council, and one half at least of the total amount required must be provided by means of share capital, whether shares or stock, not raised by borrowing, of which one half at least has been subscribed and paid up by persons other than local authorities (*o*).

Treasury
loans.

1484. If the Board of Agriculture and Fisheries certifies that the making of any light railway would benefit agriculture in any district, or is necessary to establish communication between a fishing harbour or village and a market (*p*), or if the Board of Trade certifies that the making of any such railway is necessary to develop or maintain some definite industry, but that owing to the exceptional circumstances of the district the railway cannot be constructed without special

Development
of district.

The Board of Trade has power on the application of a council to extend the limit of the amount which such council has been authorised to borrow (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 16 (3)).

(*k*) *Ibid.*, s. 16 (2). The demand note for any rate levied for meeting any expenditure under this Act must state the proportion of the rate levied for such expenditure (*ibid.*, s. 16 (6)). The form of such demand note is prescribed by the Local Government Board (*ibid.*).

(*l*) *Ibid.*, s. 16 (5).

(*m*) *Ibid.*, s. 17 (1), Sched. III. The provisions in *ibid.*, Sched. III., only apply to councils which have no power to appoint joint committees under the Local Government Act, 1888 (51 & 52 Vict. c. 41), or the Local Government Act, 1894 (56 & 57 Vict. c. 73). The provisions of those Acts apply to all councils which have power to appoint joint committees under those Acts (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 17 (2)).

(*n*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 4 (1). The rate of interest must be not less than £3 2s. 6d. per cent. per annum, and every loan is subject to such conditions as the Treasury may determine (*ibid.*, s. 4 (2)). Any loan by the Treasury ranks *pari passu* with the loan by the council under *ibid.*, s. 4 (*ibid.*, s. 4 (3)).

(*o*) *Ibid.*, s. 4 (1).

(*p*) *Ibid.*, s. 5, as amended by the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. (1), Schedule.

SECT. 7.
Loans and
Special
Advances by
Treasury.

assistance, the Treasury may by a special advance (*q*) aid the light railway out of public money if the Treasury is satisfied that any railway company working railways open for traffic has undertaken to work the railway when constructed in the event of an advance being made (*r*); and that landowners, local authorities, and other persons locally interested have by the free grant of land or otherwise given all reasonable assistance and facilities in their power for the construction of the railway (*s*). No special advance may exceed one half of the total amount required for the construction of the railway (*t*); and the order authorising the railway may make provision (*u*), as regards any parish, that so much of the railway as is in that parish shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the railway (*a*).

Limits on
total sum
advanced.

1485. The Treasury may not advance at any one time a sum exceeding in all £1,000,000, including a sum not exceeding £750,000 for the purpose of special advances (*b*). The Treasury may borrow such money as may be required for the purpose from the National Debt Commissioners on such terms as to interest, sinking fund, and period of repayment, not exceeding thirty years from the date of the loan, as may be agreed on between the Treasury and the National Debt Commissioners (*c*).

(*q*) A special advance may be a free grant or a loan or partly both, and may be subject to such conditions and interest as the Treasury directs (Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 5 (2), (3)).

(*r*) *Ibid.*, s. 5 (1), as amended by the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 5 (2). The Treasury has power, on the recommendation of the Development Commissioners, to make advances to a Government department, or through a Government department to a public authority, university, college, school, institution, association of persons or company not trading for profit, for the purpose of making light railways and for the general improvement of rural transport. Such advance may be by grant or loan, or by both methods, and subject to such terms and conditions as the Treasury may think fit (Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 1 (1) (d)). For this purpose, the Light Railway Commissioners are to be taken to be the Government department concerned (Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 3).

(*s*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 5 (1) (a).

(*t*) *Ibid.*, s. 5 (1) (b).

(*u*) This provision may be made for a period not exceeding ten years, with powers of extension by the Board of Trade, or may be fixed by the order (*ibid.*, s. 5 (1) (c)).

(*a*) Before such provision is made the local and rating authorities must be informed, and are entitled to be heard (*ibid.*).

(*b*) *Ibid.*, s. 6 (1), as amended by the Light Railways Act, 1912 (2 & 3 Geo. 5, c. 19), s. 2.

(*c*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 6 (2). Loans by the National Debt Commissioners to the Treasury must be repaid out of money provided by Parliament for the purpose, and if that is insufficient are charged on and are payable out of the Consolidated Fund or the growing produce thereof (*ibid.*, s. 6 (3)).

TRANSFER OF ACTION.

See COUNTY COURTS; MAYOR'S COURT, LONDON; PRACTICE AND PROCEDURE.

TRANSFER OF BILL OF LADING.

See SALE OF GOODS; SHIPPING AND NAVIGATION.

TRANSFER OF CHUSES IN ACTION.

See CHUSES IN ACTION.

TRANSFER OF GOODS.

See BILLS OF SALE; SALE OF GOODS.

TRANSFER OF LAND.

See REAL PROPERTY AND CHATELS REAL; SALE OF LAND.

TRANSFER OF NEGOTIABLE INSTRUMENT.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

TRANSFER OF SHARES.

See COMPANIES; STOCK EXCHANGE.

TRANSFER OF SHIPS.

See SHIPPING AND NAVIGATION.

TRAWLING.

See FISHERIES; SHIPPING AND NAVIGATION.

TREASON AND TREASON FELONY.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

TREASURE TROVE.

See CONSTITUTIONAL LAW; CORONERS; CRIMINAL LAW AND PROCEDURE.

TREASURER.

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See CONSTITUTIONAL LAW; PARLIAMENT; REVENUE.

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TRESPASS.

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Part I.—In General.

SECT. 1.

Definition.

Definition.

Trespass by relation.

SECT. 1.—Definition.

1486. Trespass (a) is a wrongful act of commission (b), done in disturbance of the possession of property of another or against the person of another against his will (c).

To constitute a trespass the act must in general be unlawful at

(a) 3 Bl. Com. 208. Trespass in its original form was a wrongful act committed *vi et armis* and directly and immediately injurious to the person or property of another; force must have been either actually used or presumed to have been used. Where the injury was only consequential, the appropriate form of action was an action on the case; see *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C. (11th ed.), p. 454; *Harvey v. Brydges* (1845), 14 M. & W. 437; *Wright v. Burroughes* (1846), 3 C. B. 685; *Holmes v. Mather* (1875), L. R. 10 Exch. 261, 268; *Taylor v. Rowan* (1834), 1 Mood. & R. 490; *Gilbertson v. Richardson* (1848), 5 C. B. 502; *Sharrod v. London and North Western Rail. Co.* (1849), 4 Exch. 580; *Leame v. Bray* (1803), 3 East, 593.

(b) A mere act of omission cannot be a trespass (*Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 1 Smith, L. C., 11th ed., p. 132; *West v. Nibbs* (1847), 4 C. B. 172), but continuing to remain in possession of the property of another is an act of commission and not an act of omission; see *Winterbourne v. Morgan* (1809), 11 East, 395.

(c) *Miles v. Dawson* (1796), Peake, Add. Cas. 54, 59; *Washborn v. Black* (1774), 11 East, 405, n.; *Christopherson v. Bare* (1848), 11 Q. B. 473; *Latter v. Braddell* (1881), 44 L. T. 369, C. A.; see pp. 860, 870, 872, post.

the time when it was committed; if an act done in respect of property was lawful when it was done, the doer cannot be made a trespasser by relation in consequence of a person becoming entitled to the property and of such person's title relating back to the time when the act was done (*d*). If the act complained of was unlawful when it was done, a person whose title relates back can sue for a trespass committed before he became owner (*e*).

SECT. 1.
Definition.

To amount to a trespass an act must be voluntary; but an act may be trespass, although it is committed by mistake (*f*) or without malice (*g*). A negligent act of commission may amount to a trespass (*h*), but a person who has not been negligent cannot be a trespasser in respect of an involuntary and inevitable accident (*i*).

Voluntary
act.

SECT. 2.—Nature of Trespass.

1487. Trespass is an actionable wrong, and, if a mere trespass, is, as a rule, actionable only and not criminal (*k*). Similarly, an agreement to commit a mere trespass is only actionable and is not criminal (*l*). There are certain trespasses, however, which are both actionable and criminal, as, for instance, a trespass which is

Civil and
criminal
proceedings.

(*d*) *Smith v. Miles* (1786), 1 Term Rep. 475; *Carlisle v. Garland* (1831), 7 Bing. 298; *Balme v. Hutton* (1833), 9 Bing. 471, Ex. Ch. As to trespass *ab initio*, see p. 856, *post*.

(*e*) *Tharpe v. Stallwood* (1843), 5 Man. & G. 760; *Kirk v. Gregory* (1876), 1 Ex. D. 55. If the business of a debtor is transferred to a company and the transfer is afterwards set aside as an act of bankruptcy to which the title of the trustee in bankruptcy relates back, and if the business has in the meantime been carried on by a receiver appointed by the debenture-holders of the company, the receiver is liable as a trespasser to account to the trustee in bankruptcy for the assets (if any) which have come to his hands or for the value of them (*Re Goldberg* (No. 2), *Ex parte Page*, [1912] 1 K. B. 606; see *Re Prigoshen, Ex parte Official Receiver*, [1912] 2 K. B. 494). As to titles relating back, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 181 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 146, 147; and p. 865, *post*.

(*f*) *Basely v. Clarkson* (1681), 3 Lev. 37.

(*g*) *Olissold v. Cratchley*, [1910] 2 K. B. 244, C. A.

(*h*) *Covell v. Laming* (1808), 1 Camp. 497.

(*i*) *Stanley v. Powell*, [1891] 1 Q. B. 86; *Sadler v. South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q. B. D. 17, C. A.; *Holmes v. Mather* (1875), L. R. 10 Exch. 261; *Hall v. Fearnley* (1842), 3 Q. B. 919; *Anon.* (1465), Y. B. 6 Edw. 4, fo. 7, pl. 18; *Basely v. Clarkson, supra*; *Williams v. Price* (1832), 3 B. & Ad. 695.

(*k*) *R. v. Storr* (1765), 3 Burr. 1698; *R. v. Bake* (1765), 3 Burr. 1731; *R. v. Atkins* (1765), 3 Burr. 1706. Under some special statutes trespass is a criminal offence, as, for instance, under the Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 16 (see title RAILWAYS AND CANALS, Vol. XXIII., pp. 720, 721); Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23 (see title RAILWAYS AND CANALS, Vol. XXIII., p. 723; for a form of a covenant by a company to prevent persons trespassing on their railway, see *Encyclopædia of Forms and Precedents*, Vol. V., p. 512); Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 77 (see title EXPLOSIVES, Vol. XIV., p. 393). Except under the provision of a special statute, or where wilful and malicious damage is done, no trespasser can be "prosecuted" criminally. The common form of notice that "trespassers will be prosecuted" is mere *brutum fulmen* so far as criminal proceedings are concerned, but notice given to a person that he is trespassing may have some effect in a civil action on the question of damages.

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 261.

SECT. 2.
Nature of
Trespass.

also a breach of the peace (*m*), or trespass in pursuit of game (*n*). A trespasser who wilfully and maliciously commits any damage, injury, or spoil to land is liable to an action and also to criminal prosecution, but the gist of the criminal offence is the wilful and malicious injury of some one else's property (*o*).

The unlawful taking and carrying away of goods with intent to steal is actionable as a trespass and is also indictable as larceny, or, if accompanied with force, as robbery (*p*). Arson (*a*), burglary (*b*), housebreaking (*c*), assault (*d*), false imprisonment (*e*), and other offences against the person are both actionable as trespasses and indictable as crimes (*f*).

Person liable.

1488. A person cannot be sued in trespass unless the act complained of was committed by him or some person (*g*) or animal (*h*) for whose act he is responsible.

(*m*) *R. v. Bathurst* (1755), cited 3 Burr. 1699.

(*n*) See title GAME, Vol. XV., p. 228. For a form of a clause in an agreement framed to prevent poaching and trespassing on an estate, see *Encyclopædia of Forms and Precedents*, Vol. IX., p. 229.

(*o*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 769.

(*p*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 629, 661.

(*a*) See *ibid.*, pp. 770 *et seq.*

(*b*) See *ibid.*, pp. 668 *et seq.*

(*c*) See *ibid.*, pp. 672 *et seq.*

(*d*) See *ibid.*, pp. 606 *et seq.*; and pp. 873 *et seq.*, *post.*

(*e*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 606, 607; and pp. 878 *et seq.*, *post.*

(*f*) As to whether it is necessary to prosecute for felony before suing for a felonious tort, see title ACTION, Vol. I., pp. 27 *et seq.*

(*g*) As to the liability of a master for the act of his servant, see title MASTER AND SERVANT, Vol. XX., pp. 256, 261; *Dyer v. Munday*, [1895] 1 Q. B. 742, C. A. (assault); *Seymour v. Greenwood* (1861), 7 H. & N. 355, Ex. Ch. (assault); *Farry v. Marshall*, *Farry v. Great Northern Rail. Co.*, [1898] 2 I. R. 352 (imprisonment); *Oullimore v. Savage South Africa Co.*, [1903] 2 I. R. 589, C. A. (imprisonment); *Gregory v. Piper* (1829), 9 B. & C. 591 (placing rubbish against wall); *Chandler v. Broughton* (1832), 1 Cr. & M. 29 (driving gig against church). As to the effect of a particular direction in a particular matter, see *Lucas v. Mason* (1875), L. R. 10 Exch. 251 (liability of chairman of a meeting); *Radley v. London County Council* (1913), 109 L. T. 162 (assault by tram conductor). As to an incitement to commit trespass or to a participation in a trespass, see *Peacock v. Young* (1869), 21 L. T. 527 (liability of candidate at parliamentary elections for acts of mob during a procession); *M'Laughlin v. Pryor* (1842), 4 Man. & G. 48 (liability of the hirer of a carriage for acts committed by postilions at his instigation); *Sedley v. Sutherland* (1800), 3 Esp. 202 (liability of solicitors for an arrest); *Roper v. Harper* (1837), 5 Scott, 250 (liability of auctioneer for wrongful seizure and sale); *Robinson v. Vaughton* (1838), 8 C. & P. 252; *Peddell v. Rutter* (1837), 8 C. & P. 337 (order to commit a trespass); *Wilson v. Barker* (1833), 4 B. & Ad. 614 (receipt of goods from a trespasser). As to the liability of a landlord for a trespass by a broker in levying distress, see *Gauntlett v. King* (1857), 3 C. B. (N. S.) 59; *Freeman v. Rosher* (1849), 13 Q. B. 780; and title DISTRESS, Vol. XI., pp. 204 *et seq.*; see also p. 856, *post.* As to liability for a trespass committed by an independent contractor, see *Black v. Christchurch Finance Co.*, [1894] A. C. 48, P. C. As to the liability of a servant for a trespass committed by his master's orders, see *Stephens v. Elwall* (1815), 4 M. & S. 259, 261; and title MASTER AND SERVANT, Vol. XX., pp. 276 *et seq.* As to trespass by a corporation, see

(*h*) For note (*h*) see p. 847, *post.*

1489. An action for trespass does not lie against the Crown (*i*). As between subject and subject, if a trespass is committed by a servant of the Crown acting as such servant, an action lies against the servant and any superior, except the King, by whose orders the trespass is committed (*k*). As between a foreigner and a servant of the Crown, the order of the Crown is an excuse; as between a subject and a servant of the Crown, such order is no excuse (*l*).

SECT. 2.
Nature of
Trespass.
Crown.

1490. The continuance of a trespass is a fresh trespass, and is actionable in the same way as the original act of trespass and although damages have been recovered for the original act (*m*).

Continuing
trespass.

Maud v. Monmouthshire Canal Co. (1842), 4 Man. & G. 452; and title CORPORATIONS, Vol. VIII., p. 386. As to actions against a trade union, or any member or officials thereof, on behalf of themselves and all other members of the trade union in respect of any trespass alleged to have been committed by or on behalf of the trade union, see title TRADE AND TRADE UNIONS, pp. 655 *et seq.*, *ante*. As to the liability of the sheriff, the solicitor and his client for trespass committed in levying executions, see *Barker v. Braham* (1773), 3 Wils. 368; *Bates v. Pilling* (1826), 6 B. & C. 38; *Crook v. Wright* (1825), Ry. & M. 278; *Wilson v. Tummon* (1843), 6 Scott (N. R.), 894; *Kowles v. Senior* (1846), 8 Q. B. 677; *Power v. Fleming* (1870), 4 I. R. C. L. 404; *Stratten v. Lawless* (1864), 14 I. C. L. R. 432; *Jarmain v. Hooper* (1843), 6 Man. & G. 827; *Morris v. Salberg* (1889), 22 Q. B. D. 614, C. A.; *Clissold v. Cratchley*, [1910] 2 K. B. 244, C. A.; and title EXECUTION, Vol. XIV., p. 19. As to the liability of a sanitary or local authority for the acts of a servant, see *Bolingbroke v. Swindon Local Board* (1874), L. R. 9 C. P. 575. As to the liability of poor law guardians for the acts of their officers, see *Tozeland v. West Ham Union*, [1907] 1 K. B. 920, C. A.; *Barns v. St. Mary, Islington, Guardians* (1911), 10 L. G. R. 113. As to the liability of a surveyor of a local authority, see *Mill v. Hawker* (1875), L. R. 10 Exch. 92, Ex. Ch. As to the liability of the head of a Government department for a trespass committed by one of the officials of the department, see *Raleigh v. Goschen*, [1898] 1 Ch. 73; *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178, C. A. See also titles AGENCY, Vol. I., p. 211; HUSBAND AND WIFE, Vol. XVI., p. 436; MASTER AND SERVANT, Vol. XX., pp. 248, 261. An infant does not become a trespasser by command or subsequent assent (Co. Litt. 180 b, note (4)). As to a joint trespass, see *Peddell v. Rutter* (1837), 8 C. & P. 337; *Sedley v. Sutherland* (1800), 3 Esp. 202; *Harris v. Butterley* (1776), 2 Cowp. 483; *Feltham v. Cartwright* (1839), 7 Scott, 695. As to ratification of a trespass, see *Barns v. St. Mary, Islington, Guardians*, *supra*.

(*h*) As to trespass by animals, see title ANIMALS, Vol. I., pp. 375, 395; *Cronin v. Connor*, [1913] 2 I. R. 119; *Bradley v. Wallaces, Ltd.* (1913), 82 L. J. (K. B.) 1074; by dogs, *Pratt v. Martin*, [1911] 2 K. B. 90. As to hunting and following game on to another person's ground, see title ANIMALS, Vol. I., p. 368; as to injury by game, see *ibid.*, p. 378; *Farrer v. Nelson* (1885), 15 Q. B. D. 258. As to the right of an occupier of land to keep off any wild animals which come or threaten to come on his land, see *Greyvensteyn v. Hattingh*, [1911] A. C. 355, P. C. For covenants by a tenant to prevent trespass in pursuit of game, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 512, 518, 576; and for a covenant by a landlord not to exercise his rights unfairly under the Ground Game Act, 1880 (43 & 44 Vict. c. 47), see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 621.

(*i*) See title CONSTITUTIONAL LAW, Vol. VI., p. 412. As to the effect of an Act of Indemnity, see *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.

(*k*) See title CONSTITUTIONAL LAW, Vol. VI., p. 415. As to seizure under a writ of extent, see *Pridgeon v. Mellor* (1912), 28 T. L. R. 261.

(*l*) See *Buron v. Denman* (1848), 2 Exch. 167; *Poll v. Lord Advocate* (1899), 1 F. (Ct. of Sess.) 823.

(*m*) *Holmes v. Wilson* (1839), 10 Ad. & El. 503; *Bowyer v. Cook* (1847), 4 C. B. 236; but see *Lawrence v. Obee* (1815), 1 Stark. 22.

SECT. 2.
Nature of
Trespass.

Kinds of
trespass.

Unlawful
entry.

1491. There are three kinds of trespass (*n*), namely, trespass to land (*o*), trespass to goods (*a*), and trespass to the person (*b*).

Part II.—Trespass to Land.

SECT. 1.—*What Constitutes Trespass to Land.*

1492. Every unlawful entry by one person on land in the possession (*c*) of another is a trespass for which an action lies, although no actual damage is done (*d*). A person unlawfully enters on land if he wrongfully sets foot on or rides or drives over it (*e*), or takes possession of it or expels the person in possession (*f*), or pulls down or destroys anything permanently fixed to it, or places or fixes anything on (*g*) or in it (*h*), or erects or plants or suffers to continue on his own land anything which permanently overhangs the land of another (*i*), or discharges or causes water to flow upon such land (*k*),

(*n*) The same wrongful act may cause damage both to land and goods and to the person; in such a case there would be three separate causes of action (*Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, C. A.). A wife may sue her husband for trespass to land or goods which are her separate property, but she cannot sue him for a trespass to the person committed during coverture; a husband cannot sue his wife in trespass at all; see title HUSBAND AND WIFE, Vol. XVI., p. 460.

(*o*) See the text, *infra*.

(*a*) See pp. 863 *et seq.*, *post*.

(*b*) See pp. 871 *et seq.*, *post*.

(*c*) As to what constitutes possession, see pp. 852 *et seq.*, *post*.

(*d*) *Ashby v. White* (1703), 2 Ld. Raym. 938; 1 Smith, L. C., 11th ed., p. 240, *per* HOLT, C.J.; *Entick v. Carrington* (1765), 19 State Tr. 1030, 1066; see also title ACTION, Vol. I., pp. 7 *et seq.* As to the effect of dispossession of the owner, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 11 *et seq.*; as to dispossession by a series of trespassers, see *ibid.*, p. 158.

(*e*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268 (crossing the seashore on foot or with bathing machine). A mere temporary passage by a balloon over the land of another is not, it seems, a trespass (*Pickering v. Rudd* (1815), 4 Camp. 219, 220; but see *Kenyon v. Hart* (1865), 6 B. & S. 249, 252); compare title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 156, note (*f*). A Secretary of State can by order prohibit the navigation of aircraft over certain areas; see title STREET AND AERIAL TRAFFIC, p. 336, *ante*.

(*f*) *Murray v. Hall* (1849), 7 C. B. 441 (expulsion of one tenant in common by another). As to unlawful eviction by a landlord, see title LANDLORD AND TENANT, Vol. XVIII., p. 485.

(*g*) *Mace v. Philcox* (1864), 15 C. B. (N. S.) 600 (placing a bathing machine on the seashore); *Whitwham v. Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538, C. A.; *Kynoch, Ltd. v. Rowlands*, [1912] 1 Ch. 527, C. A. (tipping refuse on land); *Leader v. Moody* (1875), L. R. 20 Eq. 145 (making temporary structural alterations in a theatre); *South Wales and Liverpool Steamship Co. v. Nevill's Dock and Rail. Co.* (1913), 18 Com. Cas. 124 (unlawful occupation of berth by a ship in a dock).

(*h*) *Schweder v. Worthing Gas Light and Coke Co.*, [1912] 1 Ch. 83 (laying gas pipes in sub-soil without authority); see *Schweder v. Worthing Gas Light and Coke Co.* (No. 2), [1913] 1 Ch. 118.

(*i*) *Pickering v. Rudd*, *supra*; *Corbett v. Hill* (1870), L. R. 9 Eq. 671; see *Smith v. Giddy*, [1904] 2 K. B. 448; *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5; *Lemmon v. Webb*, [1895] A. C. 1.

(*k*) *Hurdman v. North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A.; *Brine*

or suffers filth or any injurious substance which has been collected by him on his own land to pass to another's land (*l*).

An owner of land who, without wilfulness or negligence, uses his land in the ordinary manner is not liable for mischief occasioned to his neighbours by such use (*m*). If, however, he brings upon his land anything which would not naturally come there, and which is in itself dangerous, and may become mischievous if not kept under proper control, he is, though not guilty of wilfulness or negligence, liable for any mischief caused by it (*n*).

1493. It is trespass for a landlord to distrain wrongfully (*o*), or for a sheriff to levy wrongful execution (*p*), or for a landlord or sheriff who has rightfully entered on land for the purposes of distress or execution to remain there when the distress or execution has become wrongful (*q*).

1494. If a tenancy determines by effluxion of time or otherwise, and the former tenant remains in possession against the will of the rightful owner, the former tenant is a trespasser from the date of the determination of the tenancy (*r*).

1495. If land is subject to a public or private way or other similar right, a person who unlawfully uses such land for any purpose other

SECT. I.

What
Constitutes
Trespass
to Land.

Liability of
owner of land.

Distress and
execution.

Tenant
trespasser.

Abuse of
right.

v. Great Western Rail. Co. (1862), 2 B. & S. 402; *Menzies v. Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414, H. L. As to the right of a landowner to protect himself from the inroads of water, see *R. v. Pagham, Sussex (Sewers Commissioners)* (1828), 8 B. & C. 355, 359; *Nield v. London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4; *Farquharson v. Farquharson* (1741), cited 3 Bli. (N. S.) 421, H. L.; *Maxey Drainage Board v. Great Northern Rail. Co.* (1912), 10 L. G. R. 248.

(*l*) *Tenant v. Goldwin* (1704), 2 Ld. Raym. 1089; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; compare title NEGLIGENCE, Vol. XXI., p. 402.

(*m*) *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Giles v. Walker* (1890), 24 Q. B. D. 656 (thistle seeds); *Smith v. Kenrick* (1849), 7 C. B. 515; *Baird v. Williamson* (1863), 15 C. B. (N. S.) 376; compare title ACTION, Vol. I., p. 10. An owner of land does not commit a trespass if he erects an embankment on his land to keep water from flowing on to it, even though the effect of such an erection may be to increase the pressure of water on the land of someone else (*Maxey Drainage Board v. Great Northern Rail. Co.*, *supra*). The damage suffered by the neighbouring owner in such a case is *damnum absque injuriâ* (*ibid.*).

(*n*) *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; see title NEGLIGENCE, Vol. XXI., p. 401; and p. 845, *ante*. As to the liability of an owner of land for injuries done by animals on the land to trespassers, see title ANIMALS, Vol. I., p. 375.

(*o*) See title DISTRESS, Vol. XI., pp. 28 *et seq.*; as to unlawful eviction by a landlord, see title LANDLORD AND TENANT, Vol. XVIII., p. 485.

(*p*) See title EXECUTION, Vol. XIV., pp. 195 *et seq.*

(*q*) As to distress, see p. 856, note (*f*), *post*; *Ladd v. Thomas* (1840), 12 Ad. & El. 117; *Etherton v. Popplewell* (1809), 1 East, 139; and title DISTRESS, Vol. XI., p. 196; as to execution, see p. 856, note (*f*), *post*; and title EXECUTION, Vol. XIV., p. 30.

(*r*) *Coffee v. McEvoy*, [1912] 2 I. R. 290, C. A. Thus, in an action of ejectment the plaintiff can without entry recover mesne profits (which are damages for trespass) from the date when the possession of the defendant became unlawful (Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214; *Southport Tramways Co. v. Gandy*, [1897] 2 Q. B. 66, C. A.; *Dunlop v. Macedo* (1891), 8 T. L. R. 43); see title LANDLORD AND TENANT, Vol. XVIII., p. 558; see also *ibid.*, p. 501. As to a tenant at sufferance, see *Gibbs v.*

SECT. 1.
What
Constitutes
Trespass
to Land.

Subject-
matter of
trespass.

than that of exercising the right to which it is subject is a trespasser, and can be sued by the person in possession of the land (s).

1496. The subject-matter, in the case of trespass to land, must be real and corporeal property, that is, land or buildings, or the vesture of land or herbage or pasture, to the exclusive possession of which the person complaining of the trespass is entitled (t). Trespass does not lie for the disturbance of a mere incorporeal right, as a right of common of pasture, or of fishing, or digging turf, or a right of way, or to a pew, or to any easement annexed to land, if such right does not give exclusive possession (u).

Cruikshank (1873), L. R. 8 C. P. 454, 461; *Jenner v. Clegg* (1832), 1 Mood. & R. 213; *Brown v. Notley* (1848), 3 Exch. 219, 222; and compare title LANDLORD AND TENANT, Vol. XVIII., pp. 437 *et seq.* As to the right of a mortgagee against a tenant of the mortgagor, see *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (1); and title MORTGAGE, Vol. XXI., pp. 160 *et seq.* As to holding over by a guardian or trustee for an infant, or a husband seised in right of his wife only, or any other person having any estate determinable upon any life or lives, see *Cestui que Vie Act*, 1707 (6 Anne, c. 72), s. 5; and title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 182, 183.

(s) *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, C. A.; *Hickman v. Maisey*, [1900] 1 Q. B. 752, C. A.; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; *Bideford Urban District Council v. Bideford, Westward Ho! and Appledore Rail. Co.* (1903), 68 J. P. 123; *Lade v. Shepherd* (1735), 2 Stra. 1004; *Rigg v. Lonsdale (Earl)* (1857), 1 H. & N. 923, Ex. Ch.; *Northampton Corporation v. Ward* (1745), 1 Wils. 107; see *Harrison v. Parker* (1805), 6 East, 154; *Staffordshire and Worcestershire Canal Navigation v. Bradley*, [1912] 1 Ch. 91. As to the effect of a mere assertion of a public right of way over land, see *Thornhill v. Weeks*, [1913] 1 Ch. 438; see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49, 50, 55, 56.

(t) Co. Litt. 4 b; *Crosby v. Wadsworth* (1805), 6 East, 602; *Tompkinson v. Russell* (1821), 9 Price, 287; *Burt v. Moore* (1793), 5 Term Rep. 329; *Harper v. Charlesworth* (1825), 4 B. & C. 574; *Cox v. Glue* (1848), 5 C. B. 533; *Stammers v. Dixon* (1806), 7 East, 200; *Stanley v. White* (1811), 14 East, 332; *Leader v. Moody* (1875), L. R. 20 Eq. 145, 153. Trespass lies for an interference with an exclusive right of cutting turf (*Wilson v. Mackreth* (1766), 3 Burr. 1824; *Coverdale v. Charlton* (1878), 4 Q. B. D. 104), C. A.), or underwood (*Hoe v. Taylor* (1595), Cro. Eliz. 413), or timber (*Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405, P. C.); or for interference with a several fishery (*Holford v. Bailey* (1846), 8 Q. B. 1000; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Crichton v. Coltery* (1870), 19 W. R. 107), or a free warren (*Dacre (Lord) v. Tebb* (1777), 2 Wm. Bl. 1151). As to the effect of excepting trees from a lease, see *Ashmead v. Ranger* (1700), 1 Ld. Raym. 551; *Rolls v. Rock* (1729), 2 Selwyn, Law of Nisi Prius, 13th ed., 1244. As to the right of the person entitled to the subsoil to bring an action of trespass, see *Cox v. Glue* (1848), 5 C. B. 533; *Martin v. Porter* (1839), 5 M. & W. 351; *Morgan v. Powell* (1842), 3 Q. B. 278; *Keyse v. Powell* (1853), 2 E. & B. 132.

(u) *Wilson v. Mackreth* (1766), 3 Burr. 1824; *Maimwaring v. Giles* (1822), 5 B. & Ald. 356; *Bryan v. Whistler* (1828), 8 B. & C. 288; *Stocks v. Booth* (1786), 1 Term Rep. 428, 430; but see *Spooner v. Brewster* (1825), 3 Bing. 136. An action lies for the disturbance of such a right (see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 331; *Fitzpatrick v. Verschoyle*, [1913] 1 I. R. 8; *King v. Brown, Durant & Co.*, [1913] 2 Ch. 416), but it is not an action of trespass. As to rent, see Co. Litt. 322 b; Pollock and Wright, Possession in the Common Law, p. 88. An action of trespass lies by a person who has by prescription acquired the ownership of a private chapel; see *Chapman v. Jones* (1869), L. R. 4 Exch. 273; *Norfolk (Duke) v. Arbuthnot* (1880), 5 C. P. D. 390, C. A.

1497. No action lies in England for trespass to land which is out of the jurisdiction (*a*).

SECT. 1.
What
Constitutes
Trespass
to Land.

SECT. 2.—*Who may Sue.*

SUB-SECT. 1.—*Plaintiff in Possession.*

1498. Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who is in actual or constructive possession (*b*) at the time of the trespass (*c*). The owner has no right to sue in trespass, if any other person is in possession of land, since a mere right of property without a right of possession is not sufficient to support the action (*d*). If, however, land is vacant, the owner has sufficient possession to sue in trespass (*e*).

Land out of
the juris-
diction.

Person in
possession.

If an owner who has a right to enter makes an entry on land, his

Trespass by
relation.

(*a*) *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Doulson v. Matthews* (1792), 4 Term Rep. 503. Parties may, however, agree that the English courts are to have jurisdiction; see *The M. Mozham* (1876), 1 P. D. 107. Formerly the venue in this action was local and had to be laid in the county in which the land was situate, and it was necessary in an action of trespass to land to give a sufficient description of the situation of the land; see Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 418; *Beaufort (Duke) v. Vivian* (1852), 7 Exch. 580; *Humfrey v. London and North Western Rail. Co.* (1852), 7 Exch. 325; *Holt v. Daw* (1851), 16 Q. B. 990; *North v. Ingamells* (1841), 9 M. & W. 249; *Lempriere v. Humphrey* (1835), 4 Nev. & M. (K. B.) 638; *Brownlow v. Tomlinson* (1840), 1 Scott (N. R.), 426. Local venues are now abolished except where otherwise provided by statute (R. S. C., Ord. 36, r. 1), but it is still necessary in a statement of claim in an action of trespass to land to give a sufficient description of the land; see Bullen and Leake, *Precedents of Pleadings*, 6th ed., p. 501. As to pleading generally, see title PLEADING, Vol. XXII., pp. 417 *et seq.*

(*b*) As to actual possession, see pp. 852, 853, *post*; as to constructive possession, see p. 853, *post*.

(*c*) *Topham v. Dent* (1830), 6 Bing. 515; *Hunt v. Colson* (1833), 3 Moo. & S. 790; *Cooper v. Crabtree* (1832), 20 Ch. D. 589, C. A.; *Litchfield v. Ready* (1850), 5 Exch. 939; *Alexander v. Bonnin* (1838), 6 Scott, 611; *Turner v. Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932; *Ryan v. Clark* (1849), 14 Q. B. 65; *Harrison v. Blackburn* (1864), 17 C. B. (N. S.) 678; *Barton v. Cordy* (1825), M'Cle. & Yo. 278; *Smith v. Milles* (1786), 1 Term Rep. 475; *Brown v. Notley* (1848), 3 Exch. 219; *Sloper v. Saunders* (1860), 29 L. J. (EX.) 275; *Wallis v. Hands*, [1893] 2 Ch. 75; *New Trinidad Lake Asphalt Co. v. A.-G.*, [1904] A. C. 415, 419, P. C.; *Stocker v. Planet Building Society* (1879), 27 W. R. 877, C. A.; *Moore v. Shelley* (1883), 8 App. Cas. 285, P. C. As to the effect of the person in possession becoming bankrupt after the trespass, see *Rose v. Buckett*, [1901] 2 K. B. 449, C. A.; *Rogers v. Spence* (1846), 12 Cl. & Fin. 700, H. L. As to an action by an executor for injury to the real estate of the deceased, see *Hone v. Hamilton* (1874), 9 I. R. C. L. 15; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 227, 230. As to an action of trespass by an heir after entry, see *Barnett v. Guildford (Earl)* (1855), 11 Exch. 19. As to a lessor at will bringing trespass without entry, see *Harper v. Charlesworth* (1825), 4 B. & C. 574, 583; *Geary v. Bearecroft* (1667), 1 Lev. 202; *Anon.* (1440), Y. B. 19 Hen. 6, fo. 45, pl. 94; Bro. Abr., tit. Trespass, pl. 131; 2 Roll. Abr. 551, l. 49; Com. Dig., tit. Trespass (B. 2); *Shrewsbury's (Countess) Case* (1600), 5 Co. Rep. 13 b; Co. Litt. 57, n., 62 b.

(*d*) See p. 852, *post*.

(*e*) *R. v. St. Pancras Assessment Committee* (1877), 2 Q. B. D. 581, 588.

SECT. 2.
Who may
Sue.

Right to
possession.

right of possession relates back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry; the wrongdoer thus becomes a trespasser by relation so far as the person who enters is concerned (*f*).

A person having the right to the possession of land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry, wrongfully continues on the land (*g*).

SUB-SECT. 2.—*Nature of Possession.*

Actual
possession.

1499. Actual possession is a question of fact (*h*): it consists of two elements, the intention to possess the land and the exercise of control over land to the exclusion of other persons. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; possession means possession of that character of which the land is capable (*i*). Thus,

(*f*) *Ocean Accident and Guarantee Corporation v. Ilford Gas Co.*, [1905] 2 K. B. 493, C. A.; *Barnett v. Guildford (Earl)* (1855), 11 Exch. 19; *Anderson v. Radcliffe* (1858), E. B. & E. 806; see also pp. 844, 845, *ante*. As to recovery of possession by a landlord, see title LANDLORD AND TENANT, Vol. XVIII., pp. 556 *et seq.*

(*g*) *Jones v. Chapman* (1849), 2 Exch. 803, Ex. Ch., *per* ERLE, J., at p. 814; *Taunton v. Costar* (1797), 7 Term Rep. 431; *Butcher v. Butcher* (1827), 7 B. & C. 399.

(*h*) *Bristow v. Cormican* (1878), 3 App. Cas. 641. As to acts of ownership which are evidence of possession, see *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593; *Bristow v. Cormican*, *supra*; *Blandy-Jenkins v. Dunraven (Earl)*, [1899] 2 Ch. 121, C. A.; *Seddon v. Smith* (1877), 36 L. T. 168, C. A. As to acts of ownership on one part of the land being evidence of the possession of the other part, see *Jones v. Williams* (1837), 2 M. & W. 326; *Lord Advocate v. Blantyre (Lord)* (1879), 4 App. Cas. 770, 791; *Bristow v. Cormican*, *supra*; *Lord Advocate v. Young, North British Rail. Co. v. Young* (1887), 12 App. Cas. 544, 556; *Beaufort (Duke) v. Aird, John & Co.* (1904), 20 T. L. R. 602; *Clark v. Elphinstone* (1880), 6 App. Cas. 164, P. C.; *Coverdale v. Charlton* (1878), 4 Q. B. D. 104, 118, C. A.; *Stanley v. White* (1811), 14 East, 332; *Taylor v. Parry* (1840), 1 Man. & G. 604; *Wild v. Holt* (1842), 9 M. & W. 672; see *Keyse v. Powell* (1853), 2 E. & B. 132. As to possession of land, see also titles LIMITATION OF ACTIONS, Vol. XIX., pp. 113, 125 (possession by agent or guest); REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 147, 214, 215 ("possession" distinguished from "seisin"); SALE OF LAND, Vol. XXV., p. 335, note (*e*); SETTLEMENTS, Vol. XXV., p. 625, note (*r*) (possession of settled land). As to delivery of possession sufficient to constitute a surrender of a lease, see title LANDLORD AND TENANT, Vol. XVIII., pp. 548, 549. As to adverse possession of land, see titles LIMITATION OF ACTIONS, Vol. XIX., pp. 110 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 283. As to what amounts to possession by a mortgagee, see title MORTGAGE, Vol. XXI., pp. 193, 194. As to the date of delivery of possession on a sale of land, see title SALE OF LAND, Vol. XXV., pp. 367, 368. As to the right of a tenant for life of settled land to possession, see title SETTLEMENTS, Vol. XXV., pp. 597 *et seq.* As to estates in possession, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 212.

(*i*) *Lord Advocate v. Young, North British Rail. Co. v. Young*, *supra*, at p. 556; *Lord Advocate v. Lovat (Lord)* (1886), 5 App. Cas. 273, 288; *Kirby v. Cowderoy*, [1912] A. C. 599, P. C.; *Kynoch, Ltd. v. Rowlands*, [1912] 1 Ch. 527, C. A.

a person may be in possession of minerals, although he is not in possession of the surface and has no actual occupation of the minerals (*k*).

SECT. 2.

Who may
Sue.Documentary
title.

A documentary title commencing with some person rightfully in possession or who has an admitted or proved right to be in possession and connecting itself with the plaintiff is, generally speaking, and in the absence of any title in the defendant by adverse possession, sufficient for a plaintiff in an action of trespass (*l*).

1500. If one person is in actual occupation of land, and another person who is entitled to the possession enters on the land, the entry vests the possession in the person entitled and makes the other person a trespasser (*m*). Possession acquired by such an entry is called constructive possession, as by virtue of such entry the person entitled is deemed to have been in possession from the time when his right of entry accrued and to remain in possession, although he does not continue in actual occupation (*n*).

Constructive
possession.

(*k*) *M'Donnell v. M'Kinty* (1847), 10 I. L. R. 514; *Smith v. Lloyd* (1854), 9 Exch. 562; *Keyse v. Powell* (1853), 2 E. & B. 132; *Seaman v. Vardrey* (1810), 16 Ves. 390; *Adair v. Shaftoe* (undated), cited in *Norway v. Rowe* (1812), 19 Ves. 156; *Hodgkinson v. Fletcher* (1781), 3 Doug. (K. B.) 31; *Low Moor Co. v. Stanley Coal Co.* (1876), 34 L. T. 186; *Rich d. Cullen (Lord) v. Johnson* (1740), 2 Stra. 1142; *Dartmouth (Earl) v. Spittle* (1871), 24 L. T. 67; *Glyn v. Howell*, [1909] 1 Ch. 666; *Thompson v. Hickman*, [1907] 1 Ch. 550; *Ashton v. Stock* (1877), 6 Ch. D. 719; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562. As to the possession of the minerals under copyhold property, see *Eardley v. Granville* (1876), 3 Ch. D. 826; *Lewis v. Branthwaite* (1831), 2 B. & Ad. 437; *Keyse v. Powell*, *supra*. As to ownership of mines generally, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 506 *et seq.* As to the conditions governing the bringing of an action of trespass in respect of a mine, see *ibid.*, pp. 538, 539; as to the damages recoverable, see *ibid.*, p. 541; as to trespass by a mine-owner carrying minerals, see *ibid.*, pp. 587, 588; as to trespass by flooding, see *ibid.*, p. 591; as to trespass in the Derbyshire High Peak mining district, see *ibid.*, p. 642. For a form of a covenant by a mining tenant to prevent trespass by his employees and a covenant to assist the landlord in preventing trespass on the surface of land leased, see *Encyclopædia of Forms and Precedents*, Vol. VIII., pp. 319, 358. For a form of a covenant in a lease by the landlord not to permit the acquisition of rights over the land leased, see *Encyclopædia of Forms and Precedents*, Vol. VII., p. 519.

(*l*) *Bristow v. Cormican* (1878), 3 App. Cas. 641.

(*m*) *Ibid.*, at p. 661; *Jones v. Chapman* (1849) 2 Exch. 803, 821; *Butcher v. Butcher* (1827), 7 B. & C. 402; *Hey v. Moorhouse* (1839), 6 Bing. (N. C.) 52; *Lows v. Telford* (1876), 1 App. Cas. 414; *Harvey v. Brydges* (1845), 14 M. & W. 437. As to forcible entry, see *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Edwick v. Hawkes* (1881), 18 Ch. D. 199; *Jones v. Foley*, [1891] 1 Q. B. 730; *Lows v. Telford* (1876), 1 App. Cas. 414; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 474. As to the right to sue without entry in such a case, see p. 851, *ante*.

(*n*) Constructive possession is also sometimes used to denote the possession of a master or principal by means of his servant or agent (Pollock and Wright, *Possession in the Common Law*, p. 27); compare title LIMITATION OF ACTIONS, Vol. XIX., p. 125; and see p. 854, *post*. As to entry for the purposes of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), see title LIMITATION OF ACTIONS, Vol. XIX., p. 129.

SECT. 2.

Who may
Sue.

What
possession is
sufficient.

Occupation
by servant
or agent.

1501. Any possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrongdoer (*o*). A mere trespasser cannot, however, by the very act of trespass immediately and without acquiescence give himself possession (*p*); such a person may be ejected by force, if no more force is used than is reasonably necessary (*q*).

The occupation of land by a servant or agent in that capacity vests the possession in the master or principal. The servant or agent cannot sue in trespass, but the master or principal can (*r*).

(*o*) *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Perry v. Clissold*, [1907] A. C. 73, P. C.; *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405, P. C.; *Bristow v. Cormican* (1878), 3 App. Cas. 641, 657; *Revett v. Brown* (1828), 5 Bing. 7; *Catteris v. Cowper* (1812), 4 Taunt. 547; *Graham v. Peat* (1801), 1 East, 244; *Purnell v. Young* (1838), 3 M. & W. 288; *Pugh v. Roberts* (1838), 3 M. & W. 458; *Matson v. Cook* (1838), 4 Bing. (N. C.) 392; *Lewis v. Ponsford* (1838), 8 C. & P. 687; *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1; *Harper v. Charlesworth* (1825), 4 B. & C. 574; *Every v. Smith* (1857), 26 L. J. (Ex.) 344; *Griffiths v. Puleston* (1844), 13 M. & W. 358; *Heath v. Milward* (1835), 2 Bing. (N. C.) 98; *Carnaby v. Welby* (1838), 8 Ad. & El. 872. As to the rights of a person under a contract which is unenforceable under the Statute of Frauds (29 Car. 2, c. 3), s. 4, see *Scorell v. Boxall* (1827), 1 Y. & J. 399; and p. 868, *post*.

(*p*) *Browne v. Dawson* (1840), 12 Ad. & El. 624; *Stanford v. Hurlstone* (1873), 9 Ch. App. 116.

(*q*) *Scott v. Brown (Matthew) & Co.* (1884), 51 L. T. 746. As to trespass in respect of lodgings, see *Lane v. Dixon* (1847), 3 C. B. 776; *Hartley v. Moxham* (1842), 3 Q. B. 701; *Wright v. Stavert* (1860), 2 E. & E. 721; *Inman v. Stamp* (1815), 1 Stark. 12; *Edge v. Strafford* (1831), 1 Cr. & J. 391; *Fenn v. Grafton* (1836), 2 Bing. (N. C.) 617; *Monks v. Dykes* (1839), 4 M. & W. 567; *Allan v. Liverpool*, *Inman v. Kirkdale* (1874), L. R. 9 Q. B. 180, 192; *Smith v. St. Michael, Cambridge, Overseers* (1860), 3 E. & E. 383; *Bradley v. Baylis* (1881), 8 Q. B. D. 195, 219, C. A.; *E. v. St. George's Union* (1871), L. R. 7 Q. B. 90, 97. As to what is exclusive possession, see *Taylor v. Pendleton Overseers* (1887), 19 Q. B. D. 288; *London and North Western Rail. Co. v. Buckmaster* (1874), L. R. 10 Q. B. 70; *Roads v. Trumpington Overseers* (1870), L. R. 6 Q. B. 56. As to what is sufficient possession to support an action of trespass, see *Newcastle (Duke) v. Clark* (1818), 2 Moore (C. P.), 666; *Dyson v. Collick* (1822), 5 B. & Ald. 600; *Hollis v. Goldfinch* (1823), 1 B. & C. 205; *Brown v. Nolley* (1848), 3 Exch. 219; *Benham v. Gray* (1847), 5 C. B. 138. As to the possession of a church, see *Griffin v. Dighton* (1864), 5 B. & S. 93, Ex. Ch.; *Greenslade v. Darby* (1868), L. R. 3 Q. B. 421; *Jackson v. Courtenay* (1857), 8 E. & B. 8, Ex. Ch.; *Revett v. Brown* (1828), 5 Bing. 7; *Wolfe v. Surrey County Council (Clerk)*, [1905] 5 K. B. 439. As to the foreshore, see *A.-G. v. Emerson*, [1891] A. C. 649; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; *Hastings Corporation v. Ivall* (1874), L. R. 19 Eq. 558; *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Brinckman v. Matley*, [1904] 2 Ch. 313, C. A.

(*r*) *Bertie v. Beaumont* (1812), 16 East, 33; *Mayhew v. Suttle* (1854), 4 E. & B. 347; *Moore (Lessee) v. Doherty* (1843), 5 I. L. R. 449; *Allen v. England* (1862), 3 F. & F. 49; compare titles LIMITATION OF ACTIONS, Vol. XIX., p. 125; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 147. As to occupation by a licensee, see *Peakin v. Peakin*, [1895] 2 I. R. 359; *Taylor v. Caldwell* (1863), 3 B. & S. 826, 832. As to occupation by the members of the family of the person in possession, see *Searle v. Staffordshire County Council (Clerk)*, *Gough v. Same* (1910), 2 Smith, Reg. Cas. 244; compare title LIMITATION OF ACTIONS, Vol. XIX., p. 131. As to occupation by a mortgagor in possession, see title MORTGAGE, Vol. XXI., p. 168. For a form of a clause in an appointment of an agent giving him power to warn off and proceed against trespassers, see *Encyclopædia of Forms and Precedents*, Vol. I., p. 390.

1502. If land is in the possession of a tenant, the tenant(s) is the proper plaintiff to sue for trespass committed in respect of the land; but where the trespass is not merely of a temporary nature, but is injurious to the reversion, the reversioner, although he cannot sue in trespass, may sue for the injury done to his interest (t).

SECT. 2.

Who may
Sue.Tenant and
reversioner.

1503. A joint tenant or tenant in common of land can maintain trespass against his co-tenant if the co-tenant expels him from the land (a) or destroys the subject of the co-tenancy without the co-tenant's consent (b), but not otherwise (c).

Co-owners.

(s) Including a tenant at sufferance; see title LANDLORD AND TENANT, Vol. XVIII., p. 438.

(t) The action by the reversioner is not an action of trespass. In an action of trespass to land the plaintiff alleges that the defendant "broke and entered" the land of the plaintiff (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 415); in an action by a reversioner, the plaintiff generally alleges that the defendant injured the plaintiff's reversion in land (*ibid.*, p. 393; *Metropolitan Association v. Petch* (1858), 5 C. B. (N. S.) 504; *Jackson v. Pesked* (1813), 1 M. & S. 234; *Kidgill v. Moor* (1850), 9 C. B. 364; *Hosking v. Phillips* (1848), 3 Exch. 168; compare title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 539). A reversioner may sue for such injuries as the following:—structural injury to a house (*Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.); cutting down trees (*Cotterill v. Hobby* (1825), 4 B. & C. 465); digging holes and spoiling the surface of land for the purpose of quarrying or mining (*Rogers v. Taylor* (1857), 1 H. & N. 706); placing the foundation of a wall in the plaintiff's land (*Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508); building a house with eaves which discharged water on the plaintiff's land (*Tucker v. Newman* (1839), 11 Ad. & El. 40; *Battishill v. Reed* (1856), 18 C. B. 696); pulling down the eaves of the plaintiff's house and preventing the rain-water from flowing on to adjoining land (*ibid.*); removing a dam placed for the purpose of diverting a stream so as to irrigate the plaintiff's land (*Greenslade v. Halliday* (1830), 6 Bing. 379); polluting a river by pouring sewage into it (*Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393, 404); flooding land and houses with water (*Rust v. Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113, C. A.). The reversioner may sue the tenant for doing any act which might be injurious to the reversion, such as opening a new door in a house (*Young v. Spencer* (1829), 10 B. & C. 145); compare title LANDLORD AND TENANT, Vol. XVIII., p. 500. The reversioner cannot sue for a trifling trespass which produces no substantial injury (*Cooper v. Crabtree* (1882), 20 Ch. D. 589, C. A.). As to the duty of a tenant when sued by a person claiming possession adversely to the landlord, see title LANDLORD AND TENANT, Vol. XVIII., p. 559. For forms of covenants by a landlord not to permit trespass, see *Encyclopædia of Forms and Precedents*, Vol. VII., p. 534, Vol. XVI., p. 343. For forms of a clause in a lease of a shooting right by which the landlord agrees to give assistance in preventing trespass, see *ibid.*, Vol. VII., pp. 616, 621.

(a) *Murray v. Hall* (1849), 7 C. B. 441, see *Stedman v. Smith* (1857), 8 E. & B. 1; *Watson v. Gray* (1880), 14 Ch. D. 192; compare title LIMITATION OF ACTIONS, Vol. XIX., p. 130.

(b) *Wilkinson v. Haygarth* (1847), 12 Q. B. 837; but see *Job v. Potton* (1875), L. R. 20 Eq. 84; *Cresswell v. Hedges* (1862), 1 H. & C. 421.

(c) *Martyn v. Knowllys* (1799), 8 Term Rep. 145; *Cubitt v. Porter* (1828), 8 B. & C. 257; *Job v. Potton*, *supra*. A co-tenant of a party wall cannot bring trespass against his co-tenant for pulling down the wall merely for the purpose of rebuilding it (*Cubitt v. Porter*, *supra*), unless he trespasses on the property held in severalty by his co-tenant (*Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; compare *Stedman v. Smith* (1857), 8 E. & B. 1).

SECT. 2.
Who may
Sue.

It is not trespass for one co-tenant to use the common property in the natural and necessary course of use or enjoyment, as, for instance, by working a coal-mine or cutting the grass of a field and making it into hay (*d*).

Sect. 3.—*Trespass ab Initio*.

Trespass
ab initio.

1504. If a person enters on the land of another under an authority given him by law, and while there abuses the authority by an act which amounts to a trespass, he becomes a trespasser *ab initio*, and may therefore be sued as if his original entry was unlawful (*e*). Instances of an entry under the authority of the law are the entry of a customer into a common inn, of a landlord to distrain, of a reversioner to see if waste be done, or of a commoner to see his cattle (*f*).

To make a person a trespasser *ab initio* there must be a wrongful act committed; a mere nonfeasance is not enough (*g*).

SECT. 4.—*Remedies*.

Expulsion.

1505. If a trespasser peaceably enters or is on land, the person who is in possession or is entitled to the possession may request him to leave, and if he refuses to leave may remove him from the land,

In London and some other cities the rights of co-tenants of party walls are now regulated by statute (London Building Act, 1894 (57 & 58 Vict. c. cexiii.); see *Standard Bank of British South America v. Stokes* (1878), 9 Ch. D. 68; *Knight v. Pursell* (1879), 11 Ch. D. 412. As to party walls, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 134. As to what constitutes possession by co-owners for the purposes of limitation of actions, see title LIMITATION OF ACTIONS, Vol. XIX., p. 130. As to the rights of co-owners generally, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 202 *et seq.* (joint tenants), 209 (tenants in common). For a form of an award by an arbitrator with reference to a trespass by breaking a party wall, see *Encyclopædia of Forms and Precedents*, Vol. II., p. 184.

(*d*) *Job v. Potton* (1875), L. R. 20 Eq. 84; *Jacobs v. Seward* (1872), L. R. 5 H. L. 464. In such cases the remedy of the co-tenant is to sue the other co-tenant to recover a share of the proceeds; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 204.

(*e*) *Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 1 Smith, L. C., 11th ed., p. 132.

(*f*) *Ibid.*, at p. 133. As regards distress, where distress is made for rent justly due, or for money justly due for relief of the poor, and any irregularity or unlawful act is afterwards done by the distrainer the distress is not to be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover damages for the special damage sustained, unless tender of amends is made before action brought (Distress for Rent Act, 1737 (11 Geo. 2, c. 19), ss. 19, 20; Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 8; *Rodgers v. Parker* (1856), 18 C. B. 112; *Lucas v. Tarleton* (1858), 3 H. & N. 116; *Attack v. Bramwell* (1863), 3 B. & S. 520; but see *Plasycloed Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd.*, [1912] 2 K. B. 345; *Winterbourne v. Morgan* (1809), 11 East, 395 (where there was a further substantive trespass); *Vertue v. Beasley* (1831), 1 Mood. & R. 21). A sheriff who enters land under legal process becomes a trespasser by remaining there for more than a reasonable time (*Ash v. Dawnay* (1852), 8 Exch. 237; *Playfair v. Musgrove* (1845), 14 M. & W. 239), but is not, it seems, a trespasser *ab initio* (*Lee v. Dangar, Grant & Co.*, [1892] 1 Q. B. 231, 242, C. A.).

(*g*) *Shorland v. Govett* (1826), 5 B. & C. 485; *West v. Nibbs* (1847), 4

SECT. 4.
Remedies.

using no more force than is reasonably necessary; if a trespasser enters with force and violence, the person in possession may remove him without a previous request to depart (*h*). If the force or violence used in turning out a trespasser is excessive, the person who uses such force himself commits a trespass upon the person of the person removed (*i*). To justify the expulsion of a trespasser, the person who uses force must be in possession or acting under the authority of the person in possession (*j*).

If a trespasser erects a building on the land of another, the person who is entitled to the possession of the land may pull down the building, even though the trespasser is in it (*k*). Pulling down building.

1506. If a person who is entitled to the possession of land enters or is on the land and expels the occupier by force, he may in certain cases be indicted for a forcible entry, but he cannot be sued for trespass to the land (*l*). If a person who has the legal title to land is in actual possession of it, and another person attempts to eject him by force, the person who makes the attempt is liable to be indicted for a forcible entry (*m*). Forcible entry.

1507. If any animal or anything inanimate is unlawfully on the land of a person and is doing damage to the land or its produce or to any animal or thing on the land, the person entitled to the possession of the land may distrain the animal or thing doing the damage (*n*). Distrain damage feasant.

C. B. 172; see *Ladd v. Thomas* (1804), 12 Ad. & El. 117; *Etherton v. Popplewell* (1809), 1 East, 139; *Winterbourne v. Morgan* (1809), 11 East, 395.

(*h*) *Tulley v. Reed* (1823), 1 C. & P. 6; *Jackson v. Courtenay* (1857), 8 E. & B. 8, Ex. Ch.; *Scott v. Brown (Matthew) & Co., Ltd.* (1884), 51 L. T. 746; *Weaver v. Bush* (1798), 8 Term Rep. 78; *Polkinhorn v. Wright* (1845), 8 Q. B. 197; *Shaw v. Chairitie* (1850), 3 Car. & Kir. 21; *Hall v. Davis* (1825), 2 C. & P. 33; *Thomas v. Marsh* (1833), 5 C. & P. 596; *Webster v. Watts* (1847), 11 Q. B. 311; *Moriarty v. Brooks* (1834), 6 C. & P. 684.

(*i*) *Gregory v. Hill* (1799), 8 Term Rep. 299; *Johnson v. Northwood* (1817), 7 Taunt. 689; *Oakes v. Wood* (1837), 2 M. & W. 791; *Ball v. Axten* (1866), 4 F. & F. 1019; *Green v. Bartram* (1830), 4 C. & P. 308; *Simpson v. Morris* (1813), 4 Taunt. 821. As to trespassers being injured by animals on the land, see title ANIMALS, Vol. 1., p. 375.

(*j*) *Holmes v. Bagge* (1853), 1 E. & B. 782; *Monks v. Dykes* (1839), 4 M. & W. 567.

(*k*) *Burling v. Read* (1850), 11 Q. B. 904, distinguishing *Perry v. Fitzhove* (1846), 8 Q. B. 757; see *Jones v. Foley*, [1891] 1 Q. B. 730; *Davies v. Williams* (1851), 16 Q. B. 546; *Jones v. Jones* (1862), 1 H. & C. 1; and compare *Lemmon v. Webb*, [1895] A. C. 1 (right to lop overhanging branches).

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 474; *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Jones v. Foley*, [1891] 1 Q. B. 730; *Scott v. Brown* (1885), 51 L. T. 746; *Pollen v. Brewer* (1859), 7 C. B. (N. S.) 371. Such a person may be sued for trespass to the goods or person of the occupier, if he causes any injury to such goods or person (*Beddall v. Maitland*, *supra*).

(*m*) *Lows v. Telford* (1876), 1 App. Cas. 414.

(*n*) *Boden v. Roscoe*, [1894] 1 Q. B. 608; *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Midland Rail. Co.* (1853), 2 E. & B. 793; compare title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 55. The animal or thing must be taken while the damage

SECT. 4.

Remedies.

Action of
trespass.

Damages.

Mitigation of
damages.

1508. In an action of trespass the plaintiff, if he proves the trespass, is entitled to recover damages, even although he has not suffered any actual loss (o). If the trespass is accompanied by aggravating circumstances, the plaintiff is entitled to recover exemplary damages (p). If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him for his loss (q). Where the defendant has made use of the plaintiff's land and has received benefit from such use, the plaintiff is entitled to receive by way of damages such a sum as it is just should be paid for such use (r).

The defendant in an action of trespass may give evidence in mitigation of damages. For this purpose, where exemplary or substantial damages are asked for on the ground that the trespass was wilful, the defendant may rely on facts which amount to a justification or excuse, although no justification is pleaded (s).

is being done (*Wormer v. Biggs* (1845), 2 Car. & Kir. 31). A locomotive engine incumbering a railway (*Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Midland Rail. Co.* (1853), 2 E. & B. 793), or nets which have been brought on the land unlawfully to catch game etc., if they are on the land (1 Roll. Abr., tit. Distress (A)), or corn incumbering the land of the distrainer (*ibid.*; and see *Baker v. Leathes* (1810), Wight. 113), may be distrained; see, further, title ANIMALS, Vol. I., pp. 379, 380. It is not, however, lawful to distress *damage feasant* anything which is being actually used, such as a horse which is being ridden, or driven or led (*Storey v. Robinson* (1795), 6 Term Rep. 138; *Field v. Adames* (1840), 12 Ad. & El. 649); 2 Wms. Saund. (ed. 1871) 675). As to distress *damage feasant* generally, see titles ANIMALS, Vol. I., pp. 378 *et seq.*; *Coakes v. Willcocks*, [1911] 2 K. B. 124, C. A. An action of trespass is not maintainable while the distress is detained (*Boden v. Roscoe*, [1894] 1 Q. B. 608); see title ANIMALS, Vol. I., p. 382.

(o) See p. 848, *ante*. As to nominal damages, see *Twyman v. Knowles* (1853), 13 C. B. 222. As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.* As to actions for recovery of possession, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 324 *et seq.*

(p) *Davis v. Bromley Urban District Council* (1903), 67 J. P. 275; *Reeves v. Penrose* (1890), 26 L. R. Ir. 141; *Pratt v. Pratt* (1848), 2 Exch. 413; *Merest v. Harvey* (1814), 5 Taunt. 442; see *Kerby v. Denby* (1836), 2 Gale, 31; *Bland v. Bland* (1835), 1 Har. & W. 167; *Newton v. Holford* (1844), 1 Car. & Kir. 537; *Bennett v. Allcott* (1787), 2 Term Rep. 166; *Russell v. Corne* (1704), 2 Ld. Raym. 1031; *Bracegirdle v. Orford* (1813), 2 M. & S. 77; see title DAMAGES, Vol. X., pp. 325, 341. Judgment in replevin for damage to goods is no bar to an action for trespass to land (*Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454). As to assessment of damages against joint trespassers, see *Clark v. Newsam* (1847), 1 Exch. 131; *Eliot v. Allen* (1845), 1 C. B. 18; *Brown v. Allen* (1803), 4 Esp. 158; and title TORT, pp. 487, 488, *ante*. A judgment in an action against one of several joint trespassers is a bar to an action against the others for the same cause, although the judgment is unsatisfied (*Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; see *Day v. Porter* (1838), 2 Mood. & R. 151).

(q) See title DAMAGES, Vol. X., p. 340.

(r) *Ibid.*, pp. 341, 343; see *Whitwham v. Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538, C. A.; *McArthur & Co. v. Cornwall*, [1892] A. C. 75, P. C.; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Jegon v. Vivian* (1871), 6 Ch. App. 742; *Phillips v. Homfray*, *Fothergill v. Phillips* (1871), 6 Ch. App. 770; *Attersoll v. Stevens* (1808), 1 Taunt. 183.

(s) See *Skull v. Glenister* (1864), 16 C. B. (N. S.) 81, 103.

1509. If a substantial case of trespass is proved, the court may, in addition to or in substitution for damages, grant an injunction to prevent the repetition of the trespass (*t*). Where the trespass is of a trifling nature, or where damages are a sufficient remedy, or where the granting of an injunction would be oppressive, an injunction will be refused (*u*).

SECT. 4.
Remedies.
Injunction.

1510. In a proper case, on trespass being proved, the court, in addition to or in substitution for damages or an injunction, may make a declaration that the defendant, in committing the act complained of, was a trespasser (*a*).

Declaration.

SECT. 5.—Defences.

1511. A defendant in an action of trespass may deny that he entered on the plaintiff's land. He may also deny that the premises on which the trespass is alleged to have been committed are the property of or in the possession of the plaintiff; but if the plaintiff is in possession, the defendant cannot set up the title of a third person unless he claims under such person (*b*).

Denial of entry etc.

Jus tertii.

(*t*) *Goodson v. Richardson* (1874), 9 Ch. App. 221; *Brinckman v. Matley*, [1904] 2 Ch. 313, C. A.; *Hickman v. Maissey*, [1900] 1 Q. B. 752, C. A.; *Eardley v. Granville* (1876), 3 Ch. D. 826, 832; *Marriott v. East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70; *Lowndes v. Bettie* (1864), 10 Jur. (N. S.) 226; *London and North Western Rail. Co. v. Lancashire and Yorkshire Rail. Co.* (1867), L. R. 4 Eq. 174; *Cowper (Earl) v. Baker* (1810), 17 Ves. 128; *Haigh v. Jaggard* (1845), 2 Coll. 231; *Hodgson v. Duce* (1856), 4 W. R. 576; *Allen v. Martin* (1875), L. R. 20 Eq. 462; *Stanford v. Hurlstone* (1873), 9 Ch. App. 116; *Ardley v. St. Pancras Guardians* (1870), 39 L. J. (CH.) 871; *Bridges v. Highton* (1865), 11 L. T. 653; *Smith v. Brown* (1879), 48 L. J. (CH.) 694; *Stocker v. Planet Building Society* (1879), 27 W. R. 877, C. A. As to the granting of injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*u*) *Leader v. Moody* (1875), L. R. 20 Eq. 145; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Rileys v. Halifax Corporation* (1907), 97 L. T. 278; *Waterhouse v. Waterhouse* (1905), 94 L. T. 133; *Stevens v. Stevens* (1907), 24 T. L. R. 20; *Llandudno Urban Council v. Woods*, [1899] 2 Ch. 705; *Behrens v. Richards*, [1905] 2 Ch. 614; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A. As to the practice of courts of equity before the Judicature Acts (see title COURTS, Vol. IX., p. 51, note (*g*)) in granting or refusing an injunction in cases of trespass, see *Bateman v. Johnson* (1729), Fitz-G. 106; *Coulson v. White* (1743), 3 Atk. 21; *Hanson v. Gardiner* (1802), 7 Ves. 305, 309; *Courthope v. Mapplesden* (1804), 10 Ves. 290; *Crockford v. Alexander* (1808), 15 Ves. 138; *Kinder v. Jones* (1810), 17 Ves. 110; *Webster v. South Eastern Rail. Co.* (1851), 1 Sim. (N. S.) 272; *Sandys v. Murray* (1838), 1 I. Eq. R. 29; and see title INJUNCTION, Vol. XVII., p. 233.

(*a*) *Llandudno Urban Council v. Woods*, *supra*; *Behrens v. Richards*, *supra*; *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, C. A. Where an action of trespass is brought against a defendant who sets up a public right of way as a defence, any other person who assists the defendant in his defence and who claims and insists on the same right (*e.g.*, a rural district council) may be joined as a defendant in order that as against such person a declaration negating such a right may be made, although no damages are sought from him (*Thornhill v. Weeks*, [1913] 1 Ch. 438). As to criminal proceedings against trespassers, see pp. 845, 846, *ante*.

(*b*) *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405, P. C. As to traversing the authority of the defendant, see *Chambers v. Donaldson* (1809), 11 East, 65; *Cary v. Holt* (1745), 11 East, 70, n.; *Dobree v. Napier* (1836), 3 Scott, 201; *Ever v. Jones* (1846), 9 Q. B. 623. The right of a person to

SECT. 5.
Defences.

The defendant may admit the entry and justify it on the ground that he had a legal right to enter (c).

Claim of
right.

1512. A defendant in an action of trespass may plead and prove that he is the owner of and has a right to the possession of the premises on which the trespass is alleged to have been committed, or that he acted under the authority of the owner (d).

Leave and
licence.

1513. It is a good defence to an action of trespass to land, if the defendant proves that he entered on the land by the leave and licence of the plaintiff (e).

Right of the
licensee.

If the person in possession of land gives to another person licence to enter on the land, then, so long as the licence continues and the entry is justified by the licence, the person to whom the licence was given cannot be treated as a trespasser (f).

A person who has been let into possession of land by the person entitled to such possession has the right to occupy the land as a licensee, until the licence is revoked by competent authority, although he may have no estate in the land (g). An entry on land

do an act with regard to the property of another depends upon the right or authority which he really has, not upon that which he says he has (*Trent v. Hunt* (1853), 9 Exch. 14; *Baillie v. Kell* (1838), 4 Bing. (N. C.) 638, 650; *Phillips v. Whitshed* (1860), 2 E. & E. 804; see 1 Wms. Saund. (ed. 1871) 19. As to pleading in an action of trespass to a several fishery, see *Crichton v. Coltery* (1870), 19 W. R. 107.

(c) See the text, *infra*.

(d) *Holmes v. Newlands* (1839), 11 Ad. & El. 44; *Roberts v. Tayler* (1845), 1 C. B. 117, 125; *Ryan v. Clark* (1849), 14 Q. B. 65; *Jones v. Chapman* (1849), 2 Exch. 803; *Fry v. Monckton* (1840), 2 Mood. & R. 303. This defence must be specially pleaded; see Bullen and Leake, *Precedents of Pleadings*, 6th ed., p. 937. Under the old system of pleading the plea of the defendant's ownership was known as the plea of *liberum tenementum*; see *Stoccombe v. Lyall* (1851), 6 Exch. 119; *Hawke v. Bacon* (1809), 2 Taunt. 156; *Doe v. Wright* (1839), 2 Per. & Dav. 672; *Brest v. Lever* (1841), 7 M. & W. 593; *Smith v. Royston* (1841), 8 M. & W. 381; *Davison v. Wilson* (1848), 11 Q. B. 890. The plea admitted the possession of the plaintiff, but asserted a title to the freehold and a right to possession in the defendant (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 802). As to pleading generally, see title PLEADING, Vol. XXII., pp. 417 *et seq.* As to justification under a co-owner, see *Jacobs v. Seward* (1872), L. R. 5 H. L. 464; and p. 856, *ante*. As to the right of possession, see p. 852, *ante*.

(e) As to a licence to enter on land, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 239; GAME, Vol. XV., p. 219; LANDLORD AND TENANT, Vol. XVIII., p. 337; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 567. As to the liability of the owner of land towards the licensee, see *Latham v. Johnson (R.) and Nephew, Ltd.*, [1913] 1 K. B. 398, C. A.

(f) This defence must be specially pleaded (*Bennett v. Allcott* (1787), 2 Term Rep. 166; *Kavanagh v. Gudge* (1844), 7 Man. & G. 316; *Knapp v. London, Chatham and Dover Rail. Co.* (1863), 2 H. & C. 212; *Hyde v. Graham* (1862), 1 H. & C. 593). The plea must cover all the acts of trespass (*Hayward v. Grant* (1824), 1 C. & P. 448). A plea of leave and licence means leave and licence in fact; a licence in law must be expressly pleaded (*Moxon v. Savage* (1860), 2 F. & F. 182). A licence is not implied by law to the purchaser of goods, though sold under an execution or distress, to enter upon the premises of the former owner and take them away, although they have remained there with his consent (*Williams v. Morris* (1841), 8 M. & W. 488).

(g) *Littleton v. M'Namara* (1875), 9 I. R. C. L. 417. As to the right of a person who enters on land under a contract which is unenforceable, see p. 868, *post*.

for the purpose of hunting or similar purposes is lawful if it is with the express or tacit consent of the person in possession of the land, but is unlawful if there is no such consent (*h*).

SECT. 5.
Defences.

A bare licence to enter on land is revocable (*i*), but a licensee whose licence has been revoked has a right to a reasonable time to go off the land after the revocation of the licence, and if the licence is to put goods on land of the licensor, the licence cannot be revoked without allowing the licensee reasonable time to remove his goods (*j*).

Revocability
of licence.

A licence coupled with an interest, executed and acted upon, is not revocable (*k*).

In order that a licence should be a defence to an action of trespass, the defendant must have only done an act which the licence allows; thus, a licence to enter a dwelling-house and seize goods does not justify a breaking and entering the house, unless a demand of the goods is first made and an intimation given of the authority under which the demand is made (*l*); and a licence to enter into a house or land does not justify an entry except in the usual way (*m*).

Limitation of
licence as
defence.

1514. It is a good defence to an action of trespass if the defendant pleads and proves that he entered on land in the exercise of a legal right (*a*). A person may, it seems, be entitled to enter on

Justifying
right to enter.

(*h*) *Paul v. Summerhayes* (1878), 4 Q. B. D. 9; see title ANIMALS, Vol. I., p. 868. As to trespass in pursuit of game, see title GAME, Vol. XV., p. 225.

(*i*) *Wood v. Leadbitter* (1845), 13 M. & W. 838.

(*j*) *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334.

(*k*) *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440; *Vaughan v. Hampson* (1875), 33 L. T. 15; *Wood v. Manley* (1839), 11 Ad. & El. 34; *Feltham v. Cartwright* (1839), 7 Scott, 695; *Taylor v. Waters* (1817), 7 Taunt. 374; *Liggins v. Inge* (1831), 7 Bing. 682.

(*l*) *Aikins v. Brunton* (1866), 14 W. R. 636.

(*m*) *Ancaster v. Milling* (1823), 2 Dow. & Ry. (K. B.) 714.

(*a*) As, for instance, to exercise a right to fish (*Mannall v. Fisher* (1859), 5 C. B. (N. S.) 856; *Richardson v. Orford Corporation* (1793), 2 Hy. Bl. 182, Ex. Ch.); to hunt and shoot (*Wickham v. Hawker* (1840), 7 M. & W. 63; *Moore v. Plymouth (Lord)* (1817), 7 Taunt. 614; *Pickering v. Noyes* (1825), 4 B. & C. 639; *Pannell v. Mill* (1846), 3 C. B. 625); to exercise a right of way (*Holt v. Daw* (1851), 16 Q. B. 990; *Stacey v. Sherrin* (1913), 29 T. L. R. 555); to dig for minerals (*Roberts v. Davey* (1833), 4 B. & Ad. 664; *Clayton v. Corby* (1842), 2 Q. B. 813; *Cardigan (Earl) v. Armitage* (1823), 2 B. & C. 197; *Dand v. Kingscote* (1840), 6 M. & W. 174; *Smart v. Morton* (1855), 5 E. & B. 30; *Rogers v. Taylor* (1857), 1 H. & N. 706; *Hamilton (Duke) v. Graham* (1871), L. R. 2 Sc. & Div. 166; *Bassett v. Mitchell* (1831), 2 B. & Ad. 99); to cut turf (*Fitzpatrick v. Verschoye*, [1913] 1 I. R. 8); to remove an obstruction to defendant's right to light (*Thompson v. Eastwood* (1852), 8 Exch. 69); to abate a nuisance (*Jones v. Williams* (1843), 11 M. & W. 176; *Turner v. Ringwood Highway Board* (1870), L. R. 9 Eq. 418); to repair a pier in a public navigable river (*Lonsdale (Earl) v. Nelson* (1823), 2 B. & C. 302). See also *Phypers v. Eburn* (1836), 3 Bing. (N. C.) 250 (lord of a manor justifying a seizure *quousque* to enforce admittance); *Griffin v. Dighton* (1863), 5 B. & S. 93, 108, Ex. Ch. (spiritual incumbent justifying the breaking of a lock which lay rector had placed on a door of the church); *Knapp v. London, Chatham and Dover Rail. Co.* (1863), 2 H. & C. 212 (justifying entry on land under statutory powers). As to breaking open doors to effect an arrest, or to prevent the commission of a crime, or under a warrant to search for stolen goods, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 307,

SECT. 5.
Defences.

the land of another, and to do acts there which otherwise would amount to a trespass, if such entry and acts are reasonably necessary for the preservation of the property of the person entering or of the person whose land is entered, or for the preservation of life, and if such entry is made and such acts are done in a reasonable manner (*b*).

It is a good defence to an action of trespass if the defendant proves that he committed the act complained of in the lawful execution of legal process (*c*), or in the lawful carrying out of a lawful distress (*d*).

Involuntary
accident.

1515. It is a good defence in an action of trespass that the act complained of was an involuntary and inevitable accident happening without negligence (*e*).

Entry to
retake or
remove goods.

1516. If a person takes the goods of another and puts them on his own land, the owner of the goods is entitled to enter immediately

309, 310. As to the right of a police officer to enter a public-house, see *R. v. Smith* (1833), 6 C. & P. 136; title INTOXICATING LIQUORS, Vol. XVIII., p. 132. The defence of justification must be specially pleaded. As to a plea justifying a breaking and entering, see *Curlewis v. Laurie* (1848), 12 Q. B. 640; *Taylor v. Cole* (1789), 3 Term Rep. 292; *Crowther v. Ramsbottom* (1798), 7 Term Rep. 654; *Anon.* (1773), Lofft, 364; *Carriage v. Lautour* (1828), 7 L. J. (o. s.) (κ. B.) 33; *Smith v. Shirley* (1846), 3 C. B. 142. As to a reply to a plea of justification, see *Morrow v. Belcher* (1825), 7 Dow. & Ry. (κ. B.) 187; *Taylor v. Smith* (1816), 7 Taunt. 156; *Lynn v. Comer* (1860), 2 F. & F. 244. As to excessive damage in the exercise of the right, see *Hope v. Osborne*, [1913] 2 Ch. 349.

(*b*) *Cope v. Sharpe*, [1912] 1 K. B. 496, C. A. (entry on land to prevent fire spreading); compare *Kirk v. Gregory* (1876), 1 Ex. D. 55; *Huddleston v. Pearson* (1824), 3 L. J. (o. s.) (κ. B.) 43; *Hope v. Osborne*, *supra*; *Kirby v. Chessum* (1913), *Times*, 15th and 18th October. As to the liability of a landowner who protects his land from water by an erection which injures an adjoining owner, see note (*m*), p. 849, *ante*.

(*c*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 307, 310; SHERIFFS AND BAILIFFS, Vol. XXV., pp. 812 *et seq.*; *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, L. C., 11th ed., p. 104; *Cheasley v. Barnes* (1808), 10 East, 73; *Shorland v. Govett* (1826), 5 B. & C. 485; *Unwin v. St. Quintin* (1843), 11 M. & W. 277; *Playfair v. Musgrove* (1845), 14 M. & W. 239; *Jarmain v. Hooper* (1843), 6 Man. & G. 827; *Gregory v. Sloman* (1852), 1 E. & B. 360; *Percival v. Stamp* (1853), 9 Exch. 167; *Carnaby v. Welby* (1838), 8 Ad. & El. 872; *Pugh v. Griffith* (1838), 7 Ad. & El. 827; *Tancred v. Allgood* (1859), 4 H. & N. 438; *Harrison v. Dixon* (1843), 12 M. & W. 142; *Sowell v. Champion* (1837), 6 Ad. & El. 407; *Melling v. Leak* (1855), 16 C. B. 652; *Edmunds v. Pinniger* (1845), 7 Q. B. 558; *Delaney v. Fox* (1856), 1 C. B. (N. S.) 166; *Edwards v. Hodges* (1855), 15 C. B. 477; *Pedley v. Davis* (1861), 10 C. B. (N. S.) 492; *Fielding v. Lee* (1865), 18 C. B. (N. S.) 499; *Perkins v. Plympton* (1831), 7 Bing. 676. As to the liability of an agent of the Crown for acting under a writ of extent, see *Pridgeon v. Mellor* (1912), 28 T. L. R. 261. This defence must be specially pleaded.

(*d*) See title DISTRESS, Vol. XI., p. 117. This defence must be specially pleaded.

(*e*) See *Basely v. Clarkson* (1681), 3 Lev. 37; *Williams v. Price* (1832), 3 B. & Ad. 695; see p. 845, *ante*. As to tender of amends in the case of an accidental trespass, see Limitation Act, 1623 (21 Jac. 1, c. 16), s. 5; and note (*h*), p. 863, *post*. This defence need not, it seems, be specially pleaded (*Rumbold v. London County Council* (1909), 25 T. L. R. 541, C. A., disapproving *Winchelsea (Dowager Countess) v. Beckly* (1886), 2 T. L. R. 300).

on the land for the purpose of retaking his own goods (*f*). If a person wrongfully places his own goods on the land of another, the occupier of the land is entitled to enter the land of the owner of the goods for the purpose of depositing the goods there (*g*).

SECT. 5.
Defences.

1517. There are some statutes which authorise a person in particular cases who has committed a trespass to make a tender of amends before action, and if a sufficient tender is made the defendant is entitled to succeed in the action (*h*).

Tender of
amends.

1518. In some cases the right to sue for trespass may be taken away by an act of the legislature relieving a person who has committed a trespass from liability for his act (*i*).

Act of
indemnity.

1519. The defendant in an action of trespass to land may set up the defence that the action is barred by lapse of the statutory period of limitation, that is, six years from the accrual of the cause of action (*k*).

Statute of
Limitations.

Part III.—Trespass to Goods.

SECT. 1.—Definition.

SUB-SECT. 1.—What is Trespass to Goods.

1520. Trespass to goods is an unlawful disturbance of the possession (*l*) of the goods by seizure (*m*) or removal (*a*) or by a direct act causing damage to the goods (*b*).

Unlawful
disturbance of
possession.

(*f*) *Patrick v. Colerick* (1838), 3 M. & W. 483; *Wood v. Manley* (1839), 11 Ad. & El. 34; *Anthony v. Haney* (1832), 8 Bing. 186; *Webb v. Beavan* (1844), 6 Man. & G. 1055; *Burridge v. Nicolettsh* (1861), 6 H. & N. 383; *Blades v. Higgs* (1861), 10 C. B. (N. S.) 713. This defence must be specially pleaded.

(*g*) *Rea v. Sheward* (1837), 2 M. & W. 424. This defence must be specially pleaded.

(*h*) See Limitation Act, 1623 (21 Jac. 1, c. 16), s. 5 (negligent or involuntary trespass); Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 20 (lawful distress followed by unlawful act); Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 135 (trespass in execution of Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), or the special Act, or any Act incorporated therewith); Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 129 (trespass in execution of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), or the special Act, or any Act incorporated therewith); and see, generally, Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1; title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 348. This defence must be specially pleaded. As to the effect of a tender of amends, see *Jones v. Gooday* (1842), 9 M. & W. 736; *Williams v. Price* (1832), 3 B. & Ad. 695; Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 790.

(*i*) *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.

(*k*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 37. This defence must be specially pleaded.

(*l*) As to what constitutes possession of goods, see title PERSONAL PROPERTY, Vol. XXII., pp. 391 *et seq.*

(*m*) *Crozier v. Cundey* (1827), 6 B. & C. 232; see *Hartley v. Moxham*

(*a*), (*b*) For notes (*a*), (*b*), see p. 864, *post*.

SECT. 1.
Definition.

Possession
essential to
right of
action.

Trespass to
goods in
foreign
country.

The subject-matter of trespass to goods must be a personal chattel of which the person complaining of the wrong may have lawful possession (c).

A person cannot sue in trespass, unless he is in actual possession or has a right to the immediate possession of the chattel in respect of which the action is brought (d).

1521. An action may be maintained in England for a trespass to goods committed in a foreign country, if the act is not justifiable by the law of such country (e).

(1842), 3 Q. B. 701; *Jones v. Lewis* (1836), 7 C. & P. 343. As to a trespass by illegal distress, see title DISTRESS, Vol. XI., pp. 195 *et seq.*; by wrongful execution, see title EXECUTION, Vol. XIV., pp. 28 *et seq.*, 41.

(a) The technical term for a removal in trespass is asportation; any unlawful removal, however slight, amounts to a trespass (*Kirk v. Gregory* (1876), 1 Ex. D. 55). As to asportation in larceny, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 630.

(b) Any damage, however slight, is sufficient, such as, for instance, "scratching the panel of a carriage" (*Fouldes v. Willoughby* (1841), 8 M. & W. 540, *per* ALDERSON, B., at p. 549); see *Wennhak v. Morgan* (1888), 20 Q. B. D. 635. As to trespass by beating or driving or infecting or killing animals, see *Wright v. Ramscot* (1667), 1 Wms. Saund. (ed. 1845) 84; *Dand v. Sexton* (1789), 3 Term Rep. 37; *Thompson v. Berry* (1723), 1 Stra. 551; *Anderson v. Buckton* (1719), 1 Stra. 192; *Wright v. Hetton Downs Co-operative Society* (1884), Cab. & El. 200; *Carruthers v. Hollis* (1838), 8 Ad. & El. 113; *Bunch v. Kennington* (1841), 1 Q. B. 679; *Wildor v. Speer* (1838), 8 Ad. & El. 547; *Bignell v. Clarke* (1860), 5 H. & N. 485; *Oxley v. Watts* (1785), 1 Term Rep. 12; *Slater v. Swann* (1730), 2 Stra. 872; *Dye v. Leatherdale* (1769), 3 Wils. 20; *Sharrod v. London and North Western Rail. Co.* (1849), 4 Exch. 580; *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10; and title ANIMALS, Vol. I., pp. 368, 395.

(c) *Buron v. Denman* (1848), 2 Exch. 167; *Davis v. Nest* (1833), 6 C. & P. 167. As to possession of wild animals, see titles ANIMALS, Vol. I., p. 370; GAME, Vol. XV., p. 212. As to trespass in respect of fixtures, see *Beck v. Denbigh* (1860), 6 Jur. (N. S.) 998; *Boydell v. M^r Michael* (1834), 1 Cr. M. & R. 177, *per* PARKE B., at p. 179; *Pitt v. Shew* (1821), 4 B. & Ald. 206. As to trespass in respect of turf which has been cut, see *Cronien v. Connor*, [1913] 2 I. R. 119. As to various kinds of lawful possession other than ownership, see pp. 865, 905, *post*; and as to agents, see, generally, title AGENCY, Vol. I., pp. 203 *et seq.*; as to bailees, title AUCTION AND AUCTIONEERS, Vol. I., pp. 514, 515, 520 *et seq.*; BAILMENT, Vol. I., pp. 523 *et seq.*; BANKERS AND BANKING, Vol. I., pp. 627, 628, 632 *et seq.*; WORK AND LABOUR; as to carriers, title CARRIERS, Vol. IV., pp. 6 *et seq.*; as to distress, title DISTRESS, Vol. XI., pp. 115 *et seq.*; as to execution, title EXECUTION, Vol. XIV., pp. 4 *et seq.*, 37 *et seq.*; as to lien, titles AUCTION AND AUCTIONEERS, Vol. I., p. 517; BANKERS AND BANKING, Vol. I., pp. 620 *et seq.*; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 264 *et seq.*; INNS AND INNKEEPERS, Vol. XVII., pp. 323 *et seq.*; LIEN, Vol. XIX., pp. 1 *et seq.*; SOLICITORS, Vol. XXVI.; WORK AND LABOUR; as to pawnees and pledgees, title PAWNS AND PLEDGES, Vol. XXII., pp. 243 *et seq.*, 250 *et seq.*; as to receivers, title RECEIVERS, Vol. XXIV., pp. 375 *et seq.*; as to the master of a ship, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 224 *et seq.*; as to solicitors, see title SOLICITORS, Vol. XXVI.; as to stockbrokers, see title STOCK EXCHANGE, p. 238, *ante*.

(d) *Forman v. Dawes* (1841), Car. & M. 127; *Pritchard v. Long* (1842), 9 M. & W. 666; *Ashby v. Minnitt* (1838), 8 Ad. & El. 121; *Wennhak v. Morgan*, *supra*; and see p. 865, *post*.

(e) *Carr v. Fracis Times & Co.*, [1902] A. C. 176; *Buron v. Denman*, *supra*; *Machado v. Fontes*, [1897] 2 Q. B. 231, C. A.; see title CONFLICT OF LAWS, Vol. VI., pp. 248, 249.

SUB-SECT. 2.—*Trespass and Trover.*

SECT. 1.

Definition.

Distinction
between
trespass and
trover.

1522. Trespass and trover are analogous actions, each of them arising out of an unlawful dealing with personal chattels; in neither action can the plaintiff succeed, unless he had, when the unlawful act was committed, the possession, or a right to the immediate possession, of the chattel unlawfully dealt with (*f*). The gist of an action of trespass is an unlawful taking or removing or damaging of a personal chattel; the gist of an action of trover is the wrongful conversion of a personal chattel to the defendant's use or to the use of some third person or the destroying or changing the quality of the chattel (*g*). An act of trespass may be complete by an unlawful taking without any conversion (*h*), and an act may amount to conversion, where there is no unlawful taking (*i*). An act of trespass may be accompanied or followed by a conversion, and in such case the owner of the chattel may sue in trespass or trover, or in both, or he may sue in trespass alone and may give evidence of the conversion in aggravation of the damages (*k*). In an action of trespass the plaintiff may recover vindictive or only nominal damages, but in an action of trover the damages are generally the value of the goods (*l*) or of the plaintiff's interest in them (*m*).

SECT. 2.—*Nature of Right of Possession Infringed.*

1523. A plaintiff in an action of trespass to goods cannot succeed unless he proves that he had, at the time when the unlawful act was committed, actual possession, or a right to the immediate possession, of the chattel in respect of which the act was committed (*n*); if his right accrued subsequently to the unlawful act, he must prove that his right related back to the time of such act, and that the act was unlawful when it was committed (*o*).

Possession
or right to
possession.

As against a wrongdoer any possession is sufficient (*p*), provided that it is complete and unequivocal (*q*).

(*f*) As to trover, see *Bradley v. Copley* (1845), 1 C. B. 685; and see, generally, title TROVER AND DETINUE, pp. 887 *et seq.*, *post*. As to trespass, see the text, *infra*.

(*g*) *Smith v. Milles* (1786), 1 Term Rep. 475; *Fouldes v. Willoughby* (1841), 8 M. & W. 540; see title TROVER AND DETINUE, p. 888, *post*.

(*h*) *Fouldes v. Willoughby*, *supra*; *Price v. Helyar* (1828), 4 Bing. 597.

(*i*) *Wilson v. Barker* (1833), 4 B. & Ad. 614 (A. who knowingly receives from B. a chattel belonging to C. which B. has wrongfully seized, and who afterwards on demand refuses to give it up to C., cannot be sued in trespass unless the chattel was seized to his use, but can be sued in trover); see *West v. Nibbs* (1847), 4 C. B. 172.

(*k*) *Pratt v. Pratt* (1848), 2 Exch. 413. A recovery in trespass is a bar to an action of trover for the same taking (*Putt v. Roster* (1682), 2 Mod. Rep. 318).

(*l*) *Smith v. Milles* (1786), 1 Term Rep. 475, 481; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757, *per* BRETT, J., at p. 781.

(*m*) See title TROVER AND DETINUE, p. 910, *post*.

(*n*) *Ward v. Macauley* (1791), 4 Term Rep. 489. As to possession of goods, see the text, *infra*.

(*o*) *Tharpe v. Stallwood* (1843), 5 Man. & G. 760; *Re Goldberg* (No. 2), *Ex parte Page*, [1912] 1 K. B. 606; *Re Ashwell, Ex parte Salaman*, [1912] 1 K. B. 390. As to relation back, see note (*d*), p. 845, *ante*.

(*p*) *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802.

(*q*) *Young v. Hichens* (1844), 6 Q. B. 606. A mere transient and

SECT. 2.
Nature of
Right of
Possession
Infringed.

Right of
property.

1524. The right of property in goods draws with it a right to the possession (*r*), and where no one else is lawfully in possession the owner may sue in trespass although he has no actual physical control over the goods (*s*). Proof that a person has the property in a chattel is *prima facie* evidence that he is in possession (*t*). When the possession is doubtful, it is attached by law to the title (*u*). If a person has a property in a chattel at his election, by bringing an action of trespass in respect of the chattel he elects to take the chattel and is competent to sue (*w*).

Co-owner.

1525. One co-owner of goods may not sue another co-owner in trespass, unless the latter has ousted his co-owner or destroyed the common property without his co-owner's consent (*x*).

Bailment.

1526. An owner cannot sue in trespass if he has parted with the right of possession, as, for instance, by letting the goods on hire (*a*); but an owner who gratuitously permits another person to use his goods may sue a third person in trespass for an injury done to the goods while they are so used (*b*). If a bailee of goods (*c*) is entitled to the exclusive possession of the goods, the bailee and not the bailor is the proper plaintiff to sue in trespass. If a bailee who has a right to the exclusive possession of goods does an act which amounts to a determination of the bailment, the right to sue then vests in the bailor (*d*); thus, if a bailee of goods unlawfully destroys them, he is liable in trespass to the owner, as the destruction determines the bailment (*e*).

On a bailment of goods which does not exclude the right of the bailor to immediate possession, either the bailor or the bailee may

equivocal possession is no ground for an action of trespass (*Peachey v. Wing* (1826), 5 L. J. (O. S.) (K. B.) 55). As to possession of game, see *Blades v. Higgs* (1865), 11 H. L. Cas. 621; title GAME, Vol. XV., p. 212.

(*r*) *Dunwich Corporation v. Sterry* (1831), 1 B. & Ad. 831; compare title PERSONAL PROPERTY, Vol. XXII., pp. 393, 394.

(*s*) *Lotan v. Cross* (1810), 2 Camp. 465.

(*t*) *Ibid.*

(*u*) *Ramsay v. Margrett*, [1894] 2 Q. B. 18, C. A.

(*w*) *Thomas v. Philips* (1836), 7 C. & P. 573. As to election generally, see, further, title EQUITY, Vol. XIII., pp. 116 *et seq.*

(*x*) *Higgins v. Thomas* (1846), 8 Q. B. 908; *Mayhew v. Herrick* (1849), 7 C. B. 229. As to sale by one co-owner, see *ibid.* As to co-ownership of personal property generally, see title PERSONAL PROPERTY, Vol. XXII., pp. 403, 404.

(*a*) *Ward v. Macauley* (1791), 4 Term Rep. 489. As to the remedies of the owner of goods let on hire, see *Dean v. Whittaker* (1824), 1 C. & P. 347; and title TROVER AND DETINUE, p. 906, *post*.

(*b*) *Lotan v. Cross*, *supra*; see *Wooderman v. Baldock* (1819), 8 Taunt. 676. A person does not lose his possession of goods by mixing them with those of another provided that they can still be distinguished (*Cohwill v. Reeves* (1811), 2 Camp. 575); see titles BAILMENT, Vol. I., p. 542; PERSONAL PROPERTY, Vol. XXII., p. 401.

(*c*) As to the rights of the different classes of bailees generally, see title BAILMENT, Vol. I., pp. 523 *et seq.*

(*d*) *Ward v. Macauley*, *supra*. The bailor may, it seems, sue for the damage to his reversion, if any, but it is not an action of trespass.

(*e*) Co. Litt. 57 a; *Salop (Countess) v. Crompton* (1600), Cro. Eliz. 777, 784.

sue a wrongdoer in trespass (*f*); thus, where goods are in the custody of a carrier, either the carrier or the owner of the goods may sue for a trespass committed in respect of them (*g*).

A shopkeeper may sue for a trespass to goods sent to him on sale or return (*h*).

The master of a ship has sufficient possession to enable him to sue for a trespass to goods on board the ship (*i*). The charterer of a ship, however, has not possession of the ship, unless the terms of the charterparty are such as to give him the possession (*k*).

An auctioneer who is entrusted with goods to sell, whether in a public auction room or on the premises of the owner of the goods, has sufficient possession of the goods to enable him to sue in trespass (*l*).

1527. A mortgagee of a chattel may not sue in trespass, unless he is in possession or has a right to immediate possession (*m*). If a mortgagee of a chattel seizes the mortgaged chattel when he has no right to seize it, he may be sued in trespass by the mortgagor (*n*). If a third person commits a trespass to a mortgaged chattel at a time when the mortgagee has no right to seize, the mortgagor is the proper plaintiff (*o*).

1528. If premises are demised to a tenant, the tenant may maintain trespass against a wrongdoer who severs and carries away fixtures attached to the freehold (*p*); but if timber is cut down, the right to the possession of the timber vests at once in the reversioner, and he alone can sue a wrongdoer who carries the timber away (*q*).

1529. The property in a tombstone erected in a churchyard or cemetery remains in the person who erected it, and the person in

SECT. 2.
Nature of
Right of
Possession
Infringed.

Goods on sale
or return.
Ship-master.

Auctioneer.

Mortgagor
and
mortgagee.

Tenant.

Tombstone.

(*f*) *The Winkfield*, [1902] P. 42, C. A.; *Nicolls v. Bastard* (1835), 2 Cr. M. & R. 659; *Rooth v. Wilson* (1817), 1 B. & Ald. 59; Com. Dig., tit. Trespass (B. 4); 2 Roll. Abr. 569.

(*g*) *Ward v. Macauley* (1791), 4 Term Rep. 489, 490; see title CARRIERS, Vol. IV., p. 92.

(*h*) *Colwill v. Reeves* (1811), 2 Camp. 575.

(*i*) *Moore v. Robinson* (1831), 2 B. & Ad. 817. As to the rights of a master over cargo generally, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 224 *et seq.*

(*k*) *Dean v. Hogg* (1834), 10 Bing. 345; see, further, title SHIPPING AND NAVIGATION, Vol. XXVI., p. 85.

(*l*) *Williams v. Millington* (1788), 1 Hy. Bl. 81. But an auctioneer who is entrusted with the sale of fixtures attached to the freehold, the purchaser being bound to detach and remove them, has not such possession as will enable him to bring trespass for their removal (*Davis v. Danks* (1849), 3 Exch. 435). As to the rights of an auctioneer generally, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 520 *et seq.*

(*m*) *Brierly v. Kendall* (1852), 17 Q. B. 937; *White v. Morris* (1852), 11 C. B. 1015; *Wheeler v. Montefiore* (1841), 2 Q. B. 133; *Massey v. Sladen* (1868), L. R. 4 Exch. 13; *Toms v. Wilson* (1862), 4 B. & S. 442.

(*n*) *Brierly v. Kendall*, *supra*; see title BILLS OF SALE, Vol. III., p. 67.

(*o*) *Brierly v. Kendall*, *supra*; *Toms v. Wilson*, *supra*.

(*p*) *Boydell v. M'Michael* (1834), 1 Cr. M. & R. 177, 179.

(*q*) *Evans v. Evans* (1810), 2 Camp. 491; *Boydell v. M'Michael*, *supra*. This is so even if there is no express reservation to the landlord of the timber (*Ward v. Andrews* (1772), 2 Chit. 636).

SECT. 2.
Nature of
Right of
Possession
Infringed.
—
Entry under
unenforceable
contract.

whom such property is vested may maintain trespass against a person who wrongfully removes and defaces the tombstone (*r*).

1530. A person who enters on land under a contract which is unenforceable by action because of s. 4 of the Statute of Frauds (*s*), and who places his goods on the land, may justify his possession on the ground that the contract gave him a licence to enter, and may, if his goods on the land are seized, sue the wrongdoer in trespass (*t*).

SECT. 3.—Remedies.

Resistance.

1531. If one person wrongfully seizes the goods of another, the owner may resist the seizure and may use such force as is reasonably necessary; if the goods are wrongfully removed or are in the wrongful possession of someone else, the owner may retake them and may use force if necessary, and may enter on the land of the wrongdoer for the purpose of recovering the goods (*a*).

Retaking.

Damages.

1532. In an action of trespass to goods the plaintiff is entitled to recover damages for the wrong committed by the defendant and for loss sustained by the plaintiff in consequence of the wrong (*b*). The plaintiff need not, however, prove actual damage, except perhaps in the case of a trespass committed in respect of an animal (*c*).

If special damage is claimed but not proved, the plaintiff may recover general damage (*d*).

(*r*) *Spooner v. Brewster* (1825), 3 Bing. 136; see *Ashby v. Harris* (1868), L. R. 3 C. P. 523, 530. So the owner of a pew may maintain trespass against a wrongdoer for breaking it (*Dawtrie v. Dee* (1620), 2 Roll. Rep. 139); compare p. 850, *ante*. As to the rights of the incumbent and churchwardens of the parish in connexion with tombstones, see title ECCLESIASTICAL LAW, Vol. XI., pp. 541, 542.

(*s*) 29 Car. 2, c. 3; see title CONTRACT, Vol. VII., p. 361.

(*t*) *Crosby v. Wadsworth* (1805), 6 East, 602; see *Maddison v. Alderson* (1883), 8 App. Cas. 467, 474; *contra*, *Carrington v. Roots* (1837), 2 M. & W. 248, disapproved in *Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A. As to the determination of the licence in such a case, see *Crosby v. Wadsworth*, *supra*; and p. 860, *ante*.

(*a*) *Blades v. Higgs* (1861), 10 C. B. (N. S.) 713; see *Webb v. Beavan* (1844), 6 Man. & G. 1055; 3 Bl. Com. 4; compare title DISTRESS, Vol. XI., p. 209. As to seizure under a bill of sale, see title BILLS OF SALE, Vol. III., p. 68. The property in current coin and in negotiable securities passes to a *bonâ fide* holder, and the original owner has no right to retake them; see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 461. Stolen goods which have been sold in market overt become the property of the buyer, but this property, except in the case of coin and negotiable securities, may be divested by the conviction of the thief; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 686. As to cases under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, where an innocent purchaser for value obtains a title to goods, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 686, note (*m*).

(*b*) *Walker v. Sheerman* (1862), 3 F. & F. 259; see title DAMAGES, Vol. X., pp. 325, 342; and p. 858, *ante*.

(*c*) *Slater v. Swann* (1730), 2 Stra. 872. As to damages for injury to goods, see *No. 7 Steam Sand Pump Dredger (Owners) v. S.S. "Greta Holme" (Owners)*, *The "Greta Holme,"* [1897] A. C. 596; *Steamship "Mediana" (Owners) v. Lightship "Comet" (Owners, Master and Crew)*, *The "Mediana,"* [1900] A. C. 113.

(*d*) *Doss v. Doss* (1866), 14 L. T. 646, P. C. As to special and general damage, see title DAMAGES, Vol. X., pp. 303, 304.

If a person with a limited interest in goods sues a stranger for trespass to the goods, he may recover the full value of the goods if they are destroyed, but what he recovers above the value of his own interest he recovers in trust for the owner of the goods (*e*).

SECT. 3.
Remedies.

If a mortgagor recovers judgment in trespass against the mortgagee for a premature entry, the measure of damages is the value of the mortgagor's interest (*f*).

A judgment in trespass obtained by a bailor of goods is a bar to an action by the bailee, and *vice versa* (*g*).

Effect of judgment.

If a wrongdoer seizes and sells a chattel, the person in possession may waive the tort and sue for money had and received (*h*).

Waiver of tort.

1533. The plaintiff in an action of trespass may in a proper case, in addition to or substitution for damages, obtain an injunction to prevent the continuance or repetition of the wrongful act, or a declaration that the defendant was a trespasser in committing the act complained of (*i*).

Injunction and declaration.

SECT. 4.—Defences.

1534. In an action of trespass to goods the defendant may plead that the goods belong to him, or may deny that they are the

Claim of right.

(*e*) *The Winkfield*, [1902] P. 42, C. A. As to the measure of damages for an unlawful removal of goods, see *Walker v. Sheerman* (1862), 3 F. & F. 259; *Page v. Ratcliff* (1832), 1 L. J. (C. P.) 57. As to the measure of damages for an unlawful seizure under colour of legal process, see *Keene v. Dilke* (1849), 4 Exch. 388; *Holloway v. Turner* (1845), 6 Q. B. 928; *Loton v. Devereux* (1832), 3 B. & Ad. 343; *Walker v. Olding* (1862), 1 H. & C. 621; *Pickering v. Truste* (1796), 7 Term Rep. 53; *Doss v. Doss* (1866), 14 L. T. 646, P. C. As to the measure of damages for the destruction of a picture which is a scandalous libel, see *Du Bost v. Beresford* (1810), 2 Camp. 511. As to damages for a trespass by or in respect of cattle, see *Anderson v. Buckton* (1719), 1 Stra. 192; *Thompson v. Berry* (1723), 1 Stra. 551. As to the measure of damages generally, see title DAMAGES, Vol. X., pp. 331 *et seq.* There is no set-off allowed in actions of trespass (*Hawkins v. Baynes* (1823), 1 L. J. (O. S.) (K. B.) 167; *Gillard v. Brittan* (1841), 8 M. & W. 575). In an action of trespass for the retaking of goods from a buyer who has bought them on credit and has not paid for them, evidence of the debt cannot be given in mitigation of damages (*Hawkins v. Baynes*, *supra*; *Gillard v. Brittan*, *supra*); but now the defendant in such an action might counterclaim for the debt (R. S. C., Ord. 19, r. 3). As to a plea in such an action of payment after action brought, see *Rundle v. Little* (1844), 6 Q. B. 174. As to set-off and counterclaim generally, see title SET-OFF AND COUNTERCLAIM, Vol. XXV., pp. 481 *et seq.* As to staying proceedings in an action of trespass on the defendant undertaking to restore the goods or pay their value and to pay the costs of the action, see *Pickering v. Truste*, *supra*; *Knott v. Barker* (1797), 3 Anst. 896. A person against whose goods a trespass has been committed may recover damages in an action of replevin, and the recovery of damages in such an action is a bar to an action for trespass to goods (*Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454); as to an action of replevin, see title DISTRESS, Vol. XI., pp. 199 *et seq.* As to the right of an owner of goods to take possession of them, see p. 868, *ante*.

(*f*) *Brierly v. Kendall* (1852), 17 Q. B. 937.

(*g*) *The Winkfield*, *supra*; see title BAILMENT, Vol. I., p. 563.

(*h*) *Oughton v. Seppings* (1830), 1 B. & Ad. 241.

(*i*) See p. 859, *ante*. As the action of trespass is based on possession and not on property (see pp. 865, 866, *ante*), the judgment in the action does not affect the property in the goods.

SECT. 4.
Defences.

Jus tertii.

property or in the possession of the plaintiff (*k*), or that the defendant took the goods.

If a person in possession sues in trespass, the defendant cannot set up as a defence the right of a third person under whom he does not claim (*l*); but if the plaintiff relies on a mere right of property, the defendant may set up the right of such third person (*m*).

Ignorance.

It is no defence to an action of trespass that the defendant took the plaintiff's goods in ignorance that they were the plaintiff's, or in the *bonâ fide* belief that they belonged to a third person; in this case it is immaterial that the plaintiff's goods are mixed with those of a third person, provided that they can be distinguished and identified (*n*).

Self-defence.

1535. An act which otherwise would be a trespass may be justified on the ground that it was reasonably necessary for the defence of the person of the defendant or of the person of someone whom the defendant is bound to or may protect, or for the defence of the property of the defendant or other person whose property the defendant may protect (*o*).

Leave and licence.

1536. In an action for trespass to goods the defendant may also plead as a defence that the act complained of was done by the leave and licence of the plaintiff (*p*), or in the exercise of a legal right (*q*), or in the execution of legal process (*r*), or in the levying

(*k*) *Ashby v. Minnitt* (1838), 8 Ad. & El. 121; *Blades v. Higgs* (1861), 10 C. B. (N. S.) 713; *Webb v. Beavan* (1844), 6 Man. & G. 1055.

(*l*) *Haggan v. Pasley* (1878), 2 L. R. Ir. 573; *Carter v. Johnson* (1839), 2 Mood. & R. 263; *Nelson v. Cherrill* (1832), 8 Bing. 316; *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802.

(*m*) *Gadsden v. Barrow* (1854), 9 Exch. 514; *Leake v. Loveday* (1842), 4 Man. & G. 972; *Richards v. Jenkins* (1887), 18 Q. B. D. 451, C. A.

(*n*) *Colwill v. Reeves* (1811), 2 Camp. 575; see *Wyatt v. White* (1860), 5 H. & N. 371.

(*o*) 3 Bl. Com. 4; *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C., 11th ed., p. 454; *Cope v. Sharpe*, [1912] 1 K. B. 496, C. A.; compare p. 862, *ante*. A person may justify an act on the ground that it was reasonably necessary for the defence or protection of the property of someone else; see *Kirk v. Gregory* (1876), 1 Ex. D. 55. As to the killing of dogs etc. in defence of property, see title ANIMALS, Vol. I., p. 395.

(*p*) See p. 860, *ante*; *Kavanagh v. Gudge* (1844), 7 Man. & G. 316. As to the revocation of a licence, see *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400. This defence should be specially pleaded (R. S. C., Ord. 19, r. 15; but see *Christopherson v. Bare* (1848), 11 Q. B. 473).

(*q*) As, for instance, under statutory authority (*De Gondouin v. Lewis* (1839), 10 Ad. & El. 117; *Jacobsohn v. Blake* (1844), 6 Man. & G. 919; title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 312), or for the purpose of enforcing a private right, such as a right of lien (*Richards v. Symons* (1845), 8 Q. B. 90), or the right of the grantee of a liberty to seize wreck (*Dunwich Corporation v. Sterry* (1831), 1 B. & Ad. 831, 845), or the right of an occupier of land to remove an obstruction (*Slater v. Swann* (1730), 2 Stra. 872); see note (*u*), p. 871, *post*. This defence must be specially pleaded. As to an act of state as a defence, see *Buron v. Denman* (1848), 2 Exch. 167; and title CONSTITUTIONAL LAW, Vol. VI., p. 415, Vol. VII., p. 66.

(*r*) See title EXECUTION, Vol. XIV., p. 1. As to seizure of goods under a writ of extent, see *Pidgeon v. Mellor* (1912), 28 T. L. R. 261. As to

of a distress (*s*), or was an involuntary and accidental trespass (*t*), or was caused by the plaintiff's own wrongful act or default (*u*), or that the cause of action did not arise within six years of the commencement of the action (*w*).

SECT. 4.
Defences.
Statute of
Limitations.

Part IV.—Trespass to the Person.

SECT. 1.—*In General.*

1537. Trespass to the person is a wrong committed against the personal security or personal liberty of one man by another (*x*). There are three varieties of trespass to the person (*a*), namely, assault (*b*), assault and battery (*c*), and wrongful imprisonment (*d*).

Classification.

The act complained of must be either intentional or negligent (*e*),

seizure of goods under a magistrate's warrant, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; MAGISTRATES, Vol. XIX., p. 604. This defence must be specially pleaded; see p. 862, *ante*.

(*s*) See title DISTRESS, Vol. XI., p. 117; *Trent v. Hunt* (1853), 9 Exch. 14; *Phillips v. Whitted* (1860), 2 E. & E. 804. This defence must be specially pleaded; see p. 862, note (*d*), *ante*. As to distress of animals damage feasant, see p. 857, *ante*; title ANIMALS, Vol. I., pp. 378 *et seq.* As to a person who distrains animals damage feasant becoming a trespasser *ab initio* by committing a tortious act, see *Dye v. Leatherdale* (1769), 3 Wils. 20; *Oxley v. Watts* (1785), 1 Term Rep. 12.

(*t*) *Wakeman v. Robinson* (1823), 1 Bing. 213; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; compare *Wyatt v. White* (1860), 5 H. & N. 371; and p. 862, *ante*. This defence need not, it seems, be specially pleaded; see p. 862, note (*e*), *ante*.

(*u*) *Knapp v. Salisbury* (1810), 2 Camp. 500; *Hall v. Fearnley* (1842), 3 Q. B. 919. This defence should be specially pleaded; see p. 862, *ante*. If a chattel is unlawfully on someone else's land, the person in possession of the land may remove the chattel to some place within reasonable distance (*Rea v. Sheward* (1837), 2 M. & W. 424; *Drewell v. Towler* (1832), 3 B. & Ad. 735; *Pratt v. Pratt* (1848), 2 Exch. 413; *Holding v. Pigott* (1831), 7 Bing. 465; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Melling v. Leak* (1855), 16 C. B. 652). If cattle trespass on a person's land, he may drive them out and is not obliged to distrain them (*Tyrringham's Case* (1584), 4 Co. Rep. 36 b); and he may, it seems, drive them on to a highway, except where the cattle have trespassed owing to his own default in repairing hedges which he was bound to repair; in such a case he must drive them back on to the land from which they came (*Carruthers v. Hollis* (1838), 8 Ad. & El. 113).

(*w*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 37. As to special periods of limitation in particular cases, see *ibid.*, p. 176. This defence must be specially pleaded (*ibid.*, p. 183). As to tender of amends, see p. 863, *ante*.

(*x*) As to the criminal law relating to offences against the person, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 570 *et seq.*

(*a*) 3 Bl. Com. 120, 127. As to the liability of one person for a trespass committed by another, see *Dyer v. Munday*, [1895] 1 Q. B. 742, C. A., and the cases cited on p. 846, *ante*.

(*b*) See p. 873, *post*.

(*c*) See *ibid.*

(*d*) See p. 878, *post*.

(*e*) *Stanley v. Powell*, [1891] 1 Q. B. 86; *Holmes v. Mather* (1875), L. R. 10 Exch. 261; *Alderson v. Waistell* (1844), 1 Car. & Kir. 358; *Gibbons v. Pepper* (1795), 1 Ld. Raym. 38. But if A., intending to strike B., strikes C. by mistake, the injury to C. is regarded in law as intentional and A. is liable (*James v. Campbell* (1832), 5 C. & P. 372). As to the liability of a person who keeps a dangerous animal for injuries caused by

SECT. 1.
In General.

Trespass to
wife or
servant.

and must be done against the will of the person who sues for the wrong (*f*).

1538. A husband or master may maintain an action for a trespass to the person of his wife or servant, if the husband or master suffers damages caused by such trespass (*g*).

Trespass
committed
abroad.

1539. An action may be maintained in England for a trespass to the person committed abroad, provided that the act would be actionable if it had been committed in England and is not justifiable by the law of the country where the trespass was committed (*h*).

Civil and
criminal
proceedings.

1540. Trespass to the person is an actionable wrong, and is also punishable criminally either on summary proceedings or by indictment (*i*). In the case of summary proceedings for an assault, if the charge is dismissed on the merits and a certificate of such dismissal is given by the justices, or if the defendant is convicted and undergoes the punishment awarded, no subsequent proceedings, civil or criminal, in respect of the assault can be taken by the complainant (*j*). Except in the case of summary proceedings, a conviction or an acquittal on a charge involving trespass to the person is not a bar to an action (*k*).

such an animal, see *Lowery v. Walker*, [1911] A. C. 10; titles ANIMALS, Vol. I., pp. 372 *et seq.*; NEGLIGENCE, Vol. XXI., pp. 405, 406; *Clinton v. Lyons (J.) & Co., Ltd.*, [1912] 3 K. B. 198; *White v. Steadman* (1913), 29 T. L. R. 563; and compare *Bradley v. Wallaces, Ltd.* (1913), 82 L. J. (K. B.) 1074, C. A.

(*f*) *Christopherson v. Bare* (1848), 11 Q. B. 473; *Hegarty v. Shine* (1878), 4 L. R. Ir. 288, C. A. (communication of venereal disease); *Latter v. Braddell* (1881), 44 L. T. 369, C. A.; *Willis v. MacLachlan* (1876), 1 Ex. D. 376, 382, note (3); see *R. v. Coney* (1882), 8 Q. B. D. 534, 539, C. C. R.; and p. 874, *post*. As to the effect of consent obtained by fraud, see *Hegarty v. Shine, supra*, and by force or apprehension of violence, *Latter v. Braddell, supra*. In the case of an action by a master for a trespass to his servant whereby the master lost the services of the servant, the consent of the servant to the unlawful act is, it seems, no defence; see *Tullidge v. Wade* (1769), 3 Wils. 18; title MASTER AND SERVANT, Vol. XX., p. 271. As to consent in an action for assault, see p. 874, *post*.

(*g*) *Ball v. Axten* (1866), 4 F. & F. 1019; *Cole v. Turner* (1704), 6 Mod. Rep. 149; see titles HUSBAND AND WIFE, Vol. XVI., pp. 318, 319; MASTER AND SERVANT, Vol. XX., pp. 270 *et seq.*, 275 *et seq.* As to the right of a husband or wife to sue the other for a trespass committed during coverture, see title HUSBAND AND WIFE, Vol. XVI., p. 460; but compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 611, and the cases cited *ibid.*, note (*g*).

(*h*) *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; 1 Smith, L. C., 11th ed., p. 591; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.; *Scott v. Seymour (Lord)* (1862), 1 H. & C. 219; *Carr v. Francis Times & Co.*, [1902] A. C. 176; *Machado v. Fontes*, [1897] 2 Q. B. 231, C. A.

(*i*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 606.

(*j*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 45; see *Reed v. Nutt* (1890), 24 Q. B. D. 669; *R. v. Miles* (1890), 24 Q. B. D. 423, C. C. R.; *Masper v. Brown* (1876), 1 C. P. D. 97; *Lowe v. Horwarth* (1865), 13 L. T. 297; *Hancock v. Somes* (1859), 1 E. & E. 795; *Costar v. Hetherington* (1859), 1 E. & E. 802. A conviction or dismissal of a charge for assault on B., the wife of A., before a court of summary jurisdiction is a bar to an action by A. and B. for the assault on B. (*Masper v. Brown, supra*); but a conviction or dismissal of a servant upon a charge of assault is no bar to an action against the master (*Dyer v. Munday*, [1895] 1 Q. B. 742, C. A.).

(*k*) The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 45, applies only to summary proceedings.

SECT. 2.—*Assault and Assault and Battery.*SUB-SECT. 1.—*In General.*

SECT. 2.
Assault and
Assault and
Battery.
Assault.

1541. A mere assault is an attempt or offer by force or violence to do a bodily hurt or outrage to another (*l*). To constitute an assault there must be a threat by an outward act of violence exhibiting an intention to do a bodily injury or outrage, and there must be a present ability to carry the threat into execution (*m*).

Thus, it is an assault for one person within striking distance unlawfully to advance to another in a threatening attitude with the fist clenched and with the intention of striking him immediately (*n*); or to point or brandish a weapon at another with the intention of using it (*o*); or to present a loaded firearm at another with the intention of shooting (*p*); or to ride after another in a threatening manner so as to compel him to run for shelter to avoid being beaten (*q*).

A battery is an unlawful act of violence committed by one person beating or touching another (*r*). Battery.

(*l*) Buller, Law of Nisi Prius, 15; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 608 *et seq.* As to indecent assaults, see *ibid.*, pp. 616, 619.

(*m*) *Read v. Coker* (1853), 13 C. B. 850. It is not an assault for one person merely passively to obstruct the movements of another, as by barring his entrance into a room (*Innes v. Wylie* (1844), 1 Car. & Kir. 257; see *Bird v. Jones* (1845), 7 Q. B. 742). A threat to do hurt contained in words only cannot be an assault (Buller, Law of Nisi Prius, 15). As to threatening to murder, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 596.

(*n*) *Stephens v. Myers* (1830), 4 C. & P. 349. If the offer of violence is such that the threatened blow would almost immediately have reached the person threatened, if the assailant had not been stopped, it is an assault, although at the time the assailant was not near enough to have struck the other person (*ibid.*).

(*o*) *Genner v. Sparks* (1704), 1 Salk. 79.

(*p*) Buller, Law of Nisi Prius, 15; *Osborn v. Veitch* (1858), 1 F. & F. 317 (threat to shoot a person coupled with the act of presenting a loaded firearm is an assault, although the firearm is at half-cock); *Blake v. Barnard* (1840), 9 C. & P. 626 (not an assault, if the firearm is unloaded, or if the person presenting shows that it is not his intention to shoot the other).

(*q*) *Martin v. Shoppee* (1828), 3 C. & P. 374.

(*r*) The least touching of another in anger is a battery (*Cole v. Turner* (1704), 6 Mod. Rep. 149); it is not a battery for one person to touch another without any violence or design of harm (*ibid.*; *Coward v. Baddeley* (1859), 4 H. & N. 478; *Williams v. Jones* (1736), Lee temp. Hard. 298, 301). Any unlawful act of personal violence is a battery whether done by blows or direct contact, or by anything thrown from a distance; see *Forde v. Skinner* (1830), 4 C. & P. 239 (parish officers cutting off the hair of a pauper without her consent); *Agnew v. Jobson* (1877), 13 Cox. C. C. 625 (examination of the person of a female prisoner by a doctor without her consent); *Desborough v. Homes* (1857), 1 F. & F. 6 (unlawful sexual intercourse accompanied by some degree of violence); *Pursell v. Horne* (1838), 8 Ad. & El. 602 (throwing water upon a person); *Collins v. Renison* (1754), Say. 138 (overturning a ladder on which a defendant is standing and causing him to fall); *Hopper v. Reeve* (1817), 7 Taunt. 698 (injuring the person of another by driving a carriage against another carriage in which he is sitting). As to forcible feeding of a prisoner refusing to eat, see *Leigh v. Gladstone* (1909), 26 T. L. R. 139. If A. throws a squib at B., and B. to protect his person or property throws the squib from him and the squib strikes C., this is a trespass by A. to the person of C. (*Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C. 11th ed., p. 454). The act

SECT. 2.

Assault and
Assault and
Battery.

An unlawful blow which is struck in anger or which is likely or is intended to do bodily hurt is actionable, but a blow struck in sport and not likely nor intended to cause bodily harm is not actionable; thus, playing with single-sticks or boxing with gloves in the ordinary way does not involve an assault; but a blow struck in a prize-fight or in a fight with gloves with ferocity and severe punishment to the boxers is an assault; in the case of such a fight the consent of the person struck is immaterial (s). To perform a surgical operation on a person against his will or against the will of the person entitled to give consent on behalf of the patient is an assault (t).

SUB-SECT. 2.—*Remedies.*

Resistance.

1542. A person who is assaulted may repel force by the use of force, and, if no more force is used than is reasonably necessary, he is not liable for the consequences (a).

Action.

1543. An action lies for an assault, and criminal proceedings may also be taken against the offender; the injured party may pursue both remedies except in cases where summary proceedings are taken (b).

Damages.

1544. In an action of assault the plaintiff is entitled to recover by way of general damages compensation for the indignity or suffering which the assault has caused; these damages are determined by the circumstances of time and place and the manner of the indignity (c). Special damages are recoverable if claimed in the statement of claim and if they are not too remote (d).

SUB-SECT. 3.—*Defences.*

Justification.

1545. A person who is sued for an assault or an assault and

of beating or striking a person is often called an assault, which term is not confined to a mere offer or threat of violence; see *Blunt v. Beaumont* (1835), 2 Cr. M. & R. 412; *R. v. Coney* (1882), 8 Q. B. D. 534, C. C. R. It has not been expressly decided that to infect a person wilfully with disease is actionable; but it seems to follow on principle; see *Hegarty v. Shine* (1878), 4 L. R. Ir. 288, C. A. where, in the circumstances, the maxim *ex turpi causâ non oritur actio* was held to apply; and compare *Hales v. Kerr*, [1908] 2 K. B. 601; *R. v. Clarence* (1888), 22 Q. B. D. 23, 52, C. C. R. As to the wilful exposure of persons suffering from infectious diseases, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 446 *et seq.*

(s) *R. v. Coney*, *supra*, per CAVE, J., at p. 539; *Matthew v. Ollerton* (1693), Comb. 218; *Boulter v. Clark* (1747), Buller, Law of Nisi Prius, 16; but see *R. v. Coney*, *supra*, per HAWKINS, J., at p. 553. Under the old system of pleading a plea of leave and licence in an action of assault was bad (*Christopherson v. Bare* (1848), 11 Q. B. 473); it would now probably be advisable to plead consent; see R. S. C., Ord. 19, rr. 4, 15; and title PLEADING, Vol. XXII., pp. 446 *et seq.*

(t) Pollock, Law of Torts, 9th ed., p. 163. In cases of necessity where an operation is necessary and the patient is unconscious and unable to consent, and no person entitled to consent on behalf of the patient is available, the operation is probably justifiable (*ibid.*, p. 172).

(a) See pp. 874, 875, *post*.

(b) See p. 872, *ante*.

(c) See title DAMAGES, Vol. X., pp. 302, 341.

(d) *Tullidge v. Wade* (1769), 3 Wils. 18; *Merest v. Harvey* (1814), 5 Taunt. 442, per HEATH, J., at p. 444. As to evidence in mitigation of

battery may justify the act on the ground that it was committed in the defence of his own person and that he used no more force than was reasonably necessary; such an act may also be justified by a husband in defence of his wife, by a father in defence of his child, by a master in defence of his servant, and *vice versâ* (e).

An assault committed by a man in defence of his property is justifiable, provided that no more force is used than is reasonably necessary (f).

1546. If a person is in possession of a house or land and someone else enters with force and violence, or behaves with force and violence on the land, the person in possession may resist and turn him out without requesting him to leave, and may use such force as is necessary (g).

If anyone enters or is on land peaceably but without right, the person in possession may request him to leave, and on his refusing to leave may turn him out and use such force as is reasonably necessary (h).

If a trespasser is in occupation of land without title, the rightful

damages, see *Fraser v. Berkeley* (1836), 7 C. & P. 621 (libel on defendant published by plaintiff). As to remoteness of damages, see title DAMAGES, Vol. X., pp. 318 *et seq.*

(e) 3 Bl. Com. 3; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 609. A mere assault without a battery is a sufficient justification for a battery (*Buller, Law of Nisi Prius*, 18; *R. v. Deana* (1909), 73 J. P. 255, C. C. A.). A justification to be a defence to the action must be specially pleaded (*R. S. C., Ord. 19, rr. 4, 15*; but see *Syers v. Chapman* (1857), 2 C. B. (N. S.) 438). If the plaintiff can justify the first assault, the justification should be replied specially (*R. v. Phippard* (1694), Carth. 280). The justification must be proved as pleaded sufficiently to cover the wrong complained of (*Gaylard v. Morris* (1849), 3 Exch. 695; *Phillips v. Howgate* (1821), 5 B. & Ald. 220; *Atkinson v. Warne* (1835), 1 Cr. M. & R. 827). A defendant in an action of false imprisonment may plead and prove a good cause of justification, though in fact he alleged and acted upon another at the time of the trespass (*Baillie v. Kell* (1838), 4 Bing. (N. C.) 638, 650). The right of a person to do an act depends upon the authority or excuse which he in fact had, not on that which he alleges at the time; see note (b), p. 859, *ante*.

(f) *Hayling v. Okey* (1853), 8 Exch. 531, Ex. Ch.; *Alderson v. Waistell* (1844), 1 Car. & Kir. 358; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 609. The defence must be specially pleaded and must cover every separate trespass (*R. S. C., Ord. 19, rr. 4, 15*; *Bush v. Parker* (1834), 1 Bing. (N. C.) 72; *Oakes v. Wood* (1837), 2 M. & W. 791; *Gregory v. Hill* (1799), 8 Term Rep. 299; *Phillips v. Howgate* (1821), 5 B. & Ald. 220; *Stammers v. Yearsley* (1833), 10 Bing. 35; *McCurday v. Driscoll* (1833), 1 Cr. & M. 618). As to using force in recovery of goods, see p. 876, *post*.

(g) *Polkinhorn v. Wright* (1845), 8 Q. B. 197; *Tulley v. Reed* (1823), 1 C. & P. 6; *Weaver v. Bush* (1798), 8 Term Rep. 78; *Johnson v. Northwood* (1817), 7 Taunt. 689; *Green v. Bartram* (1830), 4 C. & P. 308; *Shaw v. Chairtie* (1850), 3 Car. & Kir. 21; compare p. 857, *ante*. As to what is sufficient possession, see *Holmes v. Bagge* (1853), 1 E. & B. 782; *Thomas v. Marsh* (1833), 5 C. & P. 596; *Monks v. Dykes* (1839), 4 M. & W. 567; p. 852, *ante*.

(h) See pp. 856, 857, *ante*. As to calling in a police constable to turn the person out, see *Wheeler v. Whiting* (1840), 9 C. & P. 262; *Polkinhorn v. Wright, supra*; *Ballard v. Bond* (1837), 1 Jur. 7; *Ball v. Axten* (1866), 4 F. & F. 1019; see also *Bradlaugh v. Erskine* (1883), 47 L. T. 618. As to the right of the occupier of licensed premises to remove guests and others, see *Wheeler v. Whiting, supra*; title INNS AND INNKEEPERS, Vol. XVII., p. 308.

SECT. 2.

Assault and
Assault and
Battery.Defence of
property.Expulsion of
trespasser.

SECT. 2.
Assault and
Assault and
Battery.

Retaking
goods.

Lawful
correction.

Preservation
of peace.

Creating
disturbance.

owner may enter and turn him out by force, provided that he does no injury to the trespasser's person, goods, or family (*i*), but if any such injury is done an action lies in respect of it (*k*).

1547. The owner of goods which are wrongfully in the possession of another person who refuses to deliver them up on request may retake the goods by force, so long as he uses no more force than is reasonably necessary (*l*).

1548. An act which otherwise would be an assault may be justified, if it is done in the course of lawful correction or punishment, as in the case of a child by his parent, of an apprentice or scholar by his master, of a seaman by the master of his ship, of a soldier or sailor by the order of his superior officers, or of a convicted criminal according to law (*m*).

1549. An act which would otherwise be an assault may be justified on the ground that it was necessary for the preservation of peace and order. A person who commits a breach of the peace or a felony or treason may be lawfully arrested (*n*). A person who disturbs public worship in a church or chapel (*o*), or who disturbs a public meeting (*p*) or a lawful game (*q*), may be lawfully removed, if he refuses to desist from his disturbance.

(*i*) *Scott v. Brown (Matthew) & Co., Ltd.* (1885), 51 L. T. 746; *Harvey v. Brydges* (1845), 14 M. & W. 437; see p. 857, *ante*.

(*k*) *Pollen v. Brewer* (1859), 7 C. B. (N. S.) 371.

(*l*) *Blades v. Higgs* (1861), 10 C. B. (N. S.) 713; affirmed without reference to this point (1865), 11 H. L. Cas. 621; *R. v. Milton* (1827), Mood. & M. 107; see p. 868, *ante*. The owner of the goods may justify an assault in such a case, but cannot justify the detention of the person (*Harvey v. Mayne* (1872), 6 I. R. C. L. 417). As to protection of goods in the possession of the owner, see p. 868, *ante*.

(*m*) *Newman v. Bennett* (1819), 2 Chit. 195 (music master and chorister); *Winterburn v. Brooks* (1846), 2 Car. & Kir. 16 (father and son); *Lamb v. Burnett* (1831), 1 Cr. & J. 291 (captain and sailor); *Agincourt* (1824), 1 Hag. Adm. 271; *Lowther Castle* (1825), 1 Hag. Adm. 384; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 608; EDUCATION, Vol. XII., p. 124; ROYAL FORCES, Vol. XXV., p. 16. As to the forcible feeding of a prisoner who refuses to eat, see *Leigh v. Gladstone* (1909), 26 T. L. R. 139.

(*n*) See p. 877, *post*. As to the power of any person except the King to arrest to prevent a breach of the peace or for felony or treason, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296, 297; as to the right of the police to call upon bystanders for assistance, see title POLICE, Vol. XXII., p. 499. As to the power of punishment for disturbing proceedings in a court of justice, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 307; *Garnett v. Ferrand* (1827), 6 B. & C. 611; *Willis v. MacLachlan* (1876), 1 Ex. D. 376.

(*o*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 469 *et seq.*, 663, 664.

(*p*) It is the duty of the chairman of a meeting, where a large body of people are gathered together, to preserve order, and of those who are acting as stewards or managers to assist him in preserving order, and if any persons present at such a meeting disturb the order of the meeting, the chairman may lawfully order them to be removed (*Lucas v. Manson* (1875), L. R. 10 Exch. 251, 254); but such annoyance and disturbance as crying "hear, hear" and putting questions to a speaker and making observations on his statements does not warrant the chairman in giving the person into custody (*Wooding v. Oxley* (1839), 9 C. & P. 1). A person

(*q*) For note (*q*) see p. 877, *post*.

1550. An assault committed in defence of person or property, or in the lawful punishment or arrest of another, is not justified if more force is used than is reasonably necessary. If more force is used than is reasonably necessary, the person who uses excessive force is liable for an assault (*r*).

A defendant in an action of assault is entitled to succeed if he pleads and proves that the action is barred by the lapse of time, that is, four years from the accrual of the cause of action (*s*).

SECT. 2.

Assault and
Assault and
Battery.

Use of force.
Statute of
Limitations.

who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together may be punished criminally (Public Meeting Act, 1908 (8 Edw. 7, c. 66)).

(*q*) *Holmes v. Bagge* (1853), 1 E. & B. 782.

(*r*) *Dean v. Taylor* (1855), 11 Exch. 68 (plaintiff struck the first blow, defendant used more violence than was reasonably necessary to defend himself; plaintiff entitled to damages); *Cockroft v. Smith* (1705), 11 Mod. Rep. 43 (defendant not justified in biting off the plaintiff's finger by the fact that plaintiff ran his finger in a scuffle towards the defendant's eyes); *Cook v. Beal* (1697), 1 Ld. Raym. 176 (if A. strike B., B. cannot justify drawing a sword and cutting off A.'s hand); *Williams v. Jones* (1736), Lee temp. Hard. 298, 301 (a man may not justify a battery by virtue of an arrest, unless the battery was necessary in consequence of the resistance of the person arrested, or by the defence of the person arresting); *Collins v. Renison* (1754), Say. 138 (defendant not justified in overturning a ladder on which the plaintiff was standing and in throwing him to the ground, although defendant was trespassing on the plaintiff's garden and went up the ladder in order to nail a board to the defendant's house and refused to leave when requested); *Moriarty v. Brooks* (1834), 6 C. & P. 684 (defendant not justified in wounding the plaintiff while turning him out of the defendant's house); *Simpson v. Morris* (1813), 4 Taunt. 821 (defendant not justified in throwing water over the plaintiff and his apartment in order to prevent him from obstructing the defendant's ancient light); *Imason v. Cope* (1831), 5 C. & P. 193 (defendant, one of the marshals of the city of London, engaged in keeping a passage clear to the carriages of the members of the corporation and others, not justified in striking the defendant, whom he directed to stand back, and who said that he could not because of those behind him). As to the use of force to execute a warrant, see *Burdett v. Colman* (1811), 14 East, 163. The owner of property may take reasonable measures to defend his property from trespassers (*Bird v. Holbrook* (1828), 4 Bing. 628 (defendant liable for injuries caused to a trespasser by a spring gun set by defendant without notice in a walled garden); *Ilott v. Wilkes* (1820), 3 B. & Ald. 304 (defendant not liable to an action by a trespasser who having knowledge that there are spring guns in a wood is injured by one of them); *Deane v. Clayton* (1817), 7 Taunt. 489, 518; *Jordin v. Crump* (1841), 8 M. & W. 782 (defendant not liable for injuries caused to a dog by dog spears planted in a wood, notice having been given); *Brock v. Copeland* (1794), 1 Esp. 203; but see now Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 31; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 605. If the defendant pleads a justification for an assault and the plaintiff relies on the fact that the defendant used more force than was reasonably necessary, the plaintiff ought to reply specially alleging the use of excessive force (*Dale v. Wood* (1822), 7 Moore (C. P.), 33; *Penn v. Ward* (1835), 2 Cr. M. & R. 338, explaining *Reece v. Taylor* (1835), 4 Nev. & M. (K. B.) 469, 470; *Rimmer v. Rimmer* (1867), 16 L. T. 238, not following *Dean v. Taylor* (1855), 11 Exch. 68; *Herd v. Weardale Steel, Coal and Coke Co.* (1913), 48 L. J. 391, C. A.); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 606, 607.

(*s*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 38. As to special periods of limitation, see *ibid.*, p. 176; title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 346 *et seq.*

SECT. 3.

False or
Illegal
Imprison-
ment.Restraint of
person.SECT. 3.—*False or Illegal Imprisonment.*SUB-SECT. 1.—*In General.*

1551. An action of false imprisonment lies at the suit of a person unlawfully imprisoned against the person who causes the imprisonment.

Any total restraint of the liberty of the person, for however short a time, is an imprisonment. To compel a person to remain in a given place or to go in a given direction against his will is an imprisonment. It is not necessary that the person should be touched, but force must be used or threatened or submitted to, and the restraint must be total. To obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not an imprisonment (*t*).

False
imprisonment
and malicious
prosecution.

The gist of the action of false imprisonment is the mere imprisonment (*u*); the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification (*w*).

Responsi-
bility of
defendant.

1552. The imprisonment for which the action of false imprisonment lies must be the direct act or the result of the order of the person sued or of someone for whose acts he is liable (*x*). No

(*t*) *Bird v. Jones* (1845), 7 Q. B. 742; *Innes v. Wylie* (1844), 1 Car. & Kir. 257; *Wright v. Wilson* (1699), 1 Ld. Raym. 739; *Rowe v. Hawkins* (1858), 1 F. & F. 91; *Robinson v. Balmain New Ferry Co., Ltd.*, [1910] A. C. 295, P. C. If A., with the intention of detaining B., locks the door of a room in which B. is, this is an imprisonment (*Williams v. Jones* (1736), Lee temp. Hard. 298, 300). To place a sentinel at the door of the plaintiff's house and prevent him from leaving the house is an imprisonment (*Glynn v. Houstoun* (1841), 2 Scott (N. R.), 548). Mere words cannot constitute an imprisonment. If C. gives D. in charge to a police officer, but the officer does not take D. into custody, there is no imprisonment (*Simpson v. Hill* (1795), 1 Esp. 431; see *Berry v. Adamson* (1827), 6 B. & C. 528; *George v. Radford* (1828), 3 C. & P. 464; *Bieten v. Burridge* (1811), 3 Camp. 139; *Horner v. Battyn* (1739), Buller, Law of Nisi Prius, 61). To constitute an imprisonment there must be a detention (*Whalley v. Pepper* (1836), 7 C. & P. 506; *Bristow v. Heywood* (1815), 1 Stark. 48). If a police officer tells the person charged that he must go with the officer, and the person charged submits and goes, this is an imprisonment, although there is no touching of the person (*Pocock v. Moore* (1825), Ry. & M. 321; *Chinn v. Morris* (1826), 2 C. & P. 361; *Horner v. Battyn*, *supra*; see *Wood v. Lane* (1834), 6 C. & P. 774; *Grainger v. Hill* (1838), 4 Bing. (N. C.), 212). If a person charged goes voluntarily with a police officer to the police station without being taken in charge or told that he must come, this is no imprisonment (*Cant v. Parsons* (1834), 6 C. & P. 504; *Arrowsmith v. Le Mesurier* (1806), 2 Bos. & P. (N. R.) 211; *Peters v. Stanway* (1835), 6 C. & P. 737). If a person who is charged with an offence is bailed and not committed to prison, the fact that he is in the custody of his bail and may be arrested at any time by his bail (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 323) does not constitute an imprisonment for which an action will lie (*Syed Mahamad Yusuf-ud-Din v. Secretary of State for India in Council* (1903), 19 T. L. R. 496, P. C.).

(*u*) *Brandt v. Craddock* (1858), 27 L. J. (EX.) 314.

(*w*) *Holroyd v. Doncaster* (1826), 3 Bing. 492. In an action of malicious prosecution, the burden lies on the plaintiff to prove malice and absence of reasonable and probable cause; see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 683.

(*x*) A master is liable for a false imprisonment which is the act of his

action lies against a person who takes proceedings before a magistrate or judge in respect of an imprisonment which is caused by the orders of the magistrate or judge; the remedy of the person imprisoned in such a case, if any, is an action for malicious prosecution against the person who institutes the proceedings (*a*).

SECT. 3.
False or
Illegal
Imprison-
ment.

1553. A private person is liable if he himself unlawfully detains another, or if he gives another in charge to a police officer who thereupon arrests the other, or if he causes a police officer to arrest or detain the other, or if he participates in the arrest or detention (*b*).

Arrest by
private
person.

A private person, however, has at common law the power to arrest in cases where treason or felony has been actually committed and there is reasonable and probable cause of suspecting the person arrested, or where there is immediate danger of treason or felony being committed, or where a breach of the peace has been actually

servant, if such act is within the scope of the servant's employment; see *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270, P. C.; *King v. Metropolitan District Rail. Co.* (1908), 72 J. P. 294; and the cases cited in title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 674, note (*e*); and see title MASTER AND SERVANT, Vol. XX., p. 256. As to the liability of a husband for a false imprisonment which is the act of his wife, see title HUSBAND AND WIFE, Vol. XVI., p. 436. As to evidence showing the responsibility of a superior for an arrest by a subordinate, see *Glynn v. Houstoun* (1841), 2 Scott (N. R.), 548.

(*a*) *Austin v. Dowling* (1870), L. R. 5 C. P. 534; *Barber v. Rollinson* (1853), 1 Cr. & M. 330; *Lock v. Ashton* (1848), 12 Q. B. 871; *Brown v. Chapman* (1848), 6 C. B. 365; *West v. Smallwood* (1838), 3 M. & W. 418; *Saunders v. Swansea Finance Co.* (1905), 21 T. L. R. 317, C. A.; *Lambert v. Great Eastern Railway*, [1909] 2 K. B. 776, C. A.; *Edwards v. Midland Rail. Co.* (1880), 6 Q. B. D. 287, not following *Stevens v. Midland Counties Rail. Co.* (1854), 10 Exch. 352; *Goff v. Great Northern Rail. Co.* (1861), 3 E. & E. 672; see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 671. An action of false imprisonment does not lie against the person originating the charge in respect of a lawful remand which is the act of the magistrate (*Lock v. Ashton*, *supra*; *Brown v. Chapman*, *supra*). A magistrate, however, who remands a person charged for an unreasonable time is liable to an action of false imprisonment (*Davis v. Capper* (1829), 10 B. & C. 28).

(*b*) *Warner v. Riddiford* (1858), 4 C. B. (N. S.) 180; *Peters v. Stanway* (1835), 6 C. & P. 737; *Boyce v. Douglass* (1807), 1 Camp. 59; heard after *Boyce v. Bayliffe* (1807), 1 Camp. 58, 60. The mere giving of information to a police officer, although it may lead to an arrest, does not make the giver of the information liable for the imprisonment (*Gosden v. Elphick* (1849), 4 Exch. 445, dissenting from *Flewster v. Royle* (1808), 1 Camp. 187; *Danby v. Beardsley* (1880), 43 L. T. 603). The mere signing of the charge-sheet at the police station is not evidence sufficient to support an action of false imprisonment against the person who signs (*Sewell v. National Telephone Co., Ltd.*, [1907] 1 K. B. 557, C. A.; *Grinham v. Willey* (1850), 4 H. & N. 496; but see *Harris v. Dignum* (1859), 29 L. J. (EX.) 23); but if a police officer states to a person that he will not detain the accused unless the other person makes a distinct charge and signs the charge-sheet, and if the other person thereupon signs the charge-sheet and the accused is detained, this is evidence of an imprisonment by the person who signs (*Austin v. Dowling*, *supra*). If a person who is lawfully arrested is detained for an unreasonable time without being taken before a justice, the person responsible for the arrest is liable to an action of false imprisonment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 306. As to imprisonment by a foreign Government or its officer at the instance of the defendant, see *Rafael v. Verelst* (1776), 2 Wm. Bl. 1055; *Aitken v. Bedwell* (1827), Mood. & M. 68.

SECT. 3.
False or
Illegal
Imprison-
ment.

Arrest by
police
constable.

committed or is apprehended (*c*), and he has also certain powers of arrest by statute (*d*). When, therefore, he may justify the detention on one or other of these grounds no action of false imprisonment lies against him (*e*).

1554. A police constable may by common law arrest without warrant any person in those cases where a private person may lawfully arrest by common law without a warrant (*f*). He may also within his district arrest without warrant on reasonable suspicion of felony, whether a felony has or has not been committed (*g*). Under various statutes he has powers to arrest without a warrant in certain cases (*h*). He is bound on a reasonable charge of felony being made to him by a private person against a supposed offender to take the latter into custody (*i*), and is justified in receiving into custody from a private person a supposed offender whom the private person has lawfully arrested (*k*).

A police constable who unlawfully arrests or detains another person without a warrant is liable to an action for false imprisonment (*l*). He is also liable, if he lawfully arrests another person and detains him for an unreasonable time without taking him before a magistrate (*m*).

(*c*) As to arrest without warrant, see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 296, 297, 323; *Ball v. Axten* (1866), 4 F. & F. 1019; *Williams v. Glenister* (1824), 2 B. & C. 699; *Jordan v. Gibbon* (1863), 8 L. T. 391; *Webster v. Watts* (1847), 11 Q. B. 311; *Hall v. Booth* (1834), 3 Nev. & M. (K. B.) 316.

(*d*) See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300; and compare title STREET AND AERIAL TRAFFIC, p. 277, *ante*.

(*e*) A justification for an imprisonment must be specially pleaded (R. S. C., Ord. 19, rr. 4, 15). As to the form of the defence, see *Allen v. Wright* (1838), 8 C. & P. 522; *Mure v. Kaye* (1851), 4 Taunt. 34; *Stammers v. Yearsley* (1833), 10 Bing. 35; *MCurday v. Driscoll* (1833), 1 Cr. & M. 618; *Haynes v. Mewis* (1826), 5 L. J. (O. S.) (K. B.) 47; *Titley v. Foxall* (1758), 2 Keny. 308. The justification pleaded may be different from that which the defendant alleged and acted upon at the time of the trespass (*Baillie v. Kell* (1838), 4 Bing. (N. C.) 638, 650). If the plaintiff in an action of false imprisonment has been tried and acquitted on a charge of felony, the defendant in the action is not precluded from proving that the plaintiff was actually guilty of the felony (*Cahill v. Fitzgibbon* (1885), 16 L. R. Ir. 371; see *Richards v. Turner* (1840), Car. & M. 414). The question of reasonable and probable cause for an arrest is one to be decided by the judge on the facts found by the jury (*Lister v. Perryman* (1870), L. R. 4 H. L. 521; *Hailes v. Marks* (1861), 7 H. & N. 56; *West v. Baxendale* (1850), 9 C. B. 141; *Musgrove v. Newell* (1836), 1 M. & W. 582); see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 680, 685. The arrest of a person under the age of seven for a felony cannot be justified; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 296.

(*f*) See p. 879, *ante*; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 296.

(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 298; *Creagh v. Gamble* (1888), 24 L. R. Ir. 458; *Cowles v. Dunbar* (1827), 2 C. & P. 565; *Hoye v. Bush* (1840), 1 Man. & G. 775.

(*h*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300; MAGISTRATES, Vol. XIX., p. 596, note (*j*).

(*i*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 299; *Cowles v. Dunbar* (1827), 2 C. & P. 565; *Hedges v. Chapman* (1825), 2 Bing. 523.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300. As to taking the offender before a justice, see *ibid.*, p. 306.

(*l*) See *ibid.*, p. 299.

(*m*) See *ibid.*, p. 306.

SECT. 3.
False or
Illegal
Imprison-
ment.

If a police constable or other officer is charged with the execution of a lawful warrant and executes it in a lawful manner, he can plead the warrant as a defence to an action of false imprisonment (*n*). He, however, is liable if in a case where he cannot arrest without a warrant he obtains a warrant but does not have it in his possession, when he arrests the person named in it (*o*), or if he arrests a person other than the one named in the warrant, even when the person arrested is the one intended to be named in the warrant (*p*).

A police constable acting in obedience to an illegal warrant and arresting the person named in it, is not liable to be sued for false imprisonment, unless demand in writing has been made by the plaintiff for perusal and a copy of the warrant and perusal and the copy have been refused or neglected for six days after demand (*q*).

1555. The keeper of a prison is protected in obeying a warrant of commitment valid on the face of it addressed to him, and is not liable to an action for false imprisonment if he detains a person in pursuance of the warrant (*r*). He is, however, liable if he detains a prisoner in custody without a sufficient warrant of commitment (*s*) or for a longer time than is lawful (*t*); or if he treats a prisoner as a criminal who ought not to be so treated (*a*); or if he removes a prisoner from one part of the prison to another part in which the prisoner ought not by law to be confined (*b*); or if he without lawful authority removes a prisoner in custody from the prison to another

Keeper of
prison.

(*n*) As to the issue of warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 307; *Leach v. Money* (1765), 19 State Tr. 1002; *Entick v. Carrington* (1765), 19 State Tr. 1029. As to a warrant issued by a Speaker of the House of Commons for a breach of the privileges of the House, see *Burdett v. Abbot* (1811), 14 East, 1; *Burdett v. Colman* (1811), 14 East, 163. As to the protection given by a warrant, see *Henderson v. Preston* (1888), 21 Q. B. D. 362, C. A. As to the constables by whom a warrant may be executed, see *R. v. Sanders* (1867), L. R. 1 C. C. R. 75; *R. v. Weil* (1882), 9 Q. B. D. 701, C. A.; *R. v. Crompton* (1880), 50 Q. B. D. 341, C. C. R.

(*o*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 309.

(*p*) *Money v. Leach* (1765), 3 Burr. 1742; *Hoye v. Bush* (1840), 1 Man. & G. 775.

(*q*) Constables Protection Act, 1750 (24 Geo. 2, c. 44), s. 6. If a constable arrests under an illegal warrant and cannot bring himself within the protection of the statute, he is liable to an action (*Clark v. Woods* (1848), 2 Exch. 395; see titles POLICE, Vol. XXII., p. 499; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 320).

(*r*) *Henderson v. Preston* (1888), 21 Q. B. D. 362, C. A.; *Greaves v. Keene* (1879), 4 Ex. D. 73. As to the duties of a keeper of a prison, generally, see title PRISONS, Vol. XXIII., pp. 235 *et seq*.

(*s*) *Demer v. Cook* (1903), 88 L. T. 629.

(*t*) *Mee v. Cruikshank* (1902), 86 L. T. 708; *Moone v. Rose* (1869), L. R. 4 Q. B. 486. A prisoner who is on his trial is in the legal custody of the keeper of the prison from which he comes to the court or from which he would have come if he had not been bailed; if a prisoner is tried and acquitted and is afterwards unlawfully detained in the precincts of the court by the warders of such prison, the keeper of the prison is liable to an action for false imprisonment, although he was not present in court and did not direct the illegal detention and although the warders are not his servants (*Mee v. Cruikshank*, *supra*).

(*a*) *Osborne v. Milman* (1886), 17 Q. B. D. 514; reversed on another point, (1887), 18 Q. B. D. 471, C. A.

(*b*) *Cobbett v. Grey* (1850), 4 Exch. 729. As to the different classes of prisoners, see title PRISONS, Vol. XXIII., pp. 243 *et seq*.

SECT. 3.
False or
Illegal
Imprison-
ment.

Magistrate.

Ministerial
officer.

place (c). It is no defence that in doing any such unlawful act the keeper of a prison was obeying the order of a Secretary of State; if such orders are invalid, the Secretary of State who issued them is also liable to an action for false imprisonment (d).

1556. A magistrate or other person in a judicial capacity is liable to an action for false imprisonment if he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he is not misinformed as to the facts upon which his jurisdiction depends (e). A magistrate is also liable, if he commits an accused person for re-examination for an unreasonable time (f). A magistrate or other person in a judicial capacity is not liable in respect of a matter within his jurisdiction (g). A magistrate or judge with a limited jurisdiction is not liable for a judicial act done by him without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself of that which constitutes the defect of jurisdiction (h).

A magistrate or other person in a judicial capacity is not liable for the mis-execution of a lawful warrant properly issued by him, unless he makes himself a party to such mis-execution (i).

A ministerial officer who acts under the orders of a person in a judicial capacity is not liable to an action for false imprisonment merely because he signs an unlawful warrant issued by a person acting in a judicial capacity (k).

(c) *Bint v. Lavender* (1825), 1 C. & P. 659.

(d) *Cobbett v. Grey* (1850), 4 Exch. 729.

(e) *Mason v. Barker* (1843), 1 Car. & Kir. 100; *Bridgett v. Coyney* (1827), 1 Man. & Ry. (K. B.) 211; *Foxall v. Barnett* (1853), 2 E. & B. 928; *Crepps v. Durden* (1777), 2 Cowp. 640; 1 Smith, L. C., 11th ed., p. 651; *Houlden v. Smith* (1850), 14 Q. B. 841. An action does not lie against a justice for merely backing an illegal warrant in consequence of which a person is arrested (*Clark v. Woods* (1848), 2 Exch. 395, 405); see titles MAGISTRATES, Vol. XIX., p. 556; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 323.

(f) *Davis v. Capper* (1829), 10 B. & C. 28; see *Edwards v. Ferris* (1836), 7 C. & P. 542.

(g) *Anderson v. Gorrie*, [1895] 1 Q. B. 668, C. A.; *Jones v. German*, [1897] 1 Q. B. 374, C. A.; *Kemp v. Neville* (1862), 31 L. J. (C. P.) 158; *Mills v. Collett* (1829), 6 Bing. 85; *Dicas v. Brougham and Vaux* (Baron) (1833), 1 Mood. & R. 309; *Doswell v. Impey* (1823), 1 B. & C. 163; *Hamond v. Howell* (1677), 2 Mod. Rep. 218. Magistrates are justified in acting upon a complaint made to them upon oath by the terms of which they have jurisdiction, although the real facts of the case might not have supported such a complaint, if the real facts were not laid before them at the time by the party complained against, and if such party was properly summoned (*Lowther v. Radnor* (Earl) (1806), 8 East, 113); nor are they liable for a mistake of fact; see *Houlden v. Smith*, *supra*; *Case v. Mountain* (1840), 1 Man. & G. 257. But where it appears on the face of the summons that the magistrates had no jurisdiction to entertain the matter, it is immaterial that the want of jurisdiction was not brought to his knowledge at the hearing of such summons (*Polley v. Fordham* (No. 2) (1904), 91 L. T. 525).

(h) *Calder v. Halket* (1839), 3 Moo. P. C. C. 28, 36, 77; compare title MISTAKE, Vol. XXI., pp. 4, 5.

(i) *Holroyd v. Breare* (1819), 2 B. & Ald. 473.

(k) *Demer v. Cook* (1903), 88 L. T. 629 (clerk of the peace); *Dews v. Riley* (1851), 11 C. B. 434 (clerk of county court).

1557. A sheriff or other officer to whom a warrant for the arrest of a person under civil process is directed, and who lawfully executes the warrant, is justified by the warrant (*l*). He is, however, liable to an action for false imprisonment if he arrests the wrong person (*m*), or if he arrests the right person in an unlawful manner (*n*).

SECT. 3.
False or
Illegal
Imprisonment.

1558. If a person is unlawfully arrested under an illegal warrant issued by a judge in a matter over which he has no jurisdiction, and where he is not misinformed as to the facts upon which his jurisdiction depends, an action of false imprisonment lies against the judge and against the person at whose instance the warrant was issued (*o*).

Civil process.
Judge issuing
illegal
warrant.

1559. An action will not lie for the detention of a member of the naval or military forces of the Crown, if the detention is justified by naval or military law (*p*).

Naval or
military
forces.

An action, it seems, will not lie against a member of the naval or military forces for acting under the order of his superiors, unless such order is manifestly illegal (*q*).

The ordinary courts of the realm have no jurisdiction over the action of naval or military authorities taken in a place where and at a time when war is actually raging (*r*).

1560. The master of a merchant ship is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship, if he has reasonable cause to believe that such arrest or confinement is necessary for the preservation of order and discipline or for the

Master of
ship.

(*l*) *Mitchell v. Simpson* (1890), 25 Q. B. D. 183, C. A.; *Brooks v. Hodgkinson* (1859), 4 H. & N. 712. As to arrest on civil process, see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., pp. 693 *et seq.* As to the liability of a sheriff etc., see title SHERIFFS AND BAILIFFS, Vol. XXV., p. 819.

(*m*) *De Mesnil v. Dakin* (1867), L. R. 3 Q. B. 18; *Walley v. M'Connell* (1849), 13 Q. B. 903. As to the liability of the solicitor and of the client in the suit in which process is issued, see *Stratten v. Lawless* (1864), 14 I. C. L. R. 432; *Abley v. Dale* (1850), 1 L. M. & P. 626, (1851) 2 L. M. & P. 433; *Kinning v. Buchanan* (1849), 8 C. B. 271; *Cooper v. Harding* (1845), 7 Q. B. 928; *Green v. Elgie* (1843), 5 Q. B. 99; *Sowell v. Champion* (1837), 6 Ad. & El. 407; *Brooks v. Hodgkinson*, *supra*; *Ewart v. Jones* (1845), 14 M. & W. 774; *Moore v. Gardner* (1847), 16 M. & W. 595; *Williams v. Smith* (1863), 14 C. B. (N. S.) 596; *Smith v. Sydney* (1870), L. R. 5 Q. B. 203; see title SOLICITORS, Vol. XXVI. A sheriff or other officer is not liable for false imprisonment for arresting under civil process a person who is privileged from arrest under such process (*Magnay v. Burt* (1843), 5 Q. B. 381, Ex. Ch.; *Tarleton v. Fisher* (1781), 2 Doug. (K. B.) 671; see *Ames v. Waterlow* (1869), L. R. 5 C. P. 53).

(*n*) *Kerbey v. Denby* (1836), 2 Gale. 31.

(*o*) *Houlden v. Smith* (1850), 14 Q. B. 841; see note (*e*), p. 882, *ante*.

(*p*) *Marks v. Frogley*, [1898] 1 Q. B. 888, C. A.; *Keighly v. Bell* (1866), 4 F. & F. 763; see *Broughton v. Jackson* (1852), 18 Q. B. 378; and title ROYAL FORCES, Vol. XXV., p. 90.

(*q*) *Keighly v. Bell*, *supra*; compare title ROYAL FORCES, Vol. XXV., pp. 91, 92.

(*r*) *Ex parte Marais* (*D. F.*), [1902] A. C. 109; *Elphinstone v. Bedreechund* (1830), 1 Knapp. 316, P. C.; *E. v. Wolfe Tone* (1798), 27 State Tr. 613, 625; compare titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 308; ROYAL FORCES, Vol. XXV., pp. 42, 43.

SECT. 3.
False or
Illegal
Imprison-
ment.

Parent or
schoolmaster.
Detention of
lunatic.

safety of the vessel or the persons or property on board (s). He has also by statute powers of arrest and detention in certain cases (t).

1561. A parent and a schoolmaster to whose care the parent has entrusted a child may confine a child in a reasonable manner and for sufficient reason (u).

1562. A person may justify the detention and confinement of a dangerous lunatic until there is reasonable ground to believe that he has ceased to be dangerous (a).

No action lies for the detention of a lunatic who is detained under the Lunacy Act, 1890 (b), if the person detaining acted in good faith and with reasonable care (c).

An action for false imprisonment will lie against any person who without acting under the Lunacy Act, 1890 (d), unlawfully detains another as a lunatic (e).

SUB-SECT. 2.—*Remedies.*

Remedies
available.

1563. If a person is unlawfully imprisoned, he may use force to release himself (f). He may also obtain his release by an application made on his behalf for a writ of *habeas corpus* (g).

False imprisonment is an actionable wrong and is also an indictable offence, even if no violence is used (h).

Damages.

1564. In an action of false imprisonment the plaintiff is entitled to recover general damages for the imprisonment and, by way of special damages, compensation for any loss which he has incurred, if such loss is the direct and immediate result of the trespass (i).

(s) *Boyce v. Bayliffe* (1807), 1 Camp. 58, 60; see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 59.

(t) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 222, 223; and title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 59, 60.

(u) See title EDUCATION, Vol. XII., p. 124.

(a) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 530.

(b) 53 & 54 Vict. c. 5, s. 333.

(c) See *Shackleton v. Swift*, [1913] 2 K. B. 304, C. A.; title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 530.

(d) 53 & 54 Vict. c. 5.

(e) *Sinclair v. Broughton and the Government of India* (1882), 47 L. T. 170, P. C.; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 530. As to the detention of habitual drunkards, see title INTOXICATING LIQUORS, Vol. XVIII., pp. 161, 165.

(f) *Rowe v. Hawkins* (1858), 1 F. & F. 91.

(g) See title CROWN PRACTICE, Vol. X., p. 39.

(h) *R. v. Linsberg* (1905), 69 J. P. 107. If force is used, false imprisonment is punishable as an assault on summary proceedings or by indictment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 607, note (m). As to the effect of summary proceedings on civil liability, see p. 872, *ante*.

(i) *Clark v. Woods* (1848), 2 Exch. 395; *Foxall v. Barnett* (1853), 2 E. & B. 928 (plaintiff arrested by warrant of commitment on a coroner's inquisition held without jurisdiction entitled to recover as part of his damages the expenses of quashing the inquisition); *De Mesnil v. Dakin* (1867), L. R. 3 Q. B. 18 (plaintiff can recover money which he was compelled to pay under illegal process); *Hoey v. Felton* (1861), 11 C. B. (N. S.) 142 (plaintiff not entitled to recover damages for failing to secure employment through illness caused by the imprisonment which prevented him from

He may rely in aggravation of the general damages on the circumstances attending the imprisonment and on any facts in the conduct of the defendant at the time of or before or after the imprisonment which show malice (*k*).

The defendant is entitled, although he has not pleaded a justification, to give evidence in mitigation of damages of facts which justified or excused his conduct in imprisoning the plaintiff (*l*); but he cannot give evidence by cross-examination of the plaintiff or his witnesses or otherwise to prove the bad character of the plaintiff, or that previous charges had been made against him (*m*).

SECT. 3.
False or
Illegal
Imprison-
ment.

Mitigation of
damages.

SUB-SECT. 3.—*Defences.*

1565. The defendant in an action of false imprisonment is entitled to succeed if he proves either that he did not imprison the plaintiff or that, if he did imprison the plaintiff, the imprisonment was legally justifiable (*n*), or that the cause of action in respect of the imprisonment accrued more than four years before the commencement of the action (*o*).

Denial of im-
prisonment;
justification;
Statute of
Limitations.

being present at the place where he would have been engaged; damages too remote); *Boyce v. Bayliffe* (1807), 1 Camp. 58 (plaintiff who had been imprisoned on board a ship not entitled to damages for his taking his passage on another ship, the injury not having continued to the time of his transshipment); *Glover v. London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 25 (plaintiff who was wrongfully removed from a railway carriage not entitled to recover as special damages compensation for the loss of a pair of race-glasses which he had left behind him, there being no evidence that he was prevented from taking the glasses with him or that they had come into the possession of the defendants' servants).

(*k*) *Bracegirdle v. Oxford* (1813), 2 M. & S. 77; *Edgell v. Francis* (1840), 1 Man. & G. 222 (evidence of a trespass by the defendant on the goods of the plaintiff arising out of the same transaction and committed on the day after imprisonment administered); *Dunphy v. Moore* (1865), 13 L. T. 179 (evidence that the plaintiff was searched in accordance with the usual practice is admissible); *Warwick v. Foulkes* (1844), 12 M. & W. 507 (the fact that a defence of justification is pleaded and afterwards abandoned is a matter proper to be taken into account in estimating the damages). The fact that the plaintiff was charged with a criminal offence or that he was put to expense in defending himself is not a matter to be considered in assessing the damages in an action of false imprisonment; such matters form the subject of damages in an action for malicious prosecution (*Chivers v. Savage* (1855), 5 E. & B. 697; see *Guest v. Warren* (1854), 9 Exch. 379).

(*l*) *Linford v. Lake* (1858), 3 H. & N. 276; *Perkins v. Vaughan* (1842), 4 Man. & G. 988; *Thomas v. Powell* (1837), 7 C. & P. 807; *Chinn v. Morris* (1826), 2 C. & P. 361; *Moore v. Adam* (1816), 2 Chit. 198; *Bingham v. Garnault* (1788), Buller, Law of Nisi Prius, 17; see *Tulley v. Corrie* (1867), 10 Cox, C. C. 584.

(*m*) *Downing v. Butcher* (1841), 2 Mood. & R. 374; *Newsam v. Cave* (1817), 2 Stark. 69; see *Cornwall v. Richardson* (1825), Ry. & M. 305; *contra*, *Rodriguez v. Tadmire* (1799), 2 Esp. 721.

(*n*) See pp. 879, 880, *ante*. This defence must be specially pleaded.

(*o*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 38, 57. As to special periods of limitation, see *ibid.*, p. 176; title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 346. This defence must be specially pleaded.

TRIAL.

See CRIMINAL LAW AND PROCEDURE; JUDGMENTS AND ORDERS;
JURIES; MAGISTRATES; PRACTICE AND PROCEDURE.

TRICK, LARCENY BY.

See CRIMINAL LAW AND PROCEDURE.

TRIERS.

See CRIMINAL LAW AND PROCEDURE; JURIES.

TRINIDAD.

See DEPENDENCIES AND COLONIES.

TRINITY HOUSE AND BRETHREN.

See ADMIRALTY; SHIPPING AND NAVIGATION.

TROUT.

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TROVER AND DETINUE.

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Part I.—Interpretation of Terms.

SECT. 1.

SECT. 1.—Definitions.

Definitions.

Detinue.

1566. Detinue is the form of action which lies when one person wrongfully detains the goods of another. The gist of the action is the unlawful detention of goods, that is, the unlawful failure to deliver them up when demanded (*a*). It is the appropriate form of action when the return of title deeds or other specific chattels is desired (*b*). It was originally, it seems, an action chiefly used against bailees (*c*), though it did not afford a remedy, if the bailee misused the goods, or if he restored them in a damaged condition (*d*).

Trover.

1567. Trover is a form of action later in origin than detinue, and provides a more extensive remedy. It was a form of trespass on the case (*e*), and derived its name from and was based on a fiction that the defendant had found the goods and afterwards converted them to his use (*f*). Trover lies when one person is guilty of the conversion of the goods of another by wrongfully appropriating them to his own use or wrongfully depriving the owner of the use and possession of them permanently or for a substantial time (*g*), or by destroying them or changing their quality (*h*).

SECT. 2.—Subject-matter.

Personal property.

1568. The subject-matter of both trover and detinue must be specific personal property (*i*). Neither trover nor detinue lies for money, unless it is specifically identified (*k*).

(*a*) *Jones v. Dowle* (1841), 9 M. & W. 19; *Clements v. Flight* (1846), 16 M. & W. 42; *Mason v. Farnell* (1844), 12 M. & W. 674.

(*b*) See p. 917, *post*.

(*c*) Holdsworth, *History of English Law*, Vol. III., p. 274. Detinue was formerly considered an action *ex contractu* (*Danby v. Lamb* (1861), 11 C. B. (N. s.) 423); but it is now reckoned as an action founded on tort; see *Bryant v. Herbert* (1878), 3 C. P. D. 389, C. A.

(*d*) Holdsworth, *History of English Law*, Vol. III., p. 281.

(*e*) *Ibid*.

(*f*) *Gordon v. Harper* (1796), 7 Term Rep. 9; Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 290; see title TRESPASS, p. 865, *ante*. Trover is the name of the form of action, conversion of the tort. The declaration *per inventionem* was described in 1455 by LITTLETON, J., as a "new found haliday" (*Malpas's Case* (1455), Y. B. 33 Hen. 6, 26, pl. 12). The fictitious allegations of loss and finding were abolished by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which substituted an allegation that the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods; see *Day's Common Law Procedure Acts*, 4th ed., p. 239; *Law Quarterly Review*, Vol. XXI., p. 43.

(*g*) *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Hiorst v. Bott* (1874), L. R. 9 Exch. 86.

(*h*) *Fouldes v. Willoughby* (1841), 8 M. & W. 540; *Heald v. Carey* (1852), 11 C. B. 977; *Burroughes v. Bayne* (1860), 5 H. & N. 296. As to what acts amount to conversion, see p. 889, *post*.

(*i*) *Friedel v. Castlereagh* (1877), 11 I. C. L. R. 93. The thing in respect of which the action is brought must be one which is capable of being

(*k*) For note (*k*) see p. 889, *post*.

Neither trover nor detinue will lie for fixtures which are attached to the freehold (*l*). Trover or detinue lies for fixtures (*m*), timber (*n*), crops (*o*), soil and minerals (*p*) only after such things have been severed from the freehold.

SECT. 2.

Subject-matter.

Fixtures.

Part II.—Essential Features of Conversion.

SECT. 1.—Acts Amounting to Conversion.

1569. To constitute conversion there must be a positive and wrongful act (*q*), but there need not be any knowledge on the part

Knowledge immaterial.

possessed; but see *Maunsell v. Valley Printing Co.*, [1908] 1 Ch. 567 (affirmed [1908] 2 Ch. 441, C. A.), where SWINFEN EADY, J., held that an action of the nature of conversion might be brought for damages for infringement of the common law right of the owner of an unpublished and unregistered picture; *Bowden Brothers v. Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.

(*k*) *Orton v. Butler* (1822), 5 B. & Ald. 652; *Foster v. Green* (1862), 7 H. & N. 881. An action of trover or detinue does not lie for money unless in a bag (*Foster v. Green*, *supra*, as reported 31 L. J. (EX.) 158, *per* POLLOCK, C.B., at p. 161). The buyer of a specified quantity of goods cannot sue in trover, unless they have been appropriated to him (*Wait v. Baker* (1848), 2 Exch. 1; *Austen v. Craven* (1812), 4 Taunt. 644; but see *Godts v. Rose* (1855), 17 C. B. 229). In *Abington v. Lipscomb* (1841), 1 Q. B. 776, the lord of a manor who was entitled to five best beasts as heriots marked seven beasts and left them in the possession of the defendant and afterwards applied for the beasts, but the defendant refused to give them up; and it was held that the lord could not sue for any of the beasts, it not being ascertained that any particular five were legally chosen. But trover will lie for an undivided part of a chattel (*Watson v. King* (1815), 4 Camp. 272).

(*l*) *Longstaff v. Meagoe* (1834), 2 Ad. & El. 167; *Colegrave v. Dias Santos* (1823), 2 B. & C. 76; *Roffey v. Henderson* (1851), 17 Q. B. 574; *Greene v. Cole* (1670), 2 Wms. Saund. (6th ed.) 251, 259 c, H. L.; *Wilde v. Waters* (1855), 16 C. B. 637; *Mackintosh v. Trotter* (1838), 3 M. & W. 184; *Davis v. Jones* (1818), 2 B. & Ald. 165; *Gough v. Wood & Co.*, [1894] 1 Q. B. 713, C. A.; *Re Allen (Samuel) & Sons, Ltd.*, [1907] 1 Ch. 575; *Ellis v. Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, C. A.

(*m*) *Farrant v. Thompson* (1822), 5 B. & Ald. 826; *Dalton v. Whittem* (1842), 3 Q. B. 961. The mortgagee of fixtures claiming under a tenant who surrenders his term to the landlord has a right to enter and sever the fixtures, and, although he cannot sue in trover for them, can maintain a special action against the person in possession who prevents him from exercising his right (*London and Westminster Loan and Discount Co. v. Drake* (1859), 6 C. B. (N. S.) 798). A tenant may sue in trover for things which, though slightly attached to the freehold, are personal chattels, and does not lose his property in them by giving up possession of the premises (*Davis v. Jones* (1818), 2 B. & Ald. 165; see *Sheen v. Rickie* (1839), 5 M. & W. 175). As to what are fixtures, see title LANDLORD AND TENANT, Vol. XVIII., pp. 416 *et seq.*

(*n*) *Blackett v. Loves* (1814), 2 M. & S. 494; *Pyne v. Dor* (1785), 1 Term Rep. 55; *Berry v. Heard* (1632), Cro. Car. 242.

(*o*) *Davies v. Connop* (1814), 1 Price, 53; *Boraston v. Green* (1812), 16 East, 71; *Rackham v. Jesup* (1772), 3 Wils. 332.

(*p*) *Northam v. Bowden* (1855), 11 Exch. 70; *Eardley v. Granville* (1876), 3 Ch. D. 826; *Wood v. Morewood* (1841), 3 Q. B. 440; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Jegon v. Vivian* (1871), 6 Ch. App. 742; *Livingston v. Rawyards Coal Co.* (1880), 5 App. Cas. 25.

(*q*) *Drake v. Shorter* (1802), 4 Esp. 165; *Bromley v. Coxwell* (1801), 2

SECT. 1.
Acts
Amounting
to Con-
version.

Sale.

Other dis-
positions.

of the person sued that the goods converted belong to someone else (*r*).

A wrongful sale of the goods of another person, if accompanied by delivery of the goods, or documents of title, amounts to conversion, and both the seller and the buyer in such case are liable to be sued (*s*).

A mere sale of goods not in market overt, if unaccompanied by delivery, is not conversion (*t*). A sale of goods in market overt changes the title to the goods, and is therefore conversion if it is wrongful (*u*).

Any other wrongful disposition of goods, if it has the effect of depriving the owner of the use of them permanently or for a substantial time, is conversion; thus, if a person pawns the goods of another (*a*), or hands them over to someone other than the true owner (*b*), or signs an order for the delivery of the goods and the goods are delivered under the order (*c*), such person is guilty of conversion.

Bos. & P. 438. A mere failure to carry out a contract unaccompanied by any tortious act is not conversion (*Dufresne v. Hutchinson* (1810), 3 Taunt. 117). As to the effect of the relation back of title in trover, see *Smith v. Milles* (1786), 1 Term Rep. 475; *Cooper v. Chitty* (1756), 1 Burr. 20; *Young v. Billiter* (1860), 8 H. L. Cas. 682. As to trover against an administrator for wrongfully intermeddling, see *Bear v. Soper* (1759), 2 Keny. 441.

(*r*) *Hollins v. Fowler* (1875), L. R. 7 H. L. 757.

(*s*) *Ibid.*; *Jelks v. Hayward*, [1905] 2 K. B. 460; *Martindale v. Smith* (1841), 1 Q. B. 389; *Farrant v. —* (1822), 3 Stark. 130; *Glasspoole v. Young* (1829), 9 B. & C. 696; *McCombie v. Davies* (1805), 6 East, 538; *Cooper v. Willomatt* (1845), 1 C. B. 672; *London and North Western Rail. Co. v. Hughes* (1889), 26 L. R. Ir. 165; *Metcalf v. Lumsden* (1844), 1 Car. & Kir. 309; *Binns v. Pigot* (1840), 9 C. & P. 208; *Mulliner v. Florence* (1878), 3 Q. B. D. 484, C. A.; compare title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 31, 32. As to an action against an auctioneer, see p. 893, *post*; as to sale of goods generally, see title SALE OF GOODS, Vol. XXV., pp. 105 *et seq.*; as to what constitutes delivery, see *ibid.*, p. 206.

(*t*) *Lancashire Waggon Co. v. Fitzhugh* (1861), 6 H. & N. 502. But as to sale by a bailee, see p. 899, *post*.

(*u*) As to sales in market overt; see p. 903, *post*; *Peer v. Humphrey* (1835), 2 Ad. & El. 495; *Delaney v. Wallis & Son* (1884), 14 L. R. Ir. 31; title MARKETS AND FAIRS, Vol. XX., p. 55. If a person at the time of the conviction of the thief is in possession of stolen goods which have been sold in market overt, he may be sued in trover. A person who has purchased goods sold in market overt is not liable to be sued if he parts with them before the conviction (*Horwood v. Smith* (1788), 2 Term Rep. 750); see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 687; MARKETS AND FAIRS, Vol. XX., pp. 53 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 195, 196; and compare title PAWNS AND PLEDGES, Vol. XXII., p. 246.

(*a*) *Parker v. Godin* (1728), 2 Stra. 813. As to the rights of the true owner of goods wrongfully pawned, see title PAWNS AND PLEDGES, Vol. XXII., pp. 346 *et seq.*

(*b*) *Allens v. Peyton* (1872), 21 W. R. 108; *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37; *Winter v. Bankes* (1901), 17 T. L. R. 446; *Powell v. Hoyland* (1851), 6 Exch. 67; *Peat v. Baxter* (1816), 1 Stark. 472; *Hoare v. Parker* (1788), 2 Term Rep. 376; as to conversion by a buyer of goods, see also title SALE OF GOODS, Vol. XXV., p. 184, note (*b*).

(*c*) *Hiorf v. Bott* (1874), L. R. 9 Exch. 86.

1570. If the goods of a person are wrongfully taken by force or fraud and converted to the use of the taker or of a third person, the taker is guilty of conversion. Thus, it is conversion to take a person's goods wrongfully in execution (*d*) or otherwise (*e*), or to distrain goods wrongfully (*f*). On the other hand, a mere threat to prevent an owner from removing his goods does not amount to conversion if it is not followed by any act of taking (*g*).

An infant who obtains goods by means of a fraudulent misrepresentation that he is of age is not liable to be sued for conversion, but it appears that there is an equitable remedy against him to compel him to restore the goods if they are in his possession, or if he has obtained money for the goods to refund it (*h*).

1571. If a wrongdoer obtains possession of goods by false pretences or other fraud and sells them to another person who takes them *bonâ fide* before the owner has repudiated the fraudulent transaction, the purchaser has a good title to the goods and cannot be sued in trover (*i*).

A person who acquires a good title to goods under the Factors Act, 1889 (*j*), through a disposition by a mercantile agent, although

SECT. 1.
Acts
Amounting
to Con-
version.

Forcible or
fraudulent
taking.

Goods
obtained by
infant.

Rights of
transferee.

(*d*) *Garland v. Carlisle* (1837), 4 Cl. & Fin. 693, H. L.; *Whitmore v. Greene* (1844), 13 M. & W. 104; see titles EXECUTION, Vol. XIV., pp. 20, 21, 28 *et seq.*; TRESPASS, p. 865, *ante*.

(*e*) A customs officer who seizes goods wrongfully for non-payment of duty and carries them to a warehouse is guilty of conversion (*Tinkler v. Poole* (1770), 5 Burr. 2657).

(*f*) *Clowes v. Hughes* (1870), L. R. 5 Exch. 160; *Shipwick v. Blanchard* (1795), 6 Term Rep. 298. If goods are lawfully distrained and a sufficient tender is made of the rent before impounding, the refusal to deliver up the goods is evidence of conversion (*Loring v. Warburton* (1858), E. B. & E. 507); see title DISTRESS, Vol. XI., p. 154. It is not evidence of conversion if the tender is made after impounding (*Singleton v. Williamson* (1862), 7 H. & N. 747), or if some rent is due and a distress is made for more than is due (*Whitworth v. Smith* (1832), 5 C. & P. 250). If there are other goods on the premises, and goods, such as sheep, are distrained which can only be lawfully seized if there are no other goods to seize, trover or detainee lies (*Keen v. Priest* (1859), 4 H. & N. 236). As to an unlawful act or irregularity by a distrainer, see Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 9; *Plasycœd Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd.*, [1912] 2 K. B. 345; and see, generally, title DISTRESS, Vol. XI., pp. 195 *et seq.*

(*g*) *England v. Cowley* (1873), L. R. 8 Exch. 126. *Quære* whether an actual prevention by force of the removal of goods amounts to conversion if the goods are not actually taken (*England v. Cowley*, *supra*, per BRAMWELL, B., at p. 129; see *Thorogood v. Robinson* (1845), 6 Q. B. 769). A mere statement that the expenses of a bankruptcy would fall on the plaintiff, if he did not deliver up certain goods, is not duress, and does not make the obtaining the goods a conversion (*Powell v. Hoyland* (1851), 6 Exch. 67).

(*h*) *Stocks v. Wilson*, [1913] 2 K. B. 235, *per* LUSH, J., at p. 242.

(*i*) *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A.; *Sheppard v. Shoobred* (1841), Car. & M. 61; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 23, 24 (2). The effect of *ibid.*, s. 24 (2), is that the decision in *Bentley v. Vilmont* (1887), 12 App. Cas. 471, is not now applicable, except possibly to choses in action; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 703.

(*j*) 52 & 53 Vict. c. 45.

SECT. 1.
Acts
Amounting
to Con-
version.

Destruction.
Intent to
convert.

Carrier ;
wharfinger ;
packer.

such agent has no authority to dispose of the goods, is not guilty of conversion of the goods (*k*).

1572. The destruction of goods or the changing of their quality, if wrongful, is conversion (*l*).

1573. A mere wrongful taking of goods, although it may amount to a trespass, does not amount to a conversion, unless the goods are taken with intent to convert them to the use of the taker or some third person, or unless the wrongful act has the effect of either destroying or changing the quality of the goods (*m*); thus, a carrier (*n*), wharfinger (*o*), or packer (*p*), who ships or warehouses or removes goods is not liable in trover merely for the shipping or warehousing or removal, as he only purports to change the position of the goods and not the property. Mere non-delivery without negligence by a carrier or wharfinger is not conversion (*q*), but misdelivery by such a person may amount to conversion (*r*).

(*k*) See title AGENCY, Vol. I., p. 295.

(*l*) *Standring v. Grundy* (1837), 6 L. J. (EX.) 181 (seals cut off a deed); *M'Kewen v. Cotching* (1857), 37 L. J. (EX.) 41 (bill of exchange burnt); *Richardson v. Atkinson* (1723), 1 Stra. 576 (drawing part of the liquor out of a vessel and filling it up with water is a conversion of the whole of the liquor). But a person who is sued for taking away or destroying part of property which remains in his hands cannot raise as a defence that the taking or destroying of the part was a taking or destroying of the whole so that time began to run against the owner's right to sue from the time of the taking or destroying of the part (*Philpott v. Kelley* (1835), 3 Ad. & El. 106). As to a case where destruction is justifiable or excusable, see *Simmons v. Lillystone* (1853), 8 Exch. 431. In *Heald v. Carey* (1852), 11 C. B. 977, goods were sent from abroad deliverable to the defendant to hold at the disposal of the consignee upon payment of freight: on the arrival of the goods the defendant paid the duty on them and placed them in a free warehouse—a usual and proper place for such purpose: the wharfinger afterwards for his own convenience and without the knowledge of the defendant removed the goods to another warehouse, where they were destroyed by accidental fire: it was held that the defendant had not exceeded his duty in landing and warehousing the goods, and that he was not guilty of conversion or responsible for the loss of the goods, although the jury found that he was not acting with a view to do his best or as a prudent man would have acted intending to do his best for the owner of the goods. As to confusion and intermixture of goods, see title BAILMENT, Vol. I., pp. 542, 543.

(*m*) *Fouldes v. Willoughby* (1841), 8 M. & W. 540. As to the relations between trespass and trover, see *Smith v. Milles* (1876), 1 Term Rep. 475; *Cooper v. Chitty* (1756), 1 Burr. 20; *Forsdick v. Collins* (1816), 1 Stark. 173; see title TRESPASS, p. 865, *ante*. As to distress, see *ibid.*, p. 856, note (*f*), *ante*.

(*n*) *Hollins v. Fowler* (1875), L. R. 7 H. L. 757, 767, 801; *Sheridan v. New Quay Co.* (1858), 4 C. B. (N. S.) 618, 650; see *Consolidated Co. v. Curtis & Son*, [1892] 1 Q. B. 495, 501.

(*o*) *Hollins v. Fowler*, *supra*, at p. 767; *Heald v. Carey*, *supra*; *Alexander v. Southey* (1821), 5 B. & Ald. 247.

(*p*) *Greenway v. Fisher* (1824), 1 C. & P. 190, as explained in *Hollins v. Fowler*, *supra*, at p. 768.

(*q*) *Severin v. Keppell* (1802), 4 Esp. 156; *Ross v. Johnson* (1772), 5 Burr. 2825; *Anon.* (1705), 2 Salk. 655; *Owen v. Lewyn* (1672), 1 Vent. 223; *Attersol v. Briant* (1808), 1 Camp. 409.

(*r*) *Youl v. Harbottle* (1791), Peake, 68 [49]; *Devereux v. Barclay* (1819), 2 B. & Ald. 702; *Stephenson v. Hart* (1828), 4 Bing. 476; *Wyld v. Pickford* (1841), 8 M. & W. 443; *Heugh v. London and North Western Rail. Co.*

Similarly a broker or auctioneer, who only settles the price as between the vendor and purchaser of goods and takes his commission, is not liable for conversion if the vendor is not entitled to sell; but where an auctioneer receives goods into his custody and sells and hands them over to the purchaser with a view of passing the property in them, he is liable as having converted the goods (s).

1574. If a person who is not a holder in due course of a negotiable instrument wrongfully pays it into a bank or otherwise transfers it, he is guilty of conversion (t); a holder in due course of such an instrument who takes or deals with it is not guilty of conversion (u).

If an instrument or security is not negotiable, any person who receives it from a wrongdoer and deals with it in such a way as to deprive the true owner of the possession of the instrument is guilty of conversion, unless protected by some special statutory provision (w).

SECT. I.
Acts
Amounting
to Con-
version.

Broker;
auctioneer.
Negotiable
instruments.

Instruments
not nego-
tiable.

(1870), L. R. 5 Exch. 51; *M'Kean v. M'Ivor* (1870), L. R. 6 Exch. 36; *Pontifex v. Midland Rail. Co.* (1877), 3 Q. B. D. 23; *Hiort v. London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A.; see *Glyn Mills & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591. Failure by a carrier to deliver to the person who gives notice of stoppage *in transitu* may amount to conversion (*Litt v. Cowley* (1816), 7 Taunt. 169; *Thompson v. Trail* (1826), 6 B. & C. 36; *Jackson v. Nichol* (1839), 5 Bing. (N. C.) 508); see title SALE OF GOODS, Vol. XXV., p. 257. It is conversion for a carrier who is not entitled to freight to insist on the payment of freight as a condition for the delivery of goods (*Dewell v. Moxon* (1808), 1 Taunt. 391). As to conversion by a carrier, see further, title CARRIERS, Vol. IV., pp. 13, 23, 29. An innkeeper is not liable in trover for the loss of articles deposited in his house for the purpose of being forwarded by a carrier (*Williams v. Gesse* (1837), 3 Bing. (N. C.) 849).

(s) *Barker v. Furlong*, [1891] 2 Ch. 172, disapproving *Turner v. Hockey* (1837), 56 L. J. (Q. B.) 301; *Consolidated Co. v. Curtis & Son*, [1892] 1 Q. B. 495; *Cochrane v. Rymill* (1879), 40 L. T. 744, C. A.; *National Mercantile Bank v. Rymill* (1881), 44 L. T. 767, C. A.; see, further, title AUCTION AND AUCTIONEERS, Vol. I., pp. 520, 521; as to an auctioneer's duty to the vendor of goods, see *ibid.*, pp. 514, 515; as to an auctioneer's right to possession of goods, see *ibid.*, pp. 517, 520. If a broker acts not merely as a negotiator but as a principal in the transaction and exercises dominion over the goods, he is liable for conversion (*Hollins v. Fowler* (1875), L. R. 7 H. L. 757). As to conversion by a servant, see note (p), p. 897, *post*.

(t) *Atkins v. Owen* (1836), 4 Ad. & El. 819; *Palmer v. Jarman* (1837), 2 M. & W. 282; *Goggerly v. Cuthbert* (1806), 2 Bos. & P. (N. R.) 170; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 499. For the meaning of holder in due course, see *ibid.*, p. 464.

(u) *Goodwin v. Roberts* (1876), 1 App. Cas. 476; *Gorgier v. Mievill* (1824), 3 B. & C. 45; *Wookey v. Pole* (1820), 4 B. & Ald. 1; *Middleton v. Bamed* (1849), 4 Exch. 241.

(w) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 81; *Fine Art Society v. Union Bank of London* (1886), 17 Q. B. D. 705, C. A. (A., the servant of B., pays into his own account at a bank post office orders (not negotiable) belonging to B., which the bank subsequently cashed: held, that the bank had been guilty of conversion in receiving the post office orders from A. with directions to carry them to the credit of his account, and in receiving the money from the post office). If a cheque or draft or order is drawn on a bank and is payable to order on demand, the bank is not guilty of conversion, if it pays the cheque etc. *bonâ fide*, even if the indorsement is forged (Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 19; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 60; *Capital and Counties*

SECT. 2.

Demand
and
Refusal.Failure to
deliver or
to demand.SECT. 2.—*Demand and Refusal.*

1575. The mere keeping of another person's goods does not amount to conversion (*x*). Where, however, a person has possession of the goods of another and a valid demand is made for them by the owner, an unqualified and unjustifiable refusal to deliver them up entitles the owner to sue in detinue and is evidence of conversion in an action of trover (*a*).

Bank v. Gordon, London City and Midland Bank v. Gordon, [1903] A. C. 240). If a cheque is crossed and it is paid in good faith and without negligence by the banker on whom it is drawn, then, even if it bears a forged indorsement, the banker cannot be sued for conversion, nor can the drawer of the cheque, if it has reached the hands of the payee (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80). A banker who in good faith and without negligence receives payment of a crossed cheque for a customer who has no title or a defective title is not liable to be sued by the true owner of the cheque merely by reason of having received such payment (*ibid.*, s. 82; see Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), s. 1; Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17; *Great Western Railway v. London and County Banking Co.*, [1901] A. C. 414; *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465; *Bevan v. National Bank*, *Bevan v. Capital and Counties Bank* (1906), 23 T. L. R. 65). But a banker is not protected who presents a cheque with a forged indorsement for payment or credits his customer with the amount of the cheque; in such a case the banker may be sued in trover by the true owner of the cheque (*Gordon v. London City and Midland Bank*, *Gordon v. Capital and Counties Bank*, [1902] 1 K. B. 242, C. A.; *Capital and Counties Bank v. Gordon, London City and Midland Bank v. Gordon*, *supra*, at p. 241; *Bavins, Junr., and Sims v. London and South Western Bank*, [1900] 1 Q. B. 270, C. A.; *La Cave & Co. v. Crédit Lyonnais* (1896), 2 Com. Cas. 17; *Kleinwort, Sons & Co. v. Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24; Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17). If the holder of a negotiable instrument loses it and the bank where it is payable, after receiving notice that it has been lost, discounts the bill, debits the customer on whom the bill was drawn with the amount, writes a discharge on it and delivers it up to the customer, the bank is guilty of conversion (*Lovell v. Martin* (1813), 4 Taunt. 799). If an uncrossed cheque or promissory note payable to order on which there is a forged indorsement is paid at the bank where it is payable and is returned to the drawer or maker, the true owner may, it seems, sue the drawer or maker in trover (*Johnson v. Windle* (1836), 3 Bing. (N. C.) 225); he may also sue the drawer of a crossed cheque with a forged indorsement if the cheque has been paid but never reached the hands of the payee (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 80); see titles BANKERS AND BANKING, Vol. I., p. 615; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 495, 512. As to the liability of bankers on cheques, generally, see title BANKERS AND BANKING, Vol. I., pp. 590 *et seq.*, 602 *et seq.*, 608 *et seq.*

(*x*) *Isaack v. Clark* (1615), 2 Bulst. 306; *Spackman v. Foster* (1883), 11 Q. B. D. 99; *Miller v. Dell*, [1891] 1 Q. B. 468, C. A.; *Thorogood v. Robinson* (1845), 6 Q. B. 769. The mere detaining by a servant without notice of demand is not wrongful; see *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616, 529, Ex. Ch.

(*a*) *Burroughes v. Bayne* (1860), 5 H. & N. 296; *Jones v. Dowle* (1841), 9 M. & W. 19; *M'Combie v. Davies* (1805), 6 East, 538; *Baldwin v. Cole* (1704), 6 Mod. Rep. 212. The demand must be specific; a general demand on behalf of an executor for the delivery of "the goods of the deceased" is insufficient (*Nixon v. Sedger* (1890), 7 T. L. R. 112, C. A.; *Loring v. Warburton* (1858), E. B. & E. 507; *Helby v. Matthews*,

To make a demand and refusal sufficient evidence of conversion the party who refuses must at the time of the demand have it in his power to deliver up or detain the article demanded in the condition in which the delivery is demanded (*b*).

SECT. 2.
Demand
and
Refusal.

The demand must be made by the owner of the goods or by some person in his name and with his authority (*c*). If the demand is made by some person on behalf of the owner, the person on whom the demand is made must have a reasonable opportunity to inquire into the authority of the person making the demand (*d*). A qualified or justifiable refusal to deliver up the article demanded is not evidence of conversion (*e*); thus, there is no evidence of conversion where the person in possession of the goods refuses to deliver them up on the ground that he does not know to whom they belong and keeps them until he can ascertain the owner (*f*).

Demand.

Refusal.

[1895] A. C. 471; *Turner v. Ford* (1846), 15 M. & W. 212; *Golightly v. Reynolds* (1771), Lofft, 88). An oral demand (*Smith v. Young* (1808), 1 Camp. 439) or a demand in writing left at the house of the defendant (*Logan v. Houlditch* (1793), 1 Esp. 22) is sufficient. If an oral demand and a demand in writing are made at the same time and the one has no reference to the other, evidence may be given of the oral demand without the production of the writing (*Smith v. Young, supra*). A notice of demand of property is not a notice within the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135, and is not one that may be served on the secretary of the company under that provision (*Glover v. London and North Western Rail. Co.* (1850), 5 Exch. 66); see title COMPANIES, Vol. V., p. 678. If the defendant has done an act which amounts to a complete conversion, a demand is not necessary (*Lovell v. Martin* (1813), 4 Taunt. 799; *Forsdick v. Collins* (1816), 1 Stark. 173; *Grainger v. Hill* (1838), 4 Bing. (N. C.) 212; *Wyatt v. Blades* (1813), 3 Camp. 396).

(*b*) *Smith v. Young, supra*; *Rushworth v. Taylor* (1842), 3 Q. B. 699; *Towne v. Lewis* (1849), 7 C. B. 608; *Edwards v. Hooper* (1843), 11 M. & W. 363; *Wilkinson v. Whalley* (1843), 5 Man. & G. 590; *Latter v. White* (1872), L. R. 5 H. L. 578.

(*c*) *Gunton v. Nurse* (1821) 2 Brod. & Bing. 447; *Tollit v. Sherstone* (1839), 5 M. & W. 283. When two or more persons who are jointly interested in a chattel deposit it with a stranger, a demand by one in his own name and not on behalf of all will not enable him to sue for its recovery (*Atwood v. Ernest* (1853), 13 C. B. 881; *Harper v. Godsell* (1870), L. R. 5 Q. B. 422). If a person deposits goods with a bailee and there are other persons entitled to a part of the goods, such persons are not necessary parties to an action to recover them (*Saville v. Tancred* (1748), 3 Swan. 141, n.).

(*d*) *Toms v. Wilson* (1862), 4 B. & S. 442; *Solomons v. Dawes* (1794), 1 Esp. 83; *Clayton v. Le Roy*, [1911] 2 K. B. 1031, C. A., per FLETCHER MOULTON, L.J., at p. 1051.

(*e*) *Solomons v. Dawes, supra*.

(*f*) *Ibid.*; *Pothonier v. Dawson* (1816), Holt (N. P.), 383; *Green v. Dunn* (1811), 3 Camp. 215, n. (owner of timber demanded it of the defendant, who said, "If you will bring anyone to prove it is your property, I will give it you and not else": no evidence of conversion); *Vaughan v. Watt* (1840), 6 M. & W. 492 (a mere refusal to deliver by a pawnbroker is not conversion; it is a question for the jury whether the defendant meant to apply the property to his own use or assert the title of a third party in it, or whether he only meant to keep it in order to ascertain the title to it and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed without which refusal to deliver would not be conversion); *Canot v. Hughes* (1836), 2 Bing. (N. C.) 448 (widow and administratrix of an insolvent was applied to by his assignees for some papers that had been in his possession at the time

SECT. 2.
Demand
and
Refusal.

Similarly, where the goods are in the possession of a servant, who refuses to deliver them up without an order from his master, the servant's refusal is not evidence of conversion against the master (*g*). Where, on the other hand, the person in possession of the goods refuses to deliver them up on the ground of a claim of right by a third party, which, in fact, does not exist (*h*), or where he refuses to deliver them up unless the owner complies with some condition which the person in possession has no right to impose (*i*), or where he fails, without lawful excuse, to deliver them up (*k*), this is evidence of conversion.

If there is no refusal before action brought and there is no other conversion alleged, neither trover nor detinue will lie (*l*).

Offer to
restore.

A refusal to deliver goods is substantially cured by a subsequent offer to restore them, if such offer is made before action brought,

of his decease; it was not shown that she was told who was the owner of the papers; she said they were in the hands of the insolvent's attorney: held not sufficient evidence of conversion).

(*g*) *Alexander v. Southey* (1821), 5 B. & Ald. 247. As to the liability of the servant, see note (*p*), p. 897, *post*.

(*h*) *Caunce v. Spanton* (1844), 7 Man. & G. 903; *Atkinson v. Marshall* (1842), 12 L. J. (EX.) 117 (setting up a *jus tertii*, or keeping goods in order to maintain the title of a third person, is evidence of conversion); *Syeds v. Hay* (1791), 4 Term Rep. 260; *Clendon v. Dinneford* (1831), 5 C. & P. 13; *Wilson v. Anderton* (1830), 1 B. & Ad. 450; *Catterall v. Kenyon* (1842), 3 Q. B. 310; *Pillott v. Wilkinson* (1864), 3 H. & C. 345, Ex. Ch.; *Needham v. Rawbone* (1844), 6 Q. B. 771, n.; 9 Jur. 274; *Verrall v. Robinson* (1835), 2 Cr. M. & R. 495.

(*i*) *Cobbett v. Clinton* (1826), 2 C. & P. 471 (box containing papers demanded from the defendants, who refused to deliver up the box, unless the owner would give them a schedule of the contents); *Barnett v. Crystal Palace Co.* (1861), 2 F. & F. 443 (a person who has in his possession the goods of another has no right to retain them until he has a written receipt for them); *Binstead v. Buck* (1776), 2 Wm. Bl. 1117 (dog demanded from the defendant, who refused to deliver it up, unless he was paid for its keep); *Clark v. Chamberlain* (1836), 2 M. & W. 78; *Loeschman v. Machin* (1818), 2 Stark. 311 (if a wrongdoer sends goods to an auctioneer to be sold, and the auctioneer refuses to deliver up the goods to the owner except on payment of expenses, this is conversion by the auctioneer). If a person who has possession of the goods of another is desired by the owner to send them to a particular place, and not only refuses to send them to that place, but says generally that he will not deliver them up, unless payment of a debt due from the owner to him is guaranteed, such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place (*Sharp v. Pratt* (1827), 3 C. & P. 34).

(*k*) *Atkin v. Slater* (1844), 1 Car. & Kir. 356 (defendant being served with notice of demand for the delivery of deeds said he would consult his attorney: held, that the expression, with the subsequent conduct of the defendant in not giving up the deeds, amounted to evidence of conversion); *Davies v. Nicholas* (1836), 7 C. & P. 339 (A. lent goods to B., who died; on B.'s death the goods came into the possession of C., who, when the goods were demanded of him, said he should do nothing but what the law required; the goods were not handed over: held sufficient evidence of conversion).

(*l*) *Clayton v. Le Roy*, [1911] 2 K. B. 1031, C. A. (a stolen watch, the property of the plaintiff, was purchased by A., who sent it to the defendant, at whose shop the watch had been originally bought; the defendant wrote to A. and to the plaintiff, telling them that it was the watch that had been stolen and inquiring what their wishes were; the letter to the plaintiff was not answered, but a few days after it had been sent a clerk of the

unless the owner of the goods sustains damage by being deprived of the goods (*m*).

SECT. 2.
Demand
and
Refusal.

SECT. 3.—Persons Liable.

1576. If the person in possession has a lien on the goods demanded, but sets up a claim to keep them upon a different ground and makes no mention of the lien, he must be taken to have waived his lien, and he cannot afterwards rely upon it in an action of trover (*n*).

Waiving lien.

1577. To make a person liable in trover it must be proved that the act of conversion was committed by him or by a person for whose acts he is responsible, or by a person acting under his orders, or by a servant or agent of his acting within the scope of his authority (*o*). The servant or agent can be sued in trover, whether he has or has not authority from the master or principal for his act (*p*).

Conversion
by servants,
agents etc.

plaintiff's solicitor called at the defendant's shop, and on being shown the watch demanded that it should be then and there handed over to him, and on this being refused he then served the defendant with a writ of detinue which had been taken out two hours before: held, that there had been no wrongful refusal to return the watch to the plaintiff before the issue of the writ, and that the plaintiff had no cause of action at the date of such issue against the defendant; see *Norton v. Blackie* (1864), 13 W. R. 80.

(*m*) *Hayward v. Seaward* (1832), 1 Moo. & S. 459. As to delivery after action brought, see p. 911, *post*; as to damages, see *ibid*.

(*n*) *Weeks v. Goode* (1859), 6 C. B. (N. S.) 367; *Boardman v. Sill* (1808), 1 Camp. 410, n.; see title LIEN, Vol. XIX., p. 28.

(*o*) *Glover v. London and North Western Rail. Co.* (1850), 5 Exch. 66; *Everest v. Wood* (1824), 1 C. & P. 75; *Pothonier v. Dawson* (1816), Holt (N. P.), 383 (where the evidence of conversion is the refusal to deliver by a general agent of the defendant, in order to make the defendant liable it is necessary to prove that such agent acted under a special direction); *Hilbery v. Hatton* (1864), 2 H. & C. 822 (if a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, the principal is guilty of conversion, although at the time of the ratification he had no knowledge that the sale was unlawful). As to the liability of a husband for a conversion by his wife, see *Catterall v. Kenyon* (1842), 3 Q. B. 310; *Keyworth v. Hill* (1820), 3 B. & Ald. 685. In a case of conversion by the wife an action lies against both husband and wife (*ibid.*). If goods are delivered to a husband and wife, the action is against the husband alone, as the wife in such a case cannot detain (*Isaack v. Clark* (1615), 2 Bulst. 306). An execution creditor is not liable for a wrongful seizure and sale by the sheriff, unless the creditor personally intermeddled in the execution (*Whitmore v. Greene* (1844), 13 M. & W. 104); see titles EXECUTION, Vol. XIV., pp. 20, 21, 28; SHERIFFS AND BAILIFFS, Vol. XXV., p. 812. As to trover or detinue against a corporation, see *Yarborough v. Bank of England* (1812), 16 East, 6; *Maund v. Monmouthshire Canal Co.* (1842), Car. & M. 606. As to the liability of a master for conversion by a servant, see title MASTER AND SERVANT, Vol. XX., p. 256. As to the liability of a master for the torts of a servant, generally, see *ibid.*, pp. 248 *et seq*; and of a principal for an agent, title AGENCY, Vol. I., pp. 211 *et seq*.

(*p*) *Cranch v. White* (1835), 1 Bing. (N. C.) 414; *Stephens v. Elwall* (1815), 4 M. & S. 259; *Perkins v. Hughes* (1752), 1 Wils. 328; *Parker v. Godin* (1728), 2 Stra. 813. A servant who has received goods from his master is not liable for conversion merely because he refuses to deliver up

SECT. 3.
Persons
Liable.

Joint tort-
feasors.

Co-tenants.

1578. If two or more persons act together in doing what amounts to a conversion, they may be jointly sued (*q*).

1579. A co-tenant in common of property is guilty of conversion as against his co-tenant if he destroys the common property or directly or positively excludes his co-tenant from the common property, or so disposes of it as to render it impossible that the co-tenant should ever take and use it or enjoy the proceeds, the co-tenant seeking to exercise his rights and being denied their exercise (*r*). He cannot, however, be sued for conversion by his co-tenant if he only makes use of the common property in an ordinary and legitimate way (*s*), or takes or keeps the common property (*t*), or if he sells it (*u*).

the goods without an order from his master (*Alexander v. Southey* (1821), 5 B. & Ald. 247).

(*q*) *Lee v. Bayes* (1856), 18 C. B. 599 (A. bought a horse at a public auction (not market overt) and sent it for sale to a repository for horses kept by B.; the owner of the horse finding it there demanded it of B. in the presence of A.; B. refused to give it up: held evidence of joint conversion); *Bloxholm v. Oldham* (1750), cited in *Cooper v. Chitty* (1756), 1 Burr. 20, 22 (trover against sheriff, execution creditor, and vendee of the goods, verdict against all three); *Nicoll v. Glennie* (1813), 1 M. & S. 588 (A. and B. pledged goods without authority and afterwards became bankrupt; C. and D., the assignees in bankruptcy, took possession of the goods after the bankruptcy and refused to deliver them to the owner on demand: held, no evidence of a joint conversion by A. and B. and by C. and D.); *Atkin v. Slater* (1844), 1 Car. & Kir. 356 (written notice of demand to deliver up deeds was served on three defendants at different times and places; the defendants separately refused to deliver up the deeds: held that it was for the jury to say on the whole of the evidence whether the defendants had not previously agreed to act in such a manner with reference to the deeds as to render their refusal, though separately given, evidence of a joint conversion); see *Garth v. Howard* (1832), 5 C. & P. 346. If two or more persons are liable to be jointly sued in trover or detinue, and only one is sued and judgment is recovered against him, the judgment, though unsatisfied, is a bar to an action against the others (*Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; *Buckland v. Johnson* (1854), 15 C. B. 145). As to joint tortfeasors, generally, see title TORT, pp. 487 *et seq.*, *ante*.

(*r*) *Jacobs v. Seward* (1872), L. R. 5 H. L. 464; *Barnardiston v. Chapman* (1715), cited in *Heath v. Hubbard* (1803), 4 East, 110, 121; *May v. Harvey* (1811), 13 East, 197; *Fennings v. Grenville* (Lord) (1808), 1 Taunt. 241. As to the infringement by one co-owner of the rights of his co-owners, see, further, title TRESPASS, p. 866, *ante*; as to the rights of co-owners of property *inter se*, generally, see titles PERSONAL PROPERTY, Vol. XXII., pp. 403, 404; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 199 *et seq.* If a ship is taken possession of by one tenant in common and sent to sea without the consent of his co-tenant, trover lies (*Barnardiston v. Chapman*, *supra*; approved in *Jacobs v. Seward*, *supra*, at p. 474).

(*s*) As, for instance, by cutting grass and making hay in the common field (*Jacobs v. Seward*, *supra*), or extracting the oil and the other valuable parts of a whale which is owned in common (*Fennings v. Grenville* (Lord), *supra*). A grant of arms is a sort of family document in which every member of the family has an interest; whatever member of the family has possession of it is entitled to keep it, but may be called upon by the other members to produce it; trover or detinue will not lie against anyone interested in it (*Stubs v. Stubs* (1862), 1 H. & C. 257).

(*t*) Co. Litt. 200 a; *Holliday v. Cammell and White* (1787), 1 Term Rep. 658; *Jones v. Brown* (1856), 25 L. J. (EX.) 345. Similarly the bailee of the

(*u*) For note (*u*) see p. 899, *post*.

SECT. 3.
Persons
Liable.

Conversion
by bailee.

1580. A bailee of goods for hire who sells or pledges the goods thereby determines the bailment, and an action of trover lies against him or a purchaser or pledgee from him (a). If by agreement a person is to have the use of certain goods for a specific purpose for a certain time and the goods are applied by such person during the term for purposes in contravention of the agreement, the improper use of the goods determines the bailment and the bailee may be sued in trover (b). If a bailee for safe custody wrongfully deals with them, as by selling and delivering them, an action of trover lies against him, and may be brought immediately upon the conversion; the bailor may also demand the re-delivery of the goods, and may sue the bailee in detinue for breach of his duty to deliver upon request (c). If goods are mortgaged and it is agreed that the mortgagor should hold the goods up to the day fixed for payment of the mortgage debt and the mortgagor before that date sells the goods, the sale destroys the bailment and the mortgagor may be sued in trover (d).

If a person who has a mere lien on goods wrongfully disposes of them, he waives his lien by parting with the goods and may be sued in trover (e). On the other hand, a pledgee or mortgagee in lawful possession of goods by virtue of the pledge or mortgage cannot be

common property from one co-owner is not guilty of conversion if he refuses to deliver the property on the demand of another co-owner (*Harper v. Godsell* (1870), L. R. 5 Q. B. 422; but see *Nyberg v. Handelaar*, [1892] 2 Q. B. 202, C. A.). As to conversion by a bailee who has received the common property from all the tenants in common, see *May v. Harvey* (1811), 13 East, 197; *Bleaden v. Hancock* (1829), 4 C. & P. 152. As to a defendant in an action of trover raising the defence that another person as well as the plaintiff is interested in the property, see *Nathan v. Buckland* (1818), 2 Moore (C. P.), 153.

(u) *Mayhew v. Herrick* (1849), 7 C. B. 229; *Heath v. Hubbard* (1803) 4 East, 110; *Farrar v. Beswick* (1836), 1 M. & W. 682; *Morgan v. Marquis* (1853), 9 Exch. 145; but see *Fraser v. Kershaw* (1856), 2 K. & J. 496. The remedy of the other tenants in common in such a case is not an action of trover, but an action of account; see stat. (1705) 4 & 5 Anne, c. 3, s. 27; and title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 203, 204.

(a) *Cooper v. Willomatt* (1845), 1 C. B. 672; *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37; *Helby v. Matthews*, [1895] A. C. 471; *Payne v. Wilson*, [1895] 2 Q. B. 537, C. A.; see title BAILMENT, Vol. I., p. 556. As to hire-purchase agreements, see *ibid.*, pp. 554 *et seq.*; title BILLS OF SALE, Vol. III., pp. 12, 13; *R. v. Price* (1913), 9 Criminal Appeal Reports, 15, C. C. A. The sending of the goods to an auctioneer to be sold is conversion (*Loeschman v. Machin* (1818), 2 Stark. 311). As to evidence of conversion by a pledgee, see *Vaughan v. Watt* (1840), 6 M. & W. 492; as to cases where a purchaser or pledgee from a factor has a good title, see title AGENCY, Vol. I., p. 205.

(b) *Bryant v. Wardell* (1848), 2 Exch. 479; see, further, title BAILMENT, Vol. I., pp. 534, 536, 537.

(c) *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206. The distinction is of importance with regard to the Statute of Limitations, for although time may have run against the action of trover from the date of the wrongful conversion, time does not run against the action of detinue till after the refusal to deliver (*ibid.*).

(d) *Fenn v. Bittleston* (1851), 7 Exch. 152 (action against the assignees in bankruptcy of the mortgagor for a sale by them); see title BILLS OF SALE, Vol. III., p. 67.

(e) *Mulliner v. Florence* (1878), 3 Q. B. D. 484, C. A.; *Scott v. Newington* (1833), 1 Mood. & R. 252; see title LIEN, Vol. XIX., p. 29.

SECT. 3.
Persons
Liable.

Possession
necessary.

sued in trover for a wrongful sale or re-pledging of the goods while the debt for which the goods are pledged or mortgaged remains unpaid (*f*).

1581. No one can be sued in trover or detinue unless he has had possession of the goods sought to be recovered or of a document of title relating to such goods (*g*).

Part III.—Enforcement of Liability.

SECT. 1.—Who may Sue.

SUB-SECT. 1.—In General.

Plaintiff in
trover or
detinue.

1582. If goods have been converted or detained, and both the right of property and the legal possession of the goods or the right to the immediate possession at the time of the conversion or detention (*h*) are united in the same person, that person is the proper plaintiff in an action of trover or detinue.

A person cannot sue in trover if he has no right of property in the goods converted (*i*), or if he has parted with the property in the

(*f*) *Halliday v. Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch.; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585. As to the remedy of the pledgor or mortgagor, see p. 906, *post*. As to the power of a pawnee to deal with the article pawned, see generally title PAWNS AND PLEDGES, Vol. XXII., p. 244.

(*g*) *Jones v. Dowle* (1841), 9 M. & W. 19; *Hinchliffe v. Sharpe* (1898), 77 L. T. 714. A person who has had possession of the goods and has improperly parted with the possession of them may be sued (*Jones v. Dowle*, *supra*; *Keeve v. Palmer* (1858), 5 C. B. (N. S.) 84). An administrator cannot bring detinue against a person who had possession of the goods after the death of the intestate but parted with them before the grant of administration (*Crossfield v. Such* (1853), 8 Exch. 825; but see *Goodman v. Boycott* (1862), 2 B. & S. 1); but the defendant in such a case might be sued in trover (*Tharpe v. Stallwood* (1843), 5 Man. & G. 760; approved in *Foster v. Bates* (1843), 12 M. & W. 226; *Barnett v. Guildford* (Earl) (1855), 11 Exch. 19; *Goodman v. Boycott*, *supra*; compare *Crossfield v. Such*, *supra*; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 146). If a defendant misleads the plaintiff by telling him that he had the goods sought to be recovered, the plaintiff is entitled to a verdict, although the statement was a fraud on the defendant's part (*Hall v. White* (1827), 3 C. & P. 136).

(*h*) *Gordon v. Harper* (1796), 7 Term Rep. 9; *Bradley v. Copley* (1845), 1 C. B. 685; see *Clerk v. Adam* (1832), 1 Cl. & Fin. 242, H. L. The rules as to the relation back of the plaintiff's title in trover are the same as in trespass; see title TRESPASS, p. 865, note (*o*), *ante*; *Elliott v. Kemp* (1840), 7 M. & W. 306.

(*i*) *Melling v. Kelshaw* (1830), 1 Cr. & J. 184; *Crocker v. Molyneux* (1828), 3 C. & P. 470; *Makepeace v. Jackson* (1813), 4 Taunt. 770. Thus, the buyer of a specified quantity of goods cannot sue in trover till they are appropriated to him (*Wait v. Baker* (1848), 2 Exch. 1 (delivery of the specified quantity of goods on board a ship under a bill of lading by which the cargo is deliverable to the vendor or his assigns is not an appropriation); *Evans v. Nichol* (1841), 3 Man. & G. 614 (if B. ships goods for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A., A. has sufficient property in the goods to maintain trover, although

goods at the time of the conversion (*k*), or if at the time of the conversion his title to the goods has been divested by a disposition which is valid under the Factors Act, 1889 (*l*).

If the owner of goods is induced by the fraud of a person to purport to enter into a contract with and to dispose of goods to that person in the belief that he is another person, there is no contract; no property, therefore, passes, and the owner of the goods may sue in trover the defrauder or any person in possession of the goods, although the latter may have obtained them *bonâ fide* and without notice of the fraud, provided that the goods have not been sold in market overt (*n*).

SECT. 1.
Who may
Sue.

Contract
induced by
fraud.

SUB-SECT. 2.—*Effect of Fraud and Theft.*

1583. If an owner of goods is induced by false pretences or other fraud to enter into a voidable contract with another person, the owner is entitled to repudiate the transaction, and may then sue in trover the defrauder or any agent of his or any person in possession of the goods who has taken them with notice of the fraud or otherwise than for value and without notice (*n*); but in the case of such a contract, if the defrauder, before repudiation, disposes of the goods to a third person who takes them *bonâ fide* for value and without notice of the fraud, the third person acquires a good title and cannot be sued by the owner (*o*).

Repudiation
of fraudulent
transactions.

no bill of lading is executed and A. merely holds a mate's receipt acknowledging the shipment of goods to be delivered to A.); see *De Lizardi v. Pennell* (1856), 6 E. & B. 742). If one person agrees to make an article for another, no property in the article, in the absence of special provisions to the contrary, passes to the buyer, and the buyer cannot sue in trover until the article is finished and delivered to him (*Goode v. Langley* (1827), 7 B. & C. 26; *Mucklow v. Mangles* (1808), 1 Taunt. 318; *Tripp v. Armitage* (1839), 4 M. & W. 687; *Reid v. Fairbanks* (1853), 13 C. B. 692 (where by the special terms of the contract the property in an unfinished chattel passed to the vendee before it was finished)); see also *Woods v. Russell* (1822), 5 B. & Ald. 942. As to when property passes on a sale of goods generally, see title SALE OF GOODS, Vol. XXV., pp. 166 *et seq.*

(*k*) *Armstrong v. Allan Brothers* (1892), 67 L. T. 873, C. A.; *Hornblower v. Proud* (1819), 2 B. & Ald. 327; *Emanuel v. Dane* (1812), 3 Camp. 299; *Hunter v. Westbrook* (1827), 2 C. & P. 578. But as to an unpaid vendor, see p. 908, *post*.

(*l*) 52 & 53 Vict. c. 45; see title AGENCY, Vol. I., p. 205.

(*m*) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *Hardman v. Booth* (1863), 1 H. & C. 803; *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch.; and see *Irving v. Motly* (1831), 7 Bing. 543. As to market overt, see titles MARKETS AND FAIRS, Vol. XX., pp. 53 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 195, 196.

(*n*) *E. v. George* (1901), 65 J. P. 729; *E. v. Walker* (1901), 65 J. P. 729; *Noble v. Adams* (1816), 7 Taunt. 59; *Sheppard v. Shoobred* (1841), Car. & M. 61; compare title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 686. As to the effect of fraud upon contracts generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 719 *et seq.*

(*o*) *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A.; *Parker v. Patrick* (1793), 5 Term Rep. 175; *Moyce v. Newington* (1878), 4 Q. B. D. 32 (this case was overruled by *Bentley v. Vilmont* (1887), 12 App. Cas. 471; see title SALE OF GOODS, Vol. XXV., pp. 198, 199; but the decision in that case and the decision to the same effect in *Nickling v. Heaps* (1870), 21 L. T. 754, have, as regards goods, been superseded by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2), the effect of which is to

SECT. I.

Who may
Sue.Owner
fraudulent.

1584. No person can sue to set aside a completed transaction entered into by his own fraud (*p*); if, however, an owner of goods hands over his goods to another person with a fraudulent purpose and the fraudulent purpose is not carried out, the owner may repudiate the transaction and demand the goods from the other person, and on refusal may sue him in trover. If the person to whom the goods have been handed over assigns them to a third person who is cognisant of the fraud and the fraudulent purpose is not carried out, the owner may take the same course as regards the third person (*q*).

Theft.

1585. If goods other than money or negotiable securities are stolen, the theft or any subsequent disposition of the goods, except a sale in market overt, effects no change in the property, and the owner may sue the thief or any person into whose hands the goods pass, except a purchaser in market overt (*r*), or the police authorities in whose hands the goods are for the purposes of a

restore the decision in *Moyce v. Newington* (1878), 4 Q. B. D. 32, except as to choses in action, to which the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), does not apply (see *ibid.*, s. 62 (1); and title SALE OF GOODS, Vol. XXV., p. 112); the owner who has been deprived of any other chose in action except a negotiable security by a contract voidable on the ground of fraud, may, on the conviction of the defrauder, sue the person in possession, even if he has taken the chose in action *bonâ fide* and without notice (*Bentley v. Vilmont* (1887), 12 App. Cas. 471; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2)). If there is no conviction, the *bonâ fide* possessor of the chose in action cannot be sued (*Sheppard v. Shoolbred* (1841), Car. & M. 61). As to negotiable securities, see note (*r*), *infra*.

(*p*) *Jones v. Yates* (1829), 9 B. & C. 532. The rule applies not only to the person himself, but to those claiming under him. As to rescission generally, see titles CONTRACT, Vol. VII., p. 356; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*; MISTAKE, Vol. XXI., pp. 17 *et seq.*, 111 *et seq.*

(*q*) *Taylor v. Bowers* (1876), 1 Q. B. D. 291, C. A.

(*r*) The rule of law that the owner of goods cannot sue the thief in a civil action until he has prosecuted him criminally does not seem now to be of any practical importance; see title ACTION, Vol. I., pp. 27 *et seq.* It is clear that a third person in possession of the stolen property can be sued, although the thief has not been prosecuted (*Lee v. Bayes* (1856), 18 C. B. 599; *White v. Spettigue* (1845), 13 M. & W. 603). If the stolen property consists of money, no action of trover or detinue can be brought (see p. 888, *ante*, p. 903, *post*); but, it seems, the thief or any person who received the money from him otherwise than for value could be sued for money had and received; if the stolen property is a negotiable security, the thief or anyone receiving it from him otherwise than for value and without notice could be sued in trover or detinue. No action lies against anyone who receives stolen money from the thief in currency for value (*Moss v. Hancock*, [1899] 2 Q. B. 111 (where a Jubilee £5 piece was bought as a curiosity)), or against anyone who takes from him or any intermediate transferor a negotiable security *bonâ fide* and for value without notice of the theft (*Goodwin v. Robarts* (1876), 1 App. Cas. 476; *Chichester v. Hill & Son* (1882), 52 L. J. (Q. B.) 160; *Middleton v. Barned* (1849), 4 Exch. 241). As to the recovery of stolen property, see, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.*; PAWNS AND PLEDGES, Vol. XXII., p. 247; see p. 903, *post*. If the thief has bought goods with the stolen money, the owner of the money is entitled to the goods (*Catley v. Lowndes* (1885), 2 T. L. R. 136).

prosecution, or a person entrusted by the police with the custody of such goods while the prosecution is pending (s).

If stolen goods are sold in market overt, the first person who so sells can be sued in trover (t). On the conviction of the thief on the prosecution of the owner, the property sold in market overt reverts in the owner, who can obtain an order for the restitution of the stolen property from the court by which the thief is convicted, and may, with or without an order for restitution, sue in trover or detain anyone who is in possession of the goods, even although the person in possession is a purchaser in market overt (a). The property in money which has passed in currency or in a negotiable instrument which is in the hands of a *bona fide* holder for value does not revert on the conviction of the thief, and no action can be brought to recover such property (b).

SECT. 1.

Who may
Sue.Sale of stolen
goods in
market
overt.

SUB-SECT. 3.—Persons Entitled to Possession.

1586. The owner of goods cannot sue in trover or detain unless he is in possession of them or has the immediate right to the possession (c). He does not, however, lose his possession of them

Immediate
right to
possession.

(s) *Tyler and Witt v. London and South Western Rail. Co.* (1884), Cab. & El. 285. When the prosecution has determined, the police authorities cannot detain the property from the true owner, unless within a reasonable time they make an application to a court of summary jurisdiction under the Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1, for an order with respect to the property in their hands; pending the hearing of such an application the owner cannot sue the police authorities for the recovery of the property (*Bullock v. Dunlap* (1876), 2 Ex. D. 43). If no such application is made, a policeman who, after the prosecution is determined, detains the property from the owner or hands it over to anyone not the owner who claims the goods is liable to an action by the owner, even if the policeman acted under the order of his superiors (*Golithly v. Reynolds* (1771), Loftt, 88; *Winter v. Banckes* (1901), 17 T. L. R. 446); such an action can be brought by the owner, even if the person accused of the theft has been tried and acquitted, provided that there has been no sale in market overt (*Winter v. Banckes, supra*). As to the owner of stolen goods being estopped by his negligence or other conduct from setting up his title to the goods, see *Beckwith v. Corral* (1826), 3 Bing. 444; *Morrison v. Buchanan* (1833), 6 C. & P. 18; *Gregg v. Wells* (1839), 10 Ad. & El. 90; and title ESTOPPEL, Vol. XIII., pp. 396, 398 *et seq.*

(t) *Delaney v. Wallis & Son* (1834), 14 L. R. Ir. 31, C. A.; *Peer v. Humphrey* (1835), 2 Ad. & El. 495.

(a) *Scattergood v. Sylvester* (1850), 15 Q. B. 506; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 686; MARKETS AND FAIRS, Vol. XX., p. 55. A person who purchases stolen goods in market overt, and sells and parts with them before conviction of the thief, cannot be sued by the owner of the goods, even though the owner gave him notice of the theft while the goods were in his possession (*Horwood v. Smith* (1788), 2 Term Rep. 750). A purchaser in market overt who has possession of the goods at the time of the conviction may be sued in trover (*Scattergood v. Sylvester, supra*). As to market overt, see titles MARKETS AND FAIRS, Vol. XX. pp. 53 *et seq.*; SALE OF GOODS, Vol. XXV., pp. 195, 196.

(b) *Chichester v. Hill & Son* (1882), 52 L. J. (Q. B.) 160; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; see note (r), p. 902, *ante*. *Quære* whether, if a person acquires a title under the Factors Act, 1889 (52 & 53 Vict. c. 45), a subsequent conviction for larceny divests the title (*Weiner v. Harris*, [1910] 1 K. B. 285, C. A.).

(c) *Gordon v. Harper* (1796), 7 Term Rep. 9; *Bradley v. Copley* (1845),

SECT. 1.
Who may
Sue.

by their being taken wrongfully from him, as under process which is issued without jurisdiction; in such a case he may sue the taker or holder of the goods in trover (*d*). Similarly, if he loses them, he retains his title to them and may sue anyone who converts or detains them from him, unless he has after the loss estopped himself by his negligence or otherwise from setting up his title (*e*).

Title deeds.

1587. As regards title deeds, the person who has a freehold estate has a right to the deeds, and is the proper plaintiff in an action for their conversion or detention (*f*).

Co-tenants

1588. One co-tenant of property cannot bring trover against his co-tenant, or a person deriving title under the co-tenant, unless the co-tenant or person claiming under him destroys the common property or altogether excludes the other tenant from all use and enjoyment of the property (*g*). If the defendant in an action of trover justifies as joint owner with the plaintiff, he should

1 C. B. 685; *Brind v. Hampshire* (1836), 1 M. & W. 365; *Manders v. Williams* (1849), 4 Exch. 339; *Jelks v. Hayward*, [1905] 2 K. B. 460; see *Latter v. White* (1872), L. R. 5 H. L. 578. The owner of goods who has parted with the possession for a time can maintain an action for injury to his reversionary interest, although he cannot sue in trover or detinue; in the case of the seizure of such goods under an execution against the person who has a right to their immediate possession, the owner of the goods must apprise the sheriff as soon as they are seized that the person in possession has only a limited interest in the goods (*Dean v. Whittaker* (1824), 1 C. & P. 347). As to the rights of a bailor where the bailee wrongfully determines the bailment, see p. 899, *ante*. As to the duty of the finder of goods as a bailee, see title BAILMENT, Vol. I., pp. 528 *et seq.* As to treasure trove, see title CONSTITUTIONAL LAW, Vol. VII., pp. 212, 213.

(*d*) *Quinn v. Pratt*, [1908] 2 I. R. 69. As to what constitutes possession of goods, see, further, titles PERSONAL PROPERTY, Vol. XXII., pp. 391 *et seq.*; TRESPASS, p. 865, *ante*.

(*e*) See *Beckwith v. Corral* (1826), 3 Bing. 444; compare title ESTOPPEL, Vol. XIII., pp. 398 *et seq.*; and see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 239, 240. As to the title of the finder of lost goods, see p. 905, *post*.

(*f*) *Newton v. Beck* (1858), 3 H. & N. 220; *Lord v. Wardle* (1837), 3 Bing. (N. C.) 680; *Hooper v. Ramsbottom* (1815), 6 Taunt. 12. As to the right to the title deeds of the whole of an estate, when part is sold, see *Yea v. Field* (1788), 2 Term Rep. 708; and titles REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 239; SALE OF LAND, Vol. XXV., p. 337. As to the right when several persons are equally interested in the land to which the deeds refer, see *Foster v. Crabb* (1852), 12 C. B. 136; and title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 239. As to the right to a lease, see *Hall v. Ball* (1841), 3 Man. & G. 242; *Parry v. Frame* (1801), 2 Bos. & P. 451; and title LANDLORD AND TENANT, Vol. XVIII., p. 395. As to the right to deeds prepared at the expense of a proposed purchaser, when the contract is abandoned, see *Esdaile v. Oxenham* (1824), 3 B. & C. 225; and compare title LIEN, Vol. XIX., pp. 17, note (*f*), 31. As to the right to an abstract of title and to an opinion written thereon, see *Roberts v. Wyatt* (1810), 2 Taunt. 268; and compare titles SALE OF LAND, Vol. XXV., p. 337; SOLICITORS, Vol. XXVI. There are some cases in which a person has a right to keep a document of title, although he has no right to the property to which the document relates; see *Rummens v. Hare* (1876), 1 Ex. D. 169, C. A.; and compare *Re Lehmann and Walker's Contract*, [1906] 2 Ch. 640; and title SALE OF LAND, Vol. XXV., p. 337, note (*k*).

(*g*) See p. 898, *ante*; but see *Nyberg v. Handelaar*, [1892] 2 Q. B. 202, C. A.; *Re Casey's Patents*, *Stewart v. Casey*, [1892] 1 Ch. 104, 108, C. A.

also aver and show that the alleged act of conversion was merely the exercise of the right of a co-owner (*h*).

SECT. 1.

Who may
Sue.

1589. Possession of goods by a *cestui que trust* in accordance with the provisions of the trust instrument is in law the possession of the trustee, and the trustee can maintain an action against a wrongdoer for the conversion of the goods (*i*).

*Cestui que
trust.*

1590. A donee of property cannot sue in trover, unless the gift has been perfected by the execution of a deed, or, if the gift is verbal, by the delivery of the property (*j*).

Donee.

1591. A person who is in mere possession of goods, as, for instance, the innocent finder of lost goods (*k*), has sufficient title in the goods to sue in trover or detain any person except the true owner (*l*).

Innocent
finder.

1592. A sheriff who has seized goods under an execution can sue in trover a person who wrongfully takes the goods away (*m*).

Sheriff.

(*h*) *Jones v. Brown* (1856), 25 L. J. (EX.) 345; see *Higgins v. Thomas* (1890), 8 Q. B. 908.

(*i*) *Barker v. Furlong*, [1891] 2 Ch. 172; see, further, title TRUSTS AND TRUSTEES.

(*j*) *Irons v. Smallpiece* (1819), 2 B. & Ald. 551; *Cochrane v. Moore* (1890), 25 Q. B. D. 57, C. A.; *Re Ridgway, Ex parte Ridgway* (1885), 15 Q. B. D. 447; *Brown v. Hickinbotham* (1881), 50 L. J. (Q. B.) 426, C. A.; *Shower v. Pilck* (1849), 4 Exch. 478; see title GIFTS, Vol. XV., pp. 409 *et seq.*; but see *Royston v. Hankey* (1833), 3 Moo. & S. 381. As to what amounts to a delivery, see *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Winter v. Winter* (1861), 4 L. T. 639; compare title GIFTS, Vol. XV., pp. 412, 413. If a document of title to a chose in action which is only assignable by an instrument of writing is given and delivered by the owner of the chose in action to another person, the donee has the right to retain the document, and the person in whom the legal property in the chose in action is vested cannot sue the donee in trover or detain (*Rummens v. Hare* (1876), 1 Ex. D. 169, C. A.; *Barton v. Gainer* (1858), 3 H. & N. 387). The receiver of a letter has a sufficient property in the paper on which the letter is written to enable him to sue in trover or detain a person who wrongfully detains it (*Thurston v. Charles* (1905), 21 T. L. R. 659; *Oliver v. Oliver* (1861), 11 C. B. (N. S.) 139). As to the right to publish letters, see *Macmillan & Co. v. Dent*, [1907] 1 Ch. 107, C. A.; *Philip v. Pennell*, [1907] 2 Ch. 577; see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 138; Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), ss. 1 (1), 3, 17 (1), (2).

(*k*) *Bridges v. Hawkesworth* (1851), 15 Jur. 1079; *Armory v. Delamirie* (1722), 1 Stra. 505; 1 Smith, L. C., 11th ed., p. 356; see title PERSONAL PROPERTY, Vol. XXII., pp. 394, 395; see also *Cartwright v. Green* (1803), 8 Ves. 405; *Merry v. Green* (1841), 7 M. & W. 623; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 630. The person in possession of land is generally entitled as against the finder to chattels found on the land (*South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; but see *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405, 410, P. C.).

(*l*) If a plaintiff in trover offers written evidence to establish a property which he fails to establish, he cannot recur to and rely on a mere possessory title (*Sherriff v. Cadell* (1798), 2 Esp. 617).

(*m*) *Wilbraham v. Snow* (1669), 2 Wms. Saund. (1871 ed.) 87; *Union Bank of London v. Lenanton* (1878), 3 C. P. D. 243, C. A.; see, further, title EXECUTION, Vol. XIV., p. 22. As against everyone but the execution creditor and the sheriff and his officers, the real owner is up to the time

SECT. 1.

Who may
Sue.Wrongful
possession.

1593. A wrongful possession, or, except in the case of negotiable securities or money that has passed in currency, a possession derived from a person who has wrongful possession, confers no title (*n*).

SUB-SECT. 4.—*Bailees, Pledgees, and Mortgagees.*

Bailment.

1594. Where goods are bailed simply without reward, either the bailor or the bailee may sue in trover, if they are wrongfully taken out of the bailee's possession (*o*).

A person who as against the owner is entitled to the possession of goods can sue in trover or detinue a wrongdoer who takes them away, and can even sue the owner, if the owner deprives him of the goods (*p*).

Bailment
for hire.

If goods which are in the possession of a bailee for hire are converted, the bailee is the proper person to sue in trover, but if the bailee sells them, the owner can sue the purchaser in trover, though the purchase was made *bonâ fide* (*q*).

Mortgagor in
possession.

1595. Where the mortgagor of goods is allowed to hold them up to the day fixed for payment, he is the proper plaintiff to sue in trover, but if he sells the goods, the owner may sue him or a purchaser from him (*r*).

Pledge.

1596. Where goods are pledged, the pledgee has the right to their possession, and, until the money for which the pledge is a security is tendered or paid, is the only person who can sue in trover or detinue (*s*).

A claim by the pledgee to be the absolute owner of the goods pledged does not excuse the pledgor from the necessity of tendering the amount due, and does not revest in him the right to the immediate possession of the goods without payment or tender of the amount due (*t*). An unlawful sale by the pledgee does not determine the pledge and does not enable the pledgor to sue in

of the sale in possession, and may also sue a wrongdoer in trover (*Union Bank of London v. Lenanton* (1878), 3 C. P. D. 243, C. A.).

(*n*) *Buckley v. Gross* (1863), 3 B. & S. 566; *Rackham v. Jesup* (1772), 3 Wils. 332; *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch.

(*o*) *Nicolls v. Bastard* (1835), 2 Cr. M. & R. 659. As to the rights and duties of gratuitous bailees generally, see title BAILMENT, Vol. I., pp. 526 *et seq.*

(*p*) *Roberts v. Wyatt* (1810), 2 Taunt. 268; *Craig v. Shedden* (1859), 1 F. & F. 553; *Turner v. Hardcastle* (1862), 11 C. B. (N. S.) 683. As to the difference in the measure of damages between an action against a wrongdoer and an action against the owner, see p. 910, *post*.

(*q*) *Cooper v. Willomatt* (1845), 1 C. B. 672; *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37; *Helby v. Matthews*, [1895] A. C. 471; as to the liability of the bailee, see p. 899, *ante*.

(*r*) *Fenn v. Bittleston* (1851), 7 Exch. 152; see title BILLS OF SALE, Vol. III., p. 67.

(*s*) *Martin v. Reid* (1862), 11 C. B. (N. S.) 730; *Broadbent v. Varley* (1862), 12 C. B. (N. S.) 214; *Owen v. Knight* (1837), 4 Bing. (N. C.) 54; *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; *Mecklenburgh v. Gloyn* (1865), 13 W. R. 291; see p. 899, *ante*; and see title PAWNS AND PLEDGES, Vol. XXII., p. 245.

(*t*) *Yungmann v. Briesemann* (1892), 67 L. T. 642, C. A. There is a difference in this respect between a lien and a pledge. If the bailee of

trover or detinue, although the pledgor may have a remedy by a special action, if the pledgee professes to dispose of the reversionary interest in the pledge or does the pledgor any real damage by making it more difficult for him to recover the property on payment of the debt (*a*). If a pledgee refuses a tender of the sum due, he loses his property in the goods, and the pledgor can then sue him in trover or detinue (*b*).

SECT. 1.
Who may
Sue.

1597. Where goods are mortgaged and are in the possession of the mortgagee, the mortgagor cannot sue in trover or detinue, until he pays the mortgage debt; his remedy is to sue for redemption or to make a summary application for the delivery of the goods on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. A tender properly made is not in the case of a mortgage equivalent to payment, and the refusal of a tender does not, as in the case of a pledge (*c*), deprive the mortgagee of his property in the goods (*d*).

Mortgagee in
possession.

SUB-SECT. 5.—*Sellers and Buyers.*

1598. Where specific goods are sold and nothing is said as to the time of delivery or payment, and everything that the seller has to do with them is complete, the property vests in the buyer, and the seller is bound to deliver them, whenever they are demanded, on payment of the price, but the buyer has no right to the possession till he pays the price (*e*). Where specific goods are sold upon credit and nothing is agreed upon as to the time of delivering them, the buyer is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, but is liable to be defeated if he becomes insolvent before he obtains possession (*f*). An insolvent buyer, therefore, who has not paid or tendered the price is not entitled to

Rights of
seller and
buyer.

goods who has a lien on them sets up a claim for a sum other than that which is due, or sets up a claim inconsistent with the right of the owner, he waives his lien and his detention becomes unlawful, and the owner of the goods can sue without tendering or paying the amount due (*Dirks v. Richards* (1842), Car. & M. 626; *Yungmann v. Briesemann* (1892), 67 L. T. 642, C. A.).

(*a*) *Halliday v. Holgate* (1868), L. R. 3 Exch. 299, Ex. Ch.; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585, disapproving *Johnson v. Stear* (1863), 15 C. B. (N. S.) 330, in so far as it decides that an action of trover would lie by the pledgor on an unlawful sale. In *Pigot v. Cubley* (1864), 15 C. B. (N. S.) 701, it was held that the pledgor could sue in trover on an unlawful sale by the pledgee, but in that case the amount of the debt was tendered after the sale, and the decision might perhaps be supported on the ground that there was an agreement not to sell till a certain time. As to the pledgor's remedies, see, generally, title PAWNS AND PLEDGES, Vol. XXII., pp. 242, 243; and compare *ibid.*, p. 244.

(*b*) *Yungmann v. Briesemann*, *supra*; see *Pigot v. Cubley*, *supra*.

(*c*) See the text, *supra*.

(*d*) *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273, P. C.; *Yungmann v. Briesemann*, *supra*. As to the law relating to tender generally, see title CONTRACT, Vol. VII., pp. 417 *et seq.*

(*e*) *Blozam v. Sanders* (1825), 4 B. & C. 941.

(*f*) *Ibid.*; *Tooke v. Hollingworth* (1793), 5 Term Rep. 215; as to delivery of and payment for goods sold, see, further, title SALE OF GOODS, Vol. XXV., pp. 206 *et seq.*, 233 *et seq.*

SECT. 1.

Who may
Sue.

bring trover or detinue for the goods; his only right is to have possession on payment of the price (*g*).

If the seller retains possession of the goods with a lien for unpaid purchase-money, the buyer cannot maintain trover against a person who tortiously removes the goods; the seller is the only person who can sue in trover in such a case (*h*).

Conditional
delivery.

1599. Where there is a contract that the seller should deliver goods on a condition and delivery is made of part of the goods, but the condition is broken, the delivery is only conditional, and the seller is entitled to stop further delivery and sue in trover for the goods already delivered (*i*). Similarly, where a seller sells goods to be paid for on delivery and by mistake delivers the goods without receiving payment, the seller may, after demand and refusal to return the goods or pay, sue the buyer in trover (*j*).

If goods are sold to be paid for by instalments, the balance to be paid before removal, and the seller allows the buyer to place the goods on the buyer's premises under lock and key, but the seller retains the key of the external inclosure, and the balance is unpaid, the buyer has not such a possession as will enable him to bring trover against the seller upon a wrongful removal and sale of the goods (*k*).

Seller as
buyer's
agent.

1600. If goods are sold and the seller remains in possession of them as the agent for the buyer and there has been no default on the part of the buyer and the seller converts the goods, the buyer can sue the seller in trover, as he has both the right of property and possession, which are necessary to maintain the action (*l*).

SECT. 2.—*Remedies.*SUB-SECT. 1.—*In General.*

Recapture.

1601. If goods have been wrongfully taken out of the possession of the owner, he may lawfully retake them, and is justified in the use of reasonable force against a person who resists him (*m*).

Action.

The owner may also after demand and refusal (*n*) sue the taker or any person who has possession of the goods in trover or detinue (*o*), or he may waive the tort and sue as upon an implied contract for money had and received (*p*).

SUB-SECT. 2.—*Measure of Damages.*

Damages.

1602. If the plaintiff succeeds in an action of trover, he is in general entitled to recover by way of damages the value of the

(*g*) *Bloxam v. Sanders* (1825), 4 B. & C. 941; see title SALE OF GOODS, Vol. XXV., p. 242.

(*h*) *Lord v. Price* (1874), L. R. 9 Exch. 54.

(*i*) *Bishop v. Shillito* (1818), 2 B. & Ald. 329, n. As to conditions generally, see title SALE OF GOODS, Vol. XXV., pp. 149 *et seq.*

(*j*) *Bishop v. Shillito*, *supra*, per BAYLEY, J., at p. 329, n.

(*k*) *Milgate v. Keble* (1841), 3 Man. & G. 100.

(*l*) *Chinery v. Viall* (1860), 5 H. & N. 288. As to the measure of damages in such a case, see p. 910, *post*.

(*m*) See title TRESPASS, p. 868, *ante*.

(*n*) See pp. 894 *et seq.*, *ante*.

(*o*) See pp. 888 *et seq.*, *ante*.

(*p*) See p. 912, *post*.

goods converted (*q*). The jury, in assessing the damages, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time (*r*). If an inquiry is directed as to damages and a receiver of the property is appointed, damages cannot be given in respect of detention after the appointment of the receiver (*s*).

SECT. 2.
Remedies.

Special damages may be given besides the value of the goods, if such damages have been sustained and are not too remote and are claimed in the statement of claim (*t*). Vindictive damages cannot be awarded in an action of trover or detinue (*a*).

Special
damages.

In an action for the conversion of fixtures the plaintiff cannot recover the value of the fixtures in their affixed state, but is entitled to have the value of the articles estimated at a fair price as chattels (*b*).

Fixtures.

In trover for an unstamped document, which cannot be sued on, unless it is stamped, but which can be stamped upon payment of a penalty and the stamp duty, the plaintiff is entitled to such damages as he might have recovered in an action on the document (*c*).

Unstamped
documents.

In trover for a bill of exchange the damages are the amount of principal and interest due (*d*).

Bills of
exchange.

(*q*) *Finch v. Blount* (1836), 7 C. & P. 478; *Cook v. Hartle* (1838), 8 C. & P. 568; *Keen v. Priest* (1859), 4 H. & N. 236. As to the assessment of damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(*r*) *Greening v. Wilkinson* (1825), 1 C. & P. 625, disapproving *Mercer v. Jones* (1813), 3 Camp. 477; *Johnson v. Hook* (1883), Cab. & El. 89; *France v. Gaudet* (1871), L. R. 6 Q. B. 199. The rule in detinue is the same (*Williams v. Peel River Land and Mineral Co., Ltd.* (1886), 55 L. T. 689, C. A.; *Williams v. Archer* (1847), 5 C. B. 318, Ex. Ch; *Archer v. Williams* (1846), 2 Car. & Kir. 26; *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A. C. 166). The jury may take into consideration the value of the goods even after action brought (*Williams v. Archer, supra*; but see *Leader v. Rhys* (1861), 2 F. & F. 399). Damages must be limited to detention for which the defendant is responsible (*Serrao v. Noel* (1885), 15 Q. B. D. 549, C. A.).

(*s*) *Peruvian Guano Co. v. Dreyfus Brothers & Co., supra*; see, further, title RECEIVERS, Vol. XXIV., pp. 375 *et seq.*

(*t*) *Bodley v. Reynolds* (1846), 8 Q. B. 779; *Davis v. Oswell* (1837), 7 C. & P. 804; *Archer v. Williams, supra*; compare *Price v. Webb*, [1913] 2 K. B. 367. As to the distinction between general and special damages, see title DAMAGES, Vol. X., pp. 303, 304.

(*a*) *Finch v. Blount, supra*. In *Thurston v. Charles* (1905), 21 T. L. R. 659, vindictive damages were awarded in an action for detention and conversion of a letter, but the judgment in that case may perhaps be supported on the ground that the action was in substance one of trespass in which vindictive damages may be awarded; see title TRESPASS, p. 865, *ante*. In an action of detinue the jury might formerly give such damages as would compel the defendant to deliver up the goods detained; see *Hall v. White* (1827), 3 C. & P. 136. As to what are vindictive damages, and when they may be awarded, see title DAMAGES, Vol. X., pp. 306 *et seq.* But the defendant in an action of detinue may now be ordered to deliver up the goods detained without having an option to pay damages; see p. 917, *post*.

(*b*) *McGregor v. High* (1870), 21 L. T. 803; *Clarke v. Holford* (1848), 2 Car. & Kir. 540. Damages may also be recovered under a distinct form of action for the severance (*Clarke v. Holford, supra*).

(*c*) *M'Leod v. M'Ghie* (1841), 2 Man. & G. 326; *Scott v. Jones* (1813), 4 Taunt. 865.

(*d*) *Mercer v. Jones* (1813), 3 Camp. 477; see *Bavins, Junr. and Sims*

SECT. 2.

Remedies.

When plaintiff's loss is measure of damages.

1603. In some cases of trover and detinue the measure of damages is not the value of the goods, but the loss that the plaintiff has sustained. Thus, if a buyer of goods for which he has not paid sues the seller in conversion, the measure of damages is the real loss that the buyer has sustained, that is, the difference between the price which he would have to pay and that for which he could sell the goods; but in an action against a stranger the buyer, although he has not paid the price, is, if he is liable to the seller for the price, entitled to recover from the stranger the whole value of the goods (*e*). So if a person with a limited interest in goods is suing the owner in conversion, as, for instance, if a mortgagor is suing a mortgagee for a premature seizure of goods, the measure of damages is the value of the interest of the plaintiff, although if such a person were suing a wrongdoer, he would be entitled to recover the whole value of the goods (*f*).

If goods have been detained under an illegal claim to a sum of money in respect of them, upon payment of which the plaintiff might have recovered possession of his property, the measure of damages is not necessarily that sum, but the circumstance that the plaintiff might, by paying that sum, have obtained the goods is an element for the consideration of the jury in assessing the damages (*g*).

Nominal damages.

1604. In some cases in an action of trover or detinue the plaintiff may only be entitled to recover nominal damages (*h*).

v. London and South Western Bank, [1900] 1 Q. B. 270, C. A. As to the measure of damages for the conversion of a deposit note, see *Clegg v. Baretta* (1887), 56 L. T. 775.

(*e*) *Chinery v. Viall* (1860), 5 H. & N. 288; see *Johnson v. Lancashire and Yorkshire Rail. Co.* (1878), 3 C. P. D. 499.

(*f*) *Turner v. Hardcastle* (1862), 11 C. B. (N. S.) 683; see *Great Western Rail. Co. v. Gurtton* (1858), 1 F. & F. 359 (the payment of money on demand by plaintiffs as bailees of goods to the owner is admissible evidence of damages sustained in an action of trover against persons to whom the plaintiffs had entrusted the goods for conveyance).

(*g*) *Davis v. London and North Western Rail. Co.* (1858), 7 W. R. 105.

(*h*) *Hiort v. London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A. (defendants held goods as warehousemen for the plaintiffs; an agent of the plaintiffs obtained the goods from the defendants, promising to forward them a delivery order from the plaintiffs; the delivery order was afterwards forwarded to the defendants; the plaintiffs were unable to obtain payment for the goods: held that the defendants, although they had been guilty of conversion, were only liable for nominal damages); *Cameron v. Wynch* (1846), 2 Car. & Kir. 264 (plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of his goods to another: held that the measure of damages was the plaintiff's real and *bonâ fide* interest in the goods, and not the full value); *Wills v. Wells* (1818), 2 Moore (C. P.), 247 (A. effected an insurance on the life of B., and after an act of bankruptcy assigned the policy to C., who was aware of the assignor's circumstances. On the death of B. it was discovered that the life was not insurable, but the insurance company paid half of the sum for which the life was insured to C. as a gratuity and the policy was cancelled and remained in the hands of the company. In an action of trover brought by the assignee in bankruptcy of the bankrupt against C. to recover the value of the policy it was held that the assignee in bankruptcy was only entitled to the parchment on which the policy was written, and not to the sum paid to C., as it was a mere gratuitous and voluntary payment).

SECT. 2.

Remedies.

Expenses incurred by defendant.

1605. Where the defendant in an action of trover or detinue has not been guilty of fraud or negligence and has *bond fide* incurred expenses with respect to the goods and the plaintiff has the benefit of such expenses, if the goods are delivered up to him, the defendant is entitled to reduce the damages awarded against him by the amount of such expenses (*i*); but a defendant who has wrongfully detained goods cannot show, in mitigation of damages, that he has sold the goods and applied the proceeds in satisfaction of a debt owing to him by the plaintiff (*k*).

1606. If the goods are delivered to the plaintiff after action brought, the plaintiff is not entitled to more than nominal damages, unless he proves that he has suffered some damage by the detention or conversion (*l*).

Delivery of goods after action.

If the goods are returned in an injured state, the plaintiff is entitled to damages for such injury (*m*). If the goods have depreciated in value at the time of their return, the plaintiff is entitled to damages for the depreciation (*n*). The owner of a chattel who has been wrongfully deprived of its use may recover substantial damages, although he may not have incurred any out-of-pocket expenses (*o*).

Damages for injury.

If the defendant restores the chattel converted or detained to the plaintiff and the plaintiff claims no special damage, the court may stay proceedings on payment of nominal damages and costs (*p*). In a proper case, if the value of the chattel is ascertained, and no special damages are claimed, the court may order a stay of

Stay of proceedings.

(*i*) *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A. C. 166; *Wood v. Morewood* (1841), 3 Q. B. 440; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Jegon v. Vivian* (1871), 6 Ch. App. 742; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Clarke v. Nicholson* (1835), 1 Cr. M. & R. 724; see *Reid v. Fairbanks* (1853), 13 C. B. 692; *Thompson v. Castellain* (1862), 13 C. B. (N. S.) 105.

(*k*) *Edmondson v. Nuttall* (1864), 17 C. B. (N. S.) 280. But now, it seems, he might counterclaim for the debt; see title SET-OFF AND COUNTERCLAIM, Vol. XXV., pp. 504 *et seq.*

(*l*) *Cook v. Hartle* (1838), 8 C. & P. 568; *Moon v. Raphael* (1835), 2 Bing. (N. C.) 310; *Clendon v. Dinneford* (1831), 5 C. & P. 13; *Crossfield v. Such* (1852), 8 Exch. 159.

(*m*) *M'Grath v. Bourne* (1876), 10 I. R. C. L. 160.

(*n*) *Williams v. Archer* (1847), 5 C. B. 318, Ex. Ch.

(*o*) *Steamship "Mediana" (Owners) v. Lightship "Comet" (Owners, Master and Crew), The "Mediana,"* [1900] A. C. 113; followed in *The Astrakhan*, [1910] P. 172.

(*p*) *Hiort v. London and North Western Rail. Co.* (1879), 4 Ex. D. 188, 195, C. A.; *Gibson v. Humphrey* (1833), 1 Cr. & M. 544. If the plaintiff insist on claiming special damage, proceedings will not be stayed upon delivery of the chattel and payment of costs (*Whitten v. Fuller* (1773), 2 Wm. Bl. 902); but if he fails to get substantial damages, he may be made to pay the costs of the action (*Hiort v. London and North Western Rail. Co.*, *supra*). In *Earle v. Holderness* (1828), 4 Bing. 462, an action of trover for a packet of letters, the defendant was allowed a stay of proceedings as to one of them upon delivering it up and paying costs; but in *Philipps v. Hayward* (1835), 1 Har. & W. 108, the court refused except by consent to assess the damages as to one of several articles claimed and strike it out of the declaration on its being delivered up to the plaintiff.

SECT. 2. proceedings on delivery of the chattel or payment of the price and Remedies. payment of costs (*q*).

SUB-SECT. 3.—*Waiver of Tort.*

Effect of waiver.

1607. If a person's goods have been converted or detained and are sold by the wrongdoer, the owner may waive the tort and sue for money had and received (*r*), but if he does so, he cannot subsequently sue in trover or detinue (*s*). If the owner sues in trover and recovers judgment, the judgment is a bar to an action for money had and received in respect of the same goods (*t*).

If the captain of a ship wrongfully sells a cargo and the owner of the cargo sues the shipowner in trover and recovers a verdict to the extent only of the value of the ship and freight which represents only a part of the value of the cargo, the owner of the cargo is not precluded from suing the purchasers for money had and received for the residue (*a*).

Acceptance of part proceeds.

1608. Acceptance of part of the proceeds of goods converted may in some cases amount to a waiver of the tort (*b*). Where, however, a banknote which has been lost is converted by the finder to his own use, the subsequent acceptance by the owner of part of the proceeds is not such an affirming of the conversion as to amount to a waiver of the tort, and the owner may sue in trover for the balance, but the amount accepted will go in reduction of the damages (*c*).

Where no waiver.

1609. If a person converts the goods of a bankrupt and the trustee in bankruptcy demands payment from such person as upon a sale by the bankrupt and payment is refused, the trustee is not precluded from suing in trover (*d*). If goods are converted by two persons and the owner accepts a sum of money, part of the proceeds of the

(*q*) *Tucker v. Wright* (1826), 3 Bing. 601; *Gibson v. Humphrey* (1833), 1 Cr. & M. 544; *Fisher v. Prince* (1762), 3 Burr. 1363; *Makinson v. Rawlinson* (1821), 9 Price, 460. In *Lyons v. Keller* (1864), 15 L. C. L. R. Appendix, 1, an action of detinue, where no special damages were claimed, the court compelled the plaintiff to elect whether he would stay all proceedings on delivery of the chattels in dispute on payment by the defendant of nominal damages and all costs, or would proceed for greater damages at the risk of all costs.

(*r*) *La Comité des Assureurs Maritimes v. Standard Bank of South Africa* (1883), Cab. & El. 87 (proceeds of sale of goods wrongfully obtained were paid into a colonial bank by the wrongdoer for the purpose of being transmitted to its London branch: held that the owner of the goods could follow the proceeds in the hands of the bank, and that bills of exchange received by the wrongdoer to the amount of the proceeds drawn by the colonial bank on its London branch were the property of the owner of the goods). As to actions for money had and received, see title CONTRACT, Vol. VII., pp. 473 *et seq.*

(*s*) *Smith v. Baker* (1873), L. R. 8 C. P. 350; *Brewer v. Sparrow* (1827), 7 B. & C. 310.

(*t*) *Hitchin [or Kitchen] v. Campbell* (1772), 2 Wm. Bl. 827.

(*a*) *Morris v. Robinson* (1824), 3 B. & C. 196. As to the rights of the master of a ship over the cargo, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 222 *et seq.*

(*b*) *Lythgoe v. Vernon* (1860), 5 H. & N. 180.

(*c*) *Burn v. Morris* (1834), 4 Tyr. 485.

(*d*) *Valpy v. Sanders* (1848), 5 C. B. 886.

conversion, from one of the wrongdoers without prejudice to his claim against the other, this is not an election to affirm the wrongful act and waive the tort as against the other wrongdoer, and does not preclude the owner from suing the other wrongdoer in trover (*e*).

SECT. 2.
Remedies.

SECT. 3.—Defences.

SUB-SECT. 1.—*In General.*

1610. The defendant may deny that he converted or detained the goods in dispute, and thus put in issue not only the act alleged to constitute the conversion or detention, but also the circumstances alleged to make such act wrongful (*f*). Thus, he may show that the goods were lawfully taken under a distress or under an execution or with the leave and licence of the plaintiff (*g*). In detinue the detention may be denied or justified; in trover the conversion may be denied or the defendant may show that his acts did not amount to conversion; conversion is always a wrongful act, and cannot be confessed and avoided (*h*). It is a good defence in trover or detinue if the defendant shows that he never had possession of the goods, but it is no defence, if the defendant had possession of the goods, to show that he has lost them or parted with the possession, unless such loss or parting with the possession can be justified (*i*).

Denial of
conversion.

1611. The defendant in an action of trover or detinue may deny the plaintiff's property in the goods or that he was entitled to the possession of the goods. This defence puts in issue the plaintiff's right to the possession of the goods at the time of the alleged conversion or detention (*k*). The defendant may show that he is entitled to a lien on the goods in respect of a debt or liability of the plaintiff (*l*), or that he is otherwise entitled to retain the goods as mortgagee, or pledgee, or owner or part owner, or as a person with a right to their possession (*m*). If a wrongdoer incurs expense,

Denial of
plaintiff's
right.

(*e*) *Rice v. Reed*, [1900] 1 Q. B. 54, C. A.

(*f*) *Richards v. Frankum* (1840), 6 M. & W. 420; *Clements v. Flight* (1846), 16 M. & W. 42; *Unwin v. St. Quintin* (1843), 11 M. & W. 277; *Young v. Cooper* (1851), 6 Exch. 259; *Higgins v. Thomas* (1846), 8 Q. B. 908. As to pleading in defence generally, see title PLEADING, Vol. XXII., pp. 445 *et seq.*

(*g*) *Unwin v. St. Quintin*, *supra*; *Anderson v. Smith* (1860), 29 L. J. (EX.) 460; *Whitmore v. Greene* (1844), 13 M. & W. 104; *Morgan v. Marquis* (1853), 9 Exch. 145; see p. 870, *ante*.

(*h*) *Mason v. Farnell* (1844), 12 M. & W. 674.

(*i*) *Jones v. Dowle* (1841), 9 M. & W. 19; *Reeve v. Palmer* (1858), 5 C. B. (N. S.) 84; *Goodman v. Boycott* (1862), 2 B. & S. 1; *Crossfield v. Such* (1853), 8 Exch. 825; *Latier v. White* (1872), L. R. 5 H. L. 578.

(*k*) *Isaac v. Belcher* (1839), 5 M. & W. 139.

(*l*) *Adamson v. Passman* (1835), 7 C. & P. 193; *Green v. Farmer* (1768), 4 Burr. 2214, 2218; *Lempriere v. Pasley* (1788), 2 Term Rep. 485; *Broadwood v. Granara* (1854), 10 Exch. 417; *Owen v. Knight* (1837), 4 Bing. (N. C.) 54; *Brandao v. Barnett* (1840), 1 Man. & G. 908; *Barnewall v. Williams* (1844), 7 Man. & G. 403; *Binns v. Pigot* (1840), 9 C. & P. 208. As to waiver of lien, see p. 899, *ante*.

(*m*) *Jones v. Davies* (1851), 6 Exch. 663; *Barton v. Brown* (1839), 5 M. & W. 298; *Clements v. Flight* (1846), 16 M. & W. 42; *Heslop v. Baker* (1853), 8 Exch. 411; *White v. Teal* (1840), 12 Ad. & El. 106; *Lane v. Tewson* (1841), 12 Ad. & El. 116, n.; *Mason v. Farnell* (1844), 12 M. & W.

SECT. 3.
Defences.

as, for instance, by paying freight, in order to obtain possession of goods, he cannot insist on the owner's liability to tender these expenses as a defence in an action of trover (*a*).

Lien.

1612. If a defendant claims to retain the property sued for by virtue of a lien or otherwise as security for any sum of money, the court or a judge may order that the plaintiff be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed and a further sum, if the court or a judge so directs, for interest or costs, and that upon such payment into court being made the property claimed be given up to the party claiming (*b*).

Jus tertii.

1613. If the property in the goods is clearly proved in the action to belong to some person other than the plaintiff, he cannot succeed in an action of trover or detinue (*c*), but if a person in possession of goods sues in trover or detinue, the defendant cannot set up as a defence a title in some third person under whom he does not claim (*d*). A bailee of goods is precluded from questioning the title of his bailor or showing a property in any other person through whom he does not claim (*e*). If the plaintiff was not in possession of the goods at the time of the conversion, the defendant is entitled to set up the right of a third person (*f*).

SUB-SECT. 2.—Plaintiff's Conduct.

Estoppel.

1614. The plaintiff in an action of trover or detinue may be estopped by his conduct from setting up his title to the goods (*g*). Thus, if the owner of goods allows another to represent the goods as his own and by his words or conduct intentionally induces a third person to buy them *bonâ fide*, the owner cannot recover them from

674; *Higgins v. Thomas* (1846), 8 Q. B. 908; *Ringham v. Clements* (1848), 12 Q. B. 260. As to a defendant justifying as joint owner, see *Jones v. Brown* (1856), 25 L. J. (ex.) 345; *Higgins v. Thomas*, *supra*. If a defendant who has taken goods out of pawn on being asked by the owner to deliver the goods says that he has not got them and refuses to say who has them, he cannot afterwards raise the defence that he has a right to insist on a tender of the money which he had advanced to take the goods out of pawn; a defendant can only insist on a tender of money due when on the tender being made the owner could obtain possession of the goods (*Jones v. Cliff* (1833), 1 Cr. & M. 540).

(*a*) *Lempriere v. Pasley* (1788), 2 Term Rep. 485. As to giving evidence of such expenses in mitigation of damages, see p. 911, *ante*.

(*b*) R. S. C., Ord. 50, r. 8. As to payment into court generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 147 *et seq.*

(*c*) *Laclouch v. Towle* (1800), 3 Esp. 114.

(*d*) *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802; *Newnham v. Stevenson* (1851), 10 C. B. 713; *Haggan v. Pasley* (1878), 2 L. R. Ir. 573; *Barker v. Furlong*, [1891] 2 Ch. 172; *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405, 410, P. C.

(*e*) *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, C. A.; *Biddle v. Bond* (1865), 6 B. & S. 225; *Anon.* (undated), cited in *Laclouch v. Towle*, *supra*.

(*f*) *Butler v. Hobson* (1838), 4 Bing. (N. C.) 290; *Gadsden v. Barrow* (1854), 9 Exch. 514; *Leake v. Loveday* (1842), 4 Man. & G. 972. As to the defence of *jus tertii*, see, further, title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 751, 752.

(*g*) See title ESTOPPEL, Vol. XIII., pp. 396, 398.

the buyer (h). If the owner of goods is guilty of negligence which is the proximate cause of the wrongful delivery of the goods to an innocent person, the owner is estopped from setting up his title to the goods as against such person or those claiming under him (i). If the owner of lost or stolen goods is guilty of such negligence that third parties are thereby induced to acquire them *bonâ fide* and for value, the owner may be estopped from claiming the goods (k).

SECT. 3.
Defences.

If the owner of goods affirms the taking possession of them by the defendant, as, for instance, where the defendant innocently takes possession of the goods and sells them *bonâ fide* and delivers an account of the sale and pays the balance after deducting expenses to the owner and the balance is accepted, the owner cannot treat the seller as a wrongdoer (l).

Ratification.

1615. If the plaintiff in an action of trover or detinue has previously waived the tort by suing for money had and received or obtaining an order for the proceeds of the sale of the goods sought to be recovered, the defendant may avail himself of the waiver as a defence to the action of trover or detinue (m).

Waiver.

1616. If the plaintiff in an action of trover or detinue has previously sued the defendant or a person who is jointly liable in tort with the defendant, the judgment in such previous action, even if unsatisfied, is a bar to the second action (n).

Judgment.

1617. If the plaintiff in an action of trover or detinue has accepted a sum of money in full discharge of his claims against the defendant or against a joint tortfeasor with the defendant, such acceptance is a bar to the action (o).

Discharge.

(h) *Gregg v. Wells* (1839), 10 Ad. & El. 90; *Garth v. Howard* (1832), 5 C. & P. 346; *Brown v. Hickinbotham* (1881), 50 L. J. (Q. B.) 426, C. A.; *Pickard v. Sears* (1837), 6 Ad. & El. 469; *Freeman v. Cooke* (1848), 2 Exch. 654; *Low v. McGill* (1864), 10 L. T. 495; *Richards v. Johnston* (1859), 4 H. & N. 660. If an action of trover is brought against B. and another action is brought for the same chattel against C., and the plaintiff succeeds in the action against B. and fails in the action against C. on a plea denying the plaintiff's property and C. is a party to the delivery of the chattel to the plaintiff under the judgment against B., but at the same time gives notice to the plaintiff demanding the chattel from him, C. is not estopped by being a party to the delivery from proving his title and recovering the chattel from the plaintiff (*Sandys v. Hodgson* (1839), 10 Ad. & El. 472). As to the defence of *jus tertii*, see, further, title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 751, 752.

(i) *Union Credit Bank v. Mersey Docks and Harbour Board, Same v. Same and North and South Wales Banks*, [1899] 2 Q. B. 205; compare title ESTOPPEL, Vol. XIII., pp. 398 *et seq.*; see *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch.; *Young v. Grote* (1827), 4 Bing. 253; *Scholfield v. Londesborough (Earl)*, [1896] A. C. 514; *Colonial Bank of Australasia, Ltd. v. Marshall*, [1906] A. C. 559, P. C.

(k) *Beckwith v. Corral* (1826), 3 Bing. 444; *Morrison v. Buchanan* (1833), 6 C. & P. 18.

(l) *Brewer v. Sparrow* (1827), 7 B. & C. 310. The owner in such a case cannot affirm the acts of the seller in part and avoid them as to the rest (*ibid.*).

(m) See p. 912, *ante*.

(n) *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; *Buckland v. Johnson* (1854), 15 C. B. 145; *Serrao v. Noel* (1885), 15 Q. B. D. 549, C. A.; see title ESTOPPEL, Vol. XIII., pp. 330, 335.

(o) But see *Rice v. Reed*, [1900] 1 Q. B. 54, C. A.; *Burn v. Morris* (1834),

SECT. 3.

Defences.

Time of
return.

SUB-SECT. 3.—*Return of Goods.*

1618. The defendant may allege and show that he returned the goods either before or after action brought. If the goods were returned before action brought, the defendant is entitled to judgment in the action, unless the plaintiff proves that he has suffered special damage by being deprived of them for a time; if the goods were delivered after action brought, the plaintiff is only entitled to nominal damages, unless he shows he has actually suffered damage (*p*).

SUB-SECT. 4.—*Payment into Court.*

When
available.

1619. Payment of money into court cannot be pleaded in respect of a claim for the return of goods or their value (*q*), but it can be pleaded to a claim for damages for detention or conversion, and, in an action of detinue for the return of goods or their value, if the defendant returns the goods, even after action brought, and pays sufficient money into court in respect of damages for their detention, he is entitled to succeed in the action (*r*).

SUB-SECT. 5.—*Lapse of Time.*

Lapse of
time.

1620. An action of trover or detinue is barred at the expiration of six years from the accrual of the cause of action (*s*), and a defendant who raises and proves this defence is entitled to judgment in the action (*t*).

SECT. 4.—*Judgment.*

Distinction
between
trover and
detinue.

1621. Judgment for the plaintiff in trover is for the recovery of damages for the conversion; judgment for the plaintiff in detinue is for delivery of the chattel in dispute or for damages to be reduced, if the chattel is delivered up, or for the delivery of the chattel and damages, if any have been sustained (*a*).

Transfer of
property.

1622. If a plaintiff has obtained judgment in trover or judgment in detinue for the return of the chattel in dispute or the payment of its value, the judgment, if satisfied by the payment of damages, vests the property in the chattel in the defendant (*b*).

4 Tyr. 485. A recovery in trespass is a bar to an action of trover for the same taking (*Putt v. Roster* (1682), 2 Mod. Rep. 318). If an application is made to a magistrate for an order for the delivery of goods and the order is, after inquiry, refused, the owner is not precluded by having taken these proceedings from bringing an action of trover or detinue for the goods (*Dover v. Child* (1876), 1 Ex. D. 172); but the right to take proceedings against a person in possession of property delivered under such order ceases on the expiration of six months from the date of the order (Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1 (2)); see title MAGISTRATES, Vol. XIX., p. 606.

(*p*) See p. 911, *ante*.

(*q*) *Allan v. Dunn* (1857), 1 H. & N. 572.

(*r*) *Crossfield v. Such* (1853), 8 Exch. 159.

(*s*) As to the distinction between trover and detinue in respect of the time when the cause of action accrues, see note (*c*), p. 899, *ante*.

(*t*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 50.

(*a*) *Hitchin [or Kitchen] v. Campbell* (1772), 2 Wm. Bl. 827.

(*b*) *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; *Cooper v. Shepherd* (1846), 3 C. B. 266. The judgment does not change the property until there is satisfaction of the value found by the judgment (*Re Ware, Ex parte*

1623. If an action of trover or detinue is brought in respect of several chattels and the plaintiff recovers in respect of some, but fails in respect of others, the issue is divisible, and the plaintiff is entitled to have the verdict entered generally for him with costs in respect of those chattels which he recovers, and the defendant is entitled to a verdict and to costs as to so much of the cause of action as he succeeds on (c).

SECT. 4.
Judgment.
Costs.

1624. Judgment may be given in detinue, at the discretion of the court, for the delivery of the chattel and for damages, if any have been sustained (d).

Delivery of
chattel.

An order may be made by the court under its equitable jurisdiction for the specific delivery of a chattel without measuring its value, when from the nature of the chattel there can be no compensation in damages (e), or where the person in possession of

Drake (1877), 5 Ch. D. 866, C. A.); see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209. If in an action of detinue the defendant becomes bankrupt, the plaintiff is entitled to apply in bankruptcy for an order upon the trustee to deliver up the chattel to him (*Re Ware, Ex parte Drake, supra*). Where a plaintiff obtains judgment in detinue for £100, to be reduced to nothing if the chattel is given up, and the chattel is tendered to him, he cannot prove in the bankruptcy of the defendant for its value (*Re Scarth* (1874), 10 Ch. App. 234). If a plaintiff recovers interlocutory judgment against a defendant in trover, but does not obtain satisfaction, he may waive the judgment and bring trover against a person to whom the defendant had sold the chattel (*Marston v. Phillips* (1863), 9 L. T. 289).

(c) *Williams v. Great Western Rail. Co.* (1841), 8 M. & W. 856. As to specific delivery of goods, see Sale of Goods Act, 1893 (56 & 57 Vict. s. 71), s. 52; and title SALE OF GOODS, Vol. XXV., p. 272; but see *Shannon v. Owen* (1827), 1 Man. & Ry. (K. B.) 392.

(d) R. S. C., Ord. 48, r. 1; taken from the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78 (now repealed). Before that Act judgment in detinue gave the defendant an option to return the chattel or pay for its value; now the court has a discretion to make an order for the return of the chattel without giving the defendant an option to pay for its value; the discretion is subject to review (*Chilton v. Carrington* (1855), 15 C. B. 730). Before the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it was necessary that a judgment in detinue should ascertain the value of the chattel in dispute or give some means of ascertaining it (*Phillips v. Jones* (1850), 15 Q. B. 859, Ex. Ch.). Now an order can be made for a writ of delivery whether the value of the property has been assessed or not (R. S. C., Ord. 48, r. 1; *Hymas v. Ogden*, [1905] 1 K. B. 246, 250, C. A.; *Ivory v. Cruickshank*, [1875] W. N. 249); see title EXECUTION, Vol. XIV., pp. 74, 75. In an action of detinue brought in the county court the county court judge can make an order for the delivery of the chattel in dispute without giving the defendant the option to pay the assessed value (*Winfield v. Boothroyd* (1886), 54 L. T. 574). If the plaintiff so desires, he may issue a writ of *fi. fa.* to recover the assessed value of the chattels (Yearly Supreme Court Practice, 1914, p. 706, n.). The writ of delivery is only enforceable by distraint by the sheriff. If the specific delivery of chattels is required, it may be necessary to obtain a writ of assistance by which actual possession may be obtained (R. S. C., Ord. 48, r. 2; *Wyman v. Knight* (1888), 39 Ch. D. 165; *Re Taylor, Taylor v. Rawson*, [1913] W. N. 212; see title EXECUTION, Vol. XIV., p. 74).

(e) *Pusey v. Pusey* (1684), 1 Vern. 273 (heirloom); *Macclesfield (Earl) v. Davis* (1814), 3 Ves. & B. 16; *Somerset (Duke) v. Cookson* (1735), 3 P. Wms. 389 (altar-piece); *Fells v. Read* (1796), 3 Ves. 70 (silver tobacco-box); *Nutbrown v. Thornton* (1804), 10 Ves. 159 (stock on farm); *Lowther v. Lowther (Lord)* (1806), 13 Ves. 95 (valuable pictures); *Gibson v. Ingo* (1847), 6 Hare,

SECT. 4. the chattel has acquired it through the abuse of a fiduciary
Judgment. relationship (*f*).

112 (certificate of registry of ship); *Doloret v. Rothschild* (1824), 1 Sim. & St. 590 (certificate of title to Government stock); *North v. Great Northern Rail. Co.* (1860), 2 Giff. 64 (chattel of a peculiar value from being used in business or otherwise). In *Dowling v. Bejemann* (1862), 2 John. & H. 544, where the plaintiff had put a fixed price on a picture the restitution of which was sought, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere by making an order for restitution. In *Batey & Co. v. Morgan* (1886), 2 T. L. R. 316, the court granted an injunction against the defendants to prevent them from repeating in the future wrongful acts of conversion which were the subject-matter of the action. Compare the principles governing specific performance of contracts; see title SPECIFIC PERFORMANCE, Vol. XXVI., pp. 1 *et seq.*

(*f*) *Wood v. Rowcliffe* (1847), 2 Ph. 382.

TRUCK ACTS.

See FACTORIES AND SHOPS; MASTER AND SERVANT; WORK AND LABOUR.

TRUE OWNER.

See BILLS OF SALE.

TRUSTEE.

See TRUSTS AND TRUSTEES.

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